CHAPTER 5 · THE LABOR EXEMPTION TO THE ANTITRUST LAWS

This chapter deals with one of the most important and controversial doctrines in the recent development of the law of sports — the labor exemption to the antitrust laws. In each of the antitrust challenges to the player restraint systems lodged during the decade of the 1970's, the leagues argued that the labor exemption shielded the restraint from antitrust interdiction.

An understanding of the labor exemption to the antitrust laws is essential to a full appreciation of modern antitrust litigation as well as the ongoing, and inevitable, tension between players and teams over player restraint systems in all professional team sports. At the same time, a thorough understanding of the doctrine can only be gained by a broad review of labor and antitrust history and theory. Thus, the materials in this chapter range far from sports law. For the most part, the doctrine has been judicially and not legislatively created. Accordingly, the materials include U.S. Supreme Court cases addressing the labor exemption involving industries and factual circumstances as far removed from sports employers and employees as one can imagine. Only by reviewing the evolution of the doctrine through Supreme Court decisions, however, can the student gain the necessary perspective on the topic.

Section 1: Overview of the Labor Exemption

Labor law and policy is, in some ways, inherently in conflict with antitrust law and policy. The primary purpose of antitrust legislation is to promote freedom of competition in the marketplace. At the same time, the primary purpose of the labor laws, particularly as embodied in the National Labor Relations Act (NLRA), is to protect, and, some would say, promote collective bargaining to resolve important employer and employee concerns.[1] Unions are, however, by their nature and purpose anticompetitive. As the Supreme Court has recognized,[2] a central purpose of the labor movement is to reduce competition among employees regarding wages and conditions of employment.

Competition among individual workers for wages and other employment terms are eliminated when individual employees join a union and relinquish their prior right to individually pursue employment contracts. The union becomes the exclusive representative of all employees in a collective bargaining unit on the assumption that, through the pooling of negotiating strength and the threat of strikes or other concerted activity, greater benefits for the employees as a group will be exacted.

Usually, this process produces standardization of employment terms for particular classes of employees. Unions and employers enter into contracts that establish uniform terms and consequently limit the opportunity of any individual employee freely to sell his services. Examples of union objectives with obvious anticompetitive effects include uniform wage rates, hiring halls and seniority systems. Standardized wage rates, present in most industries with industry-wide union contracts, other than the professional sports industries, result in a competitive disadvantage for more highly skilled workers who could command a wage greater than the standard rate. Hiring halls and seniority systems have a similar effect upon less senior, but

---

1 The preamble to the National Labor Relations Act states:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce ... by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

2 "This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards." *UMW v. Pennington*, 381 U.S. 651, 666 (1965).

more highly skilled, employees.

Thus, certain union objectives, and many terms agreed upon by employers, constitute "contracts [or] combinations in restraint of trade" within the literal language of the Sherman Act. At the same time, however, there is no disagreement that uniform wage rates, hiring halls and seniority systems are "wages, hours and terms and conditions of employment" within the NLRA and, accordingly, constitute mandatory subjects of bargaining. As such, they are matters about which national labor policy encourages agreement. Accordingly, if unions, some of whose proper objectives are anticompetitive are to be accepted and, indeed, protected, restrictions on the free operation of the labor market must be tolerated.[3]

The effort to accommodate these two important national policies has been left largely to the courts. As the Supreme Court has aptly observed:

> [W]e have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.[4]

In the half century since the passage of the NLRA, the Supreme Court has attempted to define the boundaries of the labor exemption through a half-dozen important cases. These cases provide intimations as to what activities by unions, or agreements between labor and management, will trigger a Sherman Act violation and which will be deemed beyond its pale.

1. Union Activities and the Sherman Act:

Perhaps the broadest view of the labor exemption was articulated in the Court's first post-NLRA review. In the 1940 case of *Apex Hosiery v. Leader*,[5] the Court held that a union did not violate the Sherman Act by engaging in a violent primary strike. In that matter, the employer sought treble damages under the Sherman Act for the union's activities in carrying out a sit-down strike at the employers production facility. The evidence established that the employees forcibly seized the plant, occupied it for more than six weeks and wilfully destroyed machinery and other property. The Court concluded that these acts unquestionably had the effect of substantially restraining the flow of the goods in interstate commerce.

Justice Stone, for the majority, attempted to set forth broad principles to be applied to labor/antitrust cases. He wrote, in *dictum*, that the Sherman Act primarily applied to commercial or product-market restraints. At the same time, he reasoned, unions, to be effective, must eliminate competition posed by nonunion labor. In his view, the "elimination of price competition based upon differences in labor standards" or, put simply, labor market restraints, however imposed, were beyond the Sherman Act's reach. In the context of professional team sports, had the Court's view set forth in *Apex* prevailed, mechanisms such as the player draft, free agent indemnity rules and other player restraints, which purposefully restrain trade, would likely have been viewed as restraints upon the labor market only and, accordingly, outside the scope of the Sherman Act.

Justice Stone's theory, however, held only brief sway. The following year, 1941, the Court in

---

[3] "We have long since concluded that the value of having unions in our society makes them worth promoting. Having made that judgment, we must be prepared to abide some of the consequences." St. Antoine, *Connell, Antitrust Law at the Expense of Labor Law*, 62 U. Va. L. Rev. 603 (1976).

[4] *Allen Bradley Co. v. Local 3, I.B.E.W.*, 325 U.S. 797, 806 (1945).

[5] 310 U.S. 469 (1940).

United States v. Hutcheson,[6] adopted a very different approach to labor/antitrust conflicts. In *Hutcheson*, a dispute arose between two unions over work assigned by Anheuser-Busch and each union felt the work should appropriately be assigned to its members. When the employer assigned the work to one union, the disappointed union organized a strike by employees of the contractors performing construction work for the employer and organized a boycott of the company's product. Hutcheson, the President of the union, was indicted for criminal conspiracy under the Sherman Act.

Justice Frankfurter reviewed the anti-injunction provisions of the Clayton and the Norris-La Guardia Acts and concluded that those provisions, read together, created a statutory immunity for unions, acting alone and in their self-interest, from the antitrust laws. The Court held that:

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

The *Hutcheson* decision is often referred to as having established a so-called statutory exemption to the antitrust laws. And, although the Court adopted a much more limited approach to labor/antitrust matters in *Hutcheson* than it did in *Apex*, the two cases left little room for the application of the antitrust laws to the activities of unions, acting alone and in their self interest.

2. Agreements between Unions and Employers: the non-statutory labor exemption:

Collective bargaining agreements between unions and employers creating restraints on trade, in contrast to unions acting alone, have caused many more difficulties for the Court. These cases have given rise to the labor exemption doctrine under examination in the sports controversies. The argument favoring an antitrust exemption for anticompetitive measures arising out of a collective bargaining agreement is essentially as follows: if, as *Apex* and *Hutcheson* plainly dictate, unions and their activities are to be governed solely by the labor laws and not by the antitrust laws, the fruits of those activities, namely collective bargaining and collective bargaining agreements, ought to be similarly insulated. Put somewhat differently, if the labor laws mandate that unions and employers collectively bargain over certain subjects of mutual interest, then agreements reached on those subjects should be immunized from antitrust review.

However, whatever breadth the Court was prepared to give the activities of unions acting alone, it soon became clear that unions could lose their immunity when they joined with employers to control the marketing of goods and services.

ALLEN BRADLEY CO. v. LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

325 U.S. 797 (1945)

Mr. Justice BLACK delivered the opinion of the Court

The question presented is whether it is a violation of the Sherman Anti-Trust Act for labor unions and their members, prompted by a desire to get and hold jobs for themselves at good wages and under high working standards, to combine with employers and with manufacturers of goods to restrain competition, in, and to monopolize the marketing of, such goods.

Upon the complaint of petitioners and after a lengthy hearing the District Court held that such a combination did violate the Sherman Act, entered a declaratory judgment to that effect, and entered an

---

[6] 312 U.S. 219 (1941).

injunction restraining respondents from engaging in a wide range of specified activities. The Circuit Court of Appeals reversed the decision and dismissed the cause, holding that combinations of unions and business men which restrained trade and tended to monopoly were not in violation of the Act where the *bona fide* purpose of the unions was to raise wages, provide better working conditions, and bring about better conditions of employment for their members. The Ninth Circuit Court of Appeals having reached a contrary conclusion in a similar case, ... we granted *certiorari* in both cases.

Petitioners are manufacturers of electrical equipment. Their places of manufacture are outside of New York City, and most of them are outside of New York State as well. They have brought this action because of their desire to sell their products in New York City, a market area that has been closed to them through the activities of respondents and others.

Respondents are a labor union, its officials and its members. The union, Local No. 3 of the International Brotherhood of Electrical Workers, has jurisdiction only over the metropolitan area of New York City. It is therefore impossible for the union to enter into a collective bargaining agreement with petitioners. Some of petitioners do have collective bargaining agreements with other unions, and in some cases even with other locals of the I.B.E.W.

Some of the members of respondent union work for manufacturers who produce electrical equipment similar to that made by petitioners; other members of respondent union are employed by contractors and work on the installation of electrical equipment, rather than in its production.

The union's consistent aim for many years has been to expand its membership, to obtain shorter hours and increased wages, and to enlarge employment opportunities for its members. To achieve this latter goal — that is, to make more work for its own members — the union realized that local manufacturers, employers of the local members, must have the widest possible outlets for their product. The union therefore waged aggressive campaigns to obtain closed shop agreements with all local electrical equipment manufacturers and contractors. Using conventional labor union methods, such as strikes and boycotts, it gradually obtained more and more closed shop agreements in the New York City area. Under these agreements, contractors were obligated to purchase equipment from none but local manufacturers who also had closed shop agreements with Local No. 3; manufacturers obligated themselves to confine their New York City sales to contractors employing the Local's members. In the course of time, this type of individual employer-employee agreement expanded into industry-wide understandings, looking not merely to terms and conditions of employment but also to price and market control. Agencies were set up composed of representatives of all three groups to boycott recalcitrant local contractors and manufacturers and to bar from the area equipment manufactured outside its boundaries. The combination among the three groups, union, contractors, and manufacturers, became highly successful from the standpoint of all of them. The business of New York City manufacturers had a phenomenal growth, thereby multiplying the jobs available for the Local's members. Wages went up, hours were shortened, and the New York electrical equipment prices soared, to the decided financial profit of local contractors and manufacturers. The success is illustrated by the fact that some New York manufacturers sold their goods in the protected city market at one price and sold identical goods outside of New York at a far lower price. All of this took place, as the Circuit Court of Appeals declared "through the stifling of competition", and because the three groups, in combination as "co-partners", achieved "a complete monopoly which they used to boycott the equipment manufactured by the plaintiffs." Interstate sale of various types of electrical equipment has, by this powerful combination, been wholly suppressed.

Quite obviously, this combination of businessmen has violated both Sections (1) and (2) of the Sherman Act, unless its conduct is immunized by the participation of the union. For it intended to and did restrain trade in and monopolize the supply of electrical equipment in the New York City area to the exclusion of equipment manufactured in and shipped from other states, and did also control its price and discriminate between its would-be customers. Our problem in this case is therefore a very narrow one -- do labor unions violate the Sherman Act when, in order to further their own interests as wage earners, they

aid and abet business men to do the precise things which that Act prohibits?

The Sherman Act as originally passed contained no language expressly exempting any labor union activities. Sharp controversy soon arose as to whether the Act applied to unions. One viewpoint was that the only evil at which Congress had aimed was high consumer prices achieved through combinations looking to control of markets by powerful groups; that those who would have a great incentive for such combinations would be the businessmen who would be the direct beneficiaries of them; therefore, the argument proceeded, Congress drafted its law to apply only to business combinations, particularly the large trusts, and not to labor unions or any of their activities as such. Involved in this viewpoint were the following contentions; that the Sherman Act is a law to regulate trade, not labor, a law to prescribe the rules governing barter and sale, and not the personal relations of employers and employees; that good wages and working conditions helped and did not hinder trade, even though increased labor costs might be reflected in the cost of products; that labor was not a commodity; that laborers had an inherent right to accept or terminate employment at their own will, either separately or in concert; that to enforce their claims for better wages and working conditions, they had a right to refuse to buy goods from their employer or anybody else; that what they could do to aid their cause, they had a right to persuade others to do; and that the Antitrust laws designed to regulate trading were unsuitable to regulate employer-employee relations and controversies. The claim was that the history of the legislation supported this line of argument.

The contrary viewpoint was that the Act covered all classes of people and all types of combinations, including unions, if their activities even physically interrupted the free flow of trade or tended to create business monopolies, and that a combination of laborers to obtain a raise in wages was itself a prohibited monopoly. Federal courts adopted the latter view and soon applied the law to unions in a number of cases. Injunctions were used to enforce the Act against unions. At the same time employers invoked injunctions to restrain labor union activities even where no violation of the Sherman Act was charged.

Vigorous protests arose from employee groups. The unions urged congressional relief from what they considered to be two separate, but partially overlapping evils — application of the Sherman Act to unions, and issuance of injunctions against strikes, boycotts and other labor union weapons. Numerous bills to curb injunctions were offered. Other proposed legislation was intended to take labor unions wholly outside any possible application of the Sherman Act. All of this is a part of the well known history of the era between 1890 and 1914. To amend, supplement and strengthen the Sherman Act against monopolistic business practices, and in response to the complaints of the unions against injunctions and application of the Act to them, Congress in 1914 passed the Clayton Act. Elimination of those "trade practices" which injuriously affected competition was its first objective. Each section of the measure prohibiting such trade practices contained language peculiarly appropriate to commercial transactions as distinguished from labor union activities, but there is no record indication in anything that was said or done in its passage which indicates that those engaged in business could escape its or the Sherman Act's prohibitions by obtaining the help of labor unions or others. That this bill was intended to make it all the more certain that competition should be the rule in all commercial transactions is clear from its language and history.

In its treatment of labor unions and their activities the Clayton Act pointed in an opposite direction. Congress in that Act responded to the prolonged complaints concerning application of the Sherman law to labor groups by adopting Section 6; for this purpose, and also drastically to restrict the general power of federal courts to issue labor injunctions, section 20, was adopted. Section 6 declared that labor was neither a commodity nor an article of commerce, and that the Sherman Act should not be "construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help...." Section 20 limited the power of courts to issue injunctions in a case "involving, or growing out of, a (labor) dispute (over) terms or conditions of employment...." It declared that no restraining order or injunction should prohibit certain specified acts, and further declared that no one of these specified acts should be "held to be violations of any law of the United States." This Act was broadly proclaimed by many as labor's "Magna Carta", wholly exempting labor from any possible inclusion in the Antitrust legislation;

others, however, strongly denied this.

Section 6 reads as follows: "That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

This Court later declined to interpret the Clayton Act as manifesting a congressional purpose wholly to exempt labor unions from the Sherman Act. *Duplex Printing Press Co. v. Deering*. In those cases labor unions had engaged in a secondary boycott; they had boycotted dealers, by whom the union members were not employed, because those dealers insisted on selling goods produced by the employers with whom the unions had an existing controversy over terms and conditions of employment. This Court held that the Clayton Act exempted labor union activities only insofar as those activities were directed against the employees' immediate employers and that controversies over the sale of goods by other dealers did not constitute "labor disputes" within the meaning of the Clayton Act.

Again the unions went to Congress. They protested against this Court's interpretation, repeating the arguments they had made against application of the Sherman Act to them. Congress adopted their viewpoint, at least in large part, and in order to escape the effect of the Duplex and Bedford decisions, passed the Norris-La Guardia Act. That Act greatly broadened the meaning this Court had attributed to the words "labor dispute", further restricted the use of injunctions in such a dispute, and emphasized the public importance under modern economic conditions of protecting the rights of employees to organize into unions and to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." This congressional purpose found further expression in the Wagner Act. We said in *Apex Hosiery Co. v. Leader*, *supra*, that labor unions are still subject to the Sherman Act to "some extent not defined." The opinion in that case, however, went on to explain that the Sherman Act "was enacted in the era of `trusts' and of `combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern"; that its purpose was to protect consumers from monopoly prices, and not to serve as a comprehensive code to regulate and police all kinds and types of interruptions and obstructions to the flow of trade. This was a recognition of the fact that Congress had accepted the arguments made continuously since 1890 by groups opposing application of the Sherman Acts to unions. It was an interpretation commanded by a fair consideration of the full history of Antitrust and labor legislation.

United States v. Hutcheson, declared that the Sherman, Clayton and Norris-La Guardia Act must be jointly considered in arriving at a conclusion as to whether labor union activities run counter to the Antitrust legislation. Conduct which they permit is not to be declared a violation of federal law. That decision held that the doctrine of the Duplex and Bedford cases was inconsistent with the congressional policy set out in the three "interlacing statutes."

The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.

Aside from the fact that the labor union here acted in combination with the contractors and manufacturers, the means it adopted to contribute to the combination's purpose fall squarely within the "specified acts" declared by Section 20 not to be violations of federal law. For the union's contribution to the trade boycott was accomplished through threats that unless their employers bought their goods from

local manufacturers the union laborers would terminate the "relation of employment" with them and cease to perform "work or labor" for them; and through their "recommending, advising, or persuading others by peaceful and lawful means" not to "patronize" sellers of the boycotted electrical equipment. Consequently, under our holdings in the *Hutcheson* case and other cases which followed it, had there been no union-contractor-manufacturer combination the union's actions here, coming as they did within the exemptions of the Clayton and Norris-La Guardia Acts, would not have been violations of the Sherman Act. We pass to the question of whether unions can with impunity aid and abet business men who are violating the Act.

On two occasions this Court has held that the Sherman Act was violated by a combination of labor unions and business men to restrain trade. In neither of them was the Court's attention sharply called to the crucial questions here presented. Furthermore, both were decided before the passage of the Norris-La Guardia Act, and prior to our holding in the *Hutcheson* case. It is correctly argued by respondents that these factors greatly detract from the weight which the two cases might otherwise have in the instant case. Without regard to these cases, however, we think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services.

Section 6 of the Clayton Act declares that the Sherman Act must not be so construed as to forbid the "existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help...." But "the purposes of mutual help" can hardly be thought to cover activities for the purpose of "employer-help" in controlling markets and prices. And in an analogous situation where an agricultural association joined with other groups to control the agricultural market, we said:

> The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise.

We have been pointed to no language in any act of Congress or in its reports or debates, nor have we found any, which indicates that it was ever suggested, considered, or legislatively determined that labor unions should be granted an immunity such as is sought in the present case. It has been argued that this immunity can be inferred from a union's right to make bargaining agreements with its employer. Since union members can without violating the Sherman Act strike to enforce a union boycott of goods, it is said they may settle the strike by getting their employers to agree to refuse to buy the goods. Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local No. 3. We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other businessmen from that area, and to charge the public prices above a competitive level. It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-La Guardia Acts.

It must be remembered that the exemptions granted the unions were special exemptions to a general legislative plan. The primary objective of all the Anti-trust legislation has been to preserve business competition and to proscribe business monopoly. It would be a surprising thing if Congress, in order to prevent a misapplication of that legislation to labor unions, had bestowed upon such unions complete and

unreviewable authority to aid business groups to frustrate its primary objective. For if business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves. Seldom, if ever, has it been claimed before, that by permitting labor unions to carry on their own activities, Congress intended completely to abdicate its constitutional power to regulate interstate commerce and to empower interested business groups to shift our society from a competitive to a monopolistic economy. Finding no purpose of Congress to immunize labor unions who aid and abet manufacturers and traders in violating the Sherman Act, we hold that the district court correctly concluded that the respondents had violated the Act.

Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. This, it is argued, brings about a wholly undesirable result — one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress. It is true that many labor union activities do substantially interrupt the course of trade and that these activities, lifted out of the prohibitions of the Sherman Act, include substantially all, if not all, of the normal peaceful activities of labor unions. It is also true that the Sherman Act "draws no distinction between the restraints effected by violence and those achieved by peaceful ... means", *Apex Hosiery Co. v. Leader*, *supra*, and that a union's exemption from the Sherman Act is not to be determined by a judicial "judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *United States v. Hutcheson*, *supra*. Thus, these congressionally permitted union activities may restrain trade in and of themselves. There is no denying the fact that many of them do so, both directly and indirectly. Congress evidently concluded, however, that the chief objective of Anti-trust legislation, preservation of business competition, could be accomplished by applying the legislation primarily only to those business groups which are directly interested in destroying competition. The difficulty of drawing legislation primarily aimed at trusts and monopolies so that it could also be applied to labor organizations without impairing the collective bargaining and related rights of those organizations has been emphasized both by congressional and judicial attempts to draw lines between permissible and prohibited union activities. There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act.

Reversed and remanded.

Questions

1. What is it about this case that makes it different from *Apex* and *Hutcheson*? Is it only that the union in *Allen-Bradley* reached anticompetitive agreements with management?

2. In all three cases, there is union conduct that is anticompetitive. Who is being deprived of the benefits of free competition in *Allen-Bradley*? Who is being deprived of those benefits in *Apex* and *Hutcheson*?

3. What is the subject matter of the agreement that is anticompetitive? Is it a mandatory subject of bargaining? If so, should not labor and management be able to reach agreement about such a subject free from antitrust scrutiny?

In 1965, the Court rendered the following companion decisions. Between them, the Court shed greater light, however oblique, upon the labor exemption doctrine.

LOCAL UNION NO. 189, AMALGAMATED MEAT CUTTERS, AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO v. JEWEL TEA COMPANY, INC.

381 U.S. 676 (1965)

Justice WHITE

This case presents questions regarding the application of §§ 1 and 2 of the Sherman Antitrust Act to activities of labor unions. In particular, it concerns the lawfulness of the following restriction on the operating hours of food store meat departments contained in a collective bargaining agreement executed after joint multi-employer, multiunion negotiations:

> Market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above.

This litigation arose out of the 1957 contract negotiations between the representatives of 9,000 Chicago retailers of fresh meat and the seven union petitioners, who are local affiliates of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, representing virtually all butchers in the Chicago area. During the 1957 bargaining sessions the employer group presented several requests for union consent to a relaxation of the existing contract restriction on marketing hours for fresh meat, which forbade the sale of meat before 9 a.m. and after 6 p.m. in both service and self-service markets. The unions rejected all such suggestions, and their own proposal retaining the marketing-hours restriction was ultimately accepted at the final bargaining session by all but two of the employers, National Tea Co. and Jewel Tea Co....

In July 1958 Jewel brought suit against the unions ... seeking invalidation under §§ 1 and 2 of the Sherman Act of the contract provision that prohibited night meat market operations. The gist of the complaint was that the defendants and others had conspired together to prevent the retail sale of fresh meat before 9 a.m. and after 6 p.m. As evidence of the conspiracy Jewel relied in part on the events during the 1957 contract negotiations — the acceptance by Associated of the market-hours restriction and the unions' imposition of the restriction on Jewel through a strike threat....

The complaint stated that in recent years the prepackaged, self-service system of marketing meat had come into vogue, that 174 of Jewel's 196 stores were equipped to vend meat in this manner, and that a butcher need not be on duty in a self-service market at the time meat purchases were actually made. The prohibition of night meat marketing, it was alleged, unlawfully impeded Jewel in the use of its property and adversely affected the general public in that many persons find it inconvenient to shop during the day....

The trial judge held the allegations of the complaint sufficient to withstand a motion to dismiss made on the grounds that the alleged restraint was within the exclusive regulatory scope of the National Labor Relations Act and was therefore outside the jurisdiction of the Court and the controversy was within the labor exemption to the antitrust laws. That ruling was sustained on appeal.

After trial, the District Judge ruled the "record was devoid of any evidence to support a finding of conspiracy" between Associated and the unions to force the restrictive provision on Jewel.... The trial court found that even in self-service markets removal of the limitation on marketing hours either would inaugurate longer hours and night work for the butchers or would result in butchers' work being done by others unskilled in the trade. Thus, the court concluded, the unions had imposed the marketing-hours limitation to serve their own interests respecting conditions of employment, and such action was clearly

within the labor exemption of the Sherman Act....

Alternatively, the District Court ruled that even if this was not the case, the arrangement did not amount to an unreasonable restraint of trade in violation of the Sherman Act.

The Court of Appeals reversed the dismissal of the complaint as to both the unions and Associated.... The Court of Appeals concluded that a conspiracy in restraint of trade had been shown and that ... Associated and the unions "entered into a combination or agreement, which constituted a conspiracy, as charged in the complaint.... (W)hether it be called an agreement, a contract or a conspiracy, is immaterial."

Similarly, the Court of Appeals did not find it necessary to review the lower court's finding that night marketing would affect either the butchers' working hours or their jurisdiction, for the court held that an employer-union contract respecting working hours would be unlawful. "One of the proprietary functions is the determination of what days a week and what hours of the day the business will be open to supply its customers.... As long as all rights of employees are recognized and duly observed by the employer, including the number of hours per day that any one shall be required to work, any agreement by a labor union, acting in concert with business competitors of the employer, designed to interfere with his operation of a retail business ... is a violation of the Sherman Act.... (T)he furnishing of a place and advantageous hours of employment for the butchers to supply meat to customers are the prerogatives of the employer."

We granted *certiorari* on the unions' petition, and now reverse the Court of Appeals.

Here, as in *United Mine Workers of America v. Pennington*, the claim is made that the agreement under attack is exempt from the antitrust laws. We agree, but not on the broad grounds urged by the union.

It is well at the outset to emphasize that this case comes to us stripped of any claim of a union-employer conspiracy against Jewel. The trial court found no evidence to sustain Jewel's conspiracy claim and this finding was not disturbed by the Court of Appeals. We therefore have a situation where the unions, having obtained a marketing-hours agreement from one group of employers, have successfully sought the same terms from a single employer, Jewel, not as a result of a bargain between the unions and some employers directed against other employers, but pursuant to what the unions deemed to be in their own labor union interests.

Jewel does not allege that it has been injured by the elimination of competition among the other employers within the unit with respect to marketing hours; Jewel complains only of the unions' action in forcing it to accept the same restriction, the unions acting not at the behest of any employer group but in pursuit of their own policies. It might be argued that absent any union-employer conspiracy against Jewel and absent any agreement between Jewel and any other employer, the union-Jewel contract cannot be a violation of the Sherman Act. But the issue before us is not the broad substantive one of a violation of the antitrust laws — was there a conspiracy or combination which unreasonably restrained trade or an attempt to monopolize and was Jewel damaged in its business? But whether the agreement is immune from attack by reason of the labor exemption from the antitrust laws. The fact that the parties to the agreement are but a single employer and the unions representing its employees does not compel immunity for the agreement. We must consider the subject matter of the agreement in the light of the national labor policy.

We pointed out in *Pennington* that exemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws. Employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects. But neither party need bargain about other matters and either party commits an unfair labor practice if it conditions its bargaining upon discussions of a nonmandatory subject. Jewel, for example, need not have bargained about or agreed to a schedule of prices at which its meat would be sold and the unions could not legally have insisted that it do so. But if the unions had made such a demand Jewel had agreed and the United States or an injured party had challenged the agreement under the antitrust laws, we seriously doubt that either the unions or Jewel could claim immunity by reason of the labor exemption, whatever substantive questions of violation there might be.

Thus the issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through *bona fide*, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.[7] We think that it is.

The Court of Appeals would classify the marketing-hours restriction with the product-pricing provision and place both within the reach of the Sherman Act. In its view, labor has a legitimate interest in the number of hours it must work but no interest in whether the hours fall in the daytime, in the nighttime or on Sundays.

Contrary to the Court of Appeals, we think that the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of "wages, hours, and other terms and conditions of employment" about which employers and unions must bargain. And, although the effect on competition is apparent and real, perhaps more so than in the case of the wage agreement, the concern of union members is immediate and direct. Weighing the respective interests involved, we think the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work. An agreement on these subjects between the union and the employers in a bargaining unit is not illegal under the Sherman Act, nor is the union's unilateral demand for the same contract of other employers in the industry.

Disposing of the case, as it did, on the broad grounds we have indicated, the Court of Appeals did not deal separately with the marketing-hours provision, as distinguished from hours of work, in connection with either service or self-service markets. The dispute here pertains principally to self-service markets.

The unions argue that since night operations would be impossible without night employment of butchers, or an impairment of the butchers' jurisdiction, or a substantial effect on the butchers' workload, the marketing-hours restriction is either little different in effect from the valid working-hours provision that work shall stop at 6 p.m. or is necessary to protect other concerns of the union members. If the unions' factual premises are true, we think the unions could impose a restriction on night operations without violation of the Sherman Act; for then operating hours, like working hours, would constitute a subject of immediate and legitimate concern to union members.

Jewel alleges on the other hand that the night operation of self-service markets requires no butcher to be in attendance and does not infringe any other legitimate union concern. Customers serve themselves; and if owners want to forgo furnishing the services of a butcher to give advice or to make special cuts, this is not the unions' concern since their desire to avoid night work is fully satisfied and no other legitimate interest is being infringed. In short, the connection between working hours and operating hours in the case of the self-service market is said to be so attenuated as to bring the provision within the prohibition of the Sherman Act.

If it were true that self-service markets could actually operate without butchers, at least for a few hours after 6 p.m., that no encroachment on butchers' work would result and that the workload of butchers

---

[7] The crucial determinant is not the form of the agreement - *e.g.*, prices or wages - but its relative impact on the product market and the interests of union members. Thus in *Teamsters Union v. Oliver*, we held that federal labor policy precluded application of state antitrust laws to an employer-union agreement that when leased trucks were driven by their owners, such owner-drivers should receive, in addition to the union wage, not less than a prescribed minimum rental. Though in form a scheme fixing prices for the supply of leased vehicles, the agreement was designed to "protect the negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs." As the agreement did not embody a "remote and indirect approach to the subject of wages" ... but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract, the paramount federal policy of encouraging collective bargaining proscribed application of the state law.

during normal working hours would not be substantially increased, Jewel's position would have considerable merit. For then the obvious restraint on the product market — the exclusion of self-service stores from the evening market for meat — would stand alone, unmitigated and unjustified by the vital interests of the union butchers which are relied upon in this case. In such event the limitation imposed by the unions might well be reduced to nothing but an effort by the unions to protect one group of employers from competition by another, which is conduct that is not exempt from the Sherman Act. Whether there would be a violation of §§ 1 and 2 would then depend on whether the elements of a conspiracy in restraint of trade or an attempt to monopolize had been proved.

Thus the dispute between Jewel and the unions essentially concerns a narrow factual question: Are night operations without butchers, and without infringement of butchers' interests, feasible? The District Court resolved this factual dispute in favor of the unions. It found that "in stores where meat is sold at night it is impractical to operate without either butchers or other employees. Someone must arrange, replenish and clean the counters and supply customer services." Operating without butchers would mean that "their work would be done by others unskilled in the trade," and "would involve an increase in workload in preparing for the night work and cleaning the next morning." Those findings were not disturbed by the Court of Appeals, which, as previously noted, proceeded on a broader ground. Our function is limited to reviewing the record to satisfy ourselves that the trial judge's findings are not clearly erroneous....

The unions' opposition to night work has a long history. Prior to 1919 the operating hours of meat markets in Chicago were 7 a.m. to 7 p.m., Monday through Friday; 7 a.m. to 10 p.m. on Saturday, and 7 a.m. to 1 p.m. on Sunday. Butchers worked the full 81-hour, seven-day week. The Chicago butchers' strike of 1919 was much concerned with shortening working hours, and the resulting contract, signed in 1920, set the working day at 8 a.m. to 6 p.m., Monday through Friday, and 8 a.m. to 9 p.m. on Saturday....

In 1947, Jewel had just started investigating the self-service method of meat vending. It introduced that method in the Chicago area in 1948 and in the territory of these unions in 1953.

During the 1957 negotiations numerous proposals for relaxation of the operating-hours restriction were presented by the employer group. Each of these proposals, including the submitted separately by Jewel for consideration at the unions' ratification meetings, combined a provision for night operations with a provision for a more flexible workday that would permit night employment of butchers. Such juxtaposition of the two provisions could, of course, only serve to reinforce the unions' fears that night operations meant night work. Jewel did allege in its complaint, filed in July 1958, that night operations were possible without butchers, but even in the 1959 bargaining sessions Jewel failed to put forth any plan for night operations that did not also include night work. Finally, toward the end of the 1961 negotiations, Jewel did make such a suggestion, but, as the trial judge remarked, the "unions questioned the seriousness of that proposal under the circumstances."

The unions' evidence with regard to the practicability of night operations without butchers was accurately summarized by the trial judge as follows:

> (I)n most of plaintiff's stores outside Chicago, where night operations exist, meat cutters are on duty whenever a meat department is open after 6 p.m.... Even in self-service departments, ostensibly operated without employees on duty after 6 p.m., there was evidence that requisite customer services in connection with meat sales were performed by grocery clerks. In the same vein, defendants adduced evidence that in the sale of delicatessen items, which could be made after 6 p.m. from self-service cases under the contract, "practically" always during the time the market was open the manager, or other employees, would be rearranging and restocking the cases. There was also evidence that even if it were practical to operate a self-service meat market after 6 p.m. without employees, the night operations would add to the workload in getting the meats prepared for night sales and in putting the counters in order the next day.

Jewel challenges the unions' evidence on each of these points — arguing, for example, that its preference to have butchers on duty at night, where possible under the union contract, is not probative of the feasibility of not having butchers on duty and that the evidence that grocery clerks performed customer services within the butchers' jurisdiction was based on a single instance resulting from "entrapment" by union agents. But Jewel's argument — when considered against the historical background of union concern with working hours and operating hours and the virtually uniform recognition by employers of the intimate relationship between the two subjects, as manifested by bargaining proposals in 1957, 1959, and 1961 — falls far short of a showing that the trial judge's ultimate findings were clearly erroneous.

Judgment reversed and remanded.

Questions

1. The Court concludes that marketing hours, as distinct from working hours, is a mandatory subject of bargaining. What is the basis for the Court's conclusion that such a matter falls within wages, hours, or terms and conditions of employment?

2. Who is primarily affected by the restriction?

3. What does the Court set forth as the overall standard for application of the labor exemption to negotiated subjects?

UNITED MINE WORKERS OF AMERICA v. PENNINGTON
381 U.S. 657 (1965)

Justice WHITE

This action began as a suit by the trustees of the United Mine Workers of America Welfare and Retirement Fund against the respondents, individually and as owners of Phillips Brothers Coal Company, a partnership, seeking to recover some $55,000 in royalty payments alleged to be due and payable under the trust provisions of the National Bituminous Coal Wage Agreement of 1950, executed by Phillips and United Mine Workers of America on or about October 1, 1953, and reexecuted with amendments on or about September 8, 1955, and October 22, 1956. Phillips filed an answer and a cross claim against UMW, alleging in both that the trustees, the UMW and certain large coal operators had conspired to restrain and to monopo-lize interstate commerce in violation of §§ 1 and 2 of the Sherman Antitrust Act. Actual damages in the amount of $100,000 were claimed for the period beginning February 14, 1954, and ending December 31, 1958.

The allegations of the cross claim were essentially as follows: Prior to the 1950 Wage Agreement between the operators and the union, severe controversy had existed in the industry, particularly over wages, the welfare fund and the union's efforts to control the working time of its members. Since 1950, however, relative peace has existed in the industry, all as the result of the 1950 Wage Agreement and its amendments and the additional understandings entered into between UMW and the large operators. Allegedly the parties considered overproduction to be the critical problem of the coal industry. The agreed solution was to be the elimination of the smaller companies, the larger companies thereby controlling the market. More specifically, the union abandoned its efforts to control the working time of the miners, agreed not to oppose the rapid mechanization of the mines which would substantially reduce mine employment,

agreed to help finance such mechanization and agreed to impose the terms of the 1950 agreement on all operators without regard to their ability to pay. The benefit to the union was to be increased wages as productivity increased with mechanization, these increases to be demanded of the smaller companies whether mechanized or not. Royalty payments into the welfare fund were to be increased also, and the union was to have effective control over the fund's use. The union and large companies agreed upon other steps to exclude the marketing, production, and sale of nonunion coal. Thus the companies agreed not to lease coal lands to nonunion operators, and in 1958 agreed not to sell or buy coal from such companies. The companies and the union jointly and successfully approached the Secretary of Labor to obtain establishment under the Walsh-Healey Act, of a minimum wage for employees of contractors selling coal to the TVA, such minimum wage being much higher than in other industries and making it difficult for small companies to compete in the TVA term contract market. At a later time, at a meeting attended by both union and company representatives, the TVA was urged to curtail its spot market purchases, a substantial portion of which were exempt from the Walsh-Healey order. Thereafter four of the larger companies waged a destructive and collusive price-cutting campaign in the TVA spot market for coal, two of the companies, West Kentucky Coal Co. and its subsidiary Nashville Coal Co., being those in which the union had large investments and over which it was in position to exercise control.

A verdict was returned in favor of Phillips and against the trustees and the union, the damages against the union being fixed in the amount of $90,000. The trial court set aside the verdict against the trustees but overruled the union's motion for judgment notwithstanding the verdict or in the alternative. The Court of Appeals affirmed. It ruled that the union was not exempt from liability under the Sherman Act on the facts of this case, considered the instructions adequate and found the evidence generally sufficient to support the verdict. We granted *certiorari*.

A major part of Phillips' case was that the union entered into a conspiracy with the large operators to impose the agreed-upon wage and royalty scales upon the smaller, nonunion operators, regardless of their ability to pay and regardless of whether or not the union represented the employees of these companies, all for the purpose of eliminating them from the industry, limiting production and pre-empting the market for the large, unionized operators. The UMW urges that since such an agreement concerned wage standards, it is exempt from the antitrust laws.

It is true that wages lie at the very heart of those subject about which employers and unions must bargain and the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit. The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe. We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers.

This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form and content of the agreement. Unquestionably the Board's demarcation of the bounds of the duty to bargain has great relevance to any consideration of the sweep of labor's antitrust immunity, for we are concerned here with harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting "the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation," *Fibreboard Paper Prods. Corp. v. National Labor Relations Board*, 379 U.S. 203, 211. But there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws.

We have said that a union may make wage agreements with a multiemployer bargaining unit and

may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior.[8] But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.

We do not find anything in the national labor policy that conflicts with this conclusion. This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503. But there is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry. On the contrary, the duty to bargain unit by unit leads to a quite different conclusion. The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being strait-jacketed by some prior agreement with the favored employers.

So far as the employer is concerned it has long been the Board's view that an employer may not condition the signing of a collective bargaining agreement on the union's organization of a majority of the industry. In such cases the obvious interest of the employer is to ensure that acceptance of the union's wage demands will not adversely affect his competitive position. In *American Range Lines, Inc.* the Board rejected that employer interest as a justification for the demand. "[A]n employer cannot lawfully deny his employees the right to bargain collectively through their designated representative in an appropriate unit because he envisions disadvantages accruing from such bargaining." Such an employer condition, if upheld, would clearly reduce the extent of collective bargaining. Thus, in *Newton Chevrolet, Inc.*, where it was held a refusal to bargain for the employer to insist on a provision that the agreed contract terms would not become effective until five competitors had signed substantially similar contracts the Board stated that "[t]here is nothing in the Act to justify the imposition of a duty upon an exclusive bargaining representative to secure an agreement from a majority of an employer's competitors as a condition precedent to the negotiation of an agreement with the employer. To permit individual employers to refuse to bargain collectively until some or all of their competitors had done so clearly would lead to frustration of the fundamental purpose of the Act to encourage the practice of collective bargaining." Permitting insistence on an agreement by the union to attempt to impose a similar contract on other employers would likewise seem to impose a restraining influence on the extent of collective bargaining, for the union could avoid an impasse only by surrendering its freedom to act in its own interest vis-a-vis other employers, something it will be unwilling to do in many instances. Once again, the employer's interest is a competitive interest rather than an interest in regulating its own labor relations, and the effect on the union of such an agreement would be to limit the free exercise of the employees' right to engage in concerted activities according to their own view of their self-interest. In sum, we cannot conclude that the national labor policy provides any support for such agreements.

---

[8] Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy. There was, of course, other evidence in this case, but we indicate no opinion as to its sufficiency.

On the other hand, the policy of the antitrust laws is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit. One could hardly contend, for example, that one group of employers could lawfully demand that the union impose on other employers wages that were significantly higher than those paid by the requesting employers, or a system of computing wages that, because of differences in methods of production, would be more costly to one set of employers than to another. The anticompetitive potential of such a combination is obvious, but is little more severe than what is alleged to have been the purpose and effect of the conspiracy in this case to establish wages at a level that marginal producers could not pay so that they would be driven from the industry. And if the conspiracy presently under attack were declared exempt it would hardly be possible to deny exemption to such avowedly discriminatory schemes.

From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. Prior to the agreement the union might seek uniform standards in its own self-interest but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective of uniform standards should temporarily give way. After the agreement the union's interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy.

Thus the relevant labor and antitrust policies compel us to conclude that the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws.

The judgment is reversed and remanded.

Mr. Justice GOLDBERG, with whom Mr. Justice HARLAN and Mr. Justice STEWART join, dissenting from the opinion but concurring in the reversal in [*Jewel-Tea*] and dissentions in the judgment of the Court in [*Pennington*].

Stripped of all the pejorative adjectives and reduced to their essential facts, both *Pennington* and *Jewel Tea* represent refusals by judges to give full effect to congressional action designed to prohibit judicial intervention via the antitrust route in legitimate collective bargaining. The history of these cases furnishes fresh evidence of the observation that in this area, necessarily involving a determination of "what public policy in regard to the industrial struggle demands," "courts have neither the aptitude nor the criteria for reaching sound decisions."

Pennington presents a case of a union negotiating with the employers in the industry for wages, fringe benefits, and working conditions. Despite allegations of conspiracy, which connotes clandestine activities, it is no secret that the United Mine Workers acting to further what it considers to be the best interests of its members, espouses a philosophy of achieving uniform high wages, fringe benefits, and good working conditions. As the *quid pro quo* for this, the Union is willing to accept the burdens and consequences of automation. Further, it acts upon the view that the existence of marginal operators who cannot afford these high wages, fringe benefits, and good working conditions does not serve the best interests of the working miner but, on the contrary, depresses wage standards and perpetuates undesirable conditions. This has been the articulated policy of the Union since 1933. The Mine Workers has openly stated its preference, if need be, for a reduced working force in the industry, with those employed working at high wages rather than for greater total employment at lesser wage rates.

Consistent with this view, the Union welcomes automation, insisting only that the workers participate in its benefits. *Jewel Tea* presents another and different aspect of collective bargaining philosophy. The Chicago Local of the Amalgamated Meat Cutters bargains for its members with small,

independent service butchers as well as large automated self-service chains. It seeks from both a uniform policy that no fresh meat be sold after 6 p.m. This union policy, as my Brother WHITE recognizes, has a long history dating back to 1919 and has grown out of the Union's struggle to reduce the long, arduous hours worked by butchers, which in 1919 were 81 hours per week. It took a long strike to achieve the first limitation on hours in 1920, and it has required hard extensive collective bargaining since then to maintain the policy and further reduce the number of hours worked. While it is claimed by *Jewel Tea*, a large operator of automated self-service markets, that it can operate beyond the set hours without increasing the work of butchers or having others do butchers' work — a claim rejected by the trial court and the majority of this Court — it is conceded, on this record, that the small, independent service operators cannot do so. Therefore to the extent that the Union's uniform policy limiting hours of selling fresh meat has the effect of aiding one group of employers at the expense of another, here the union policy, unlike that in *Pennington*, aids the small employers at the expense of the large.

Although evidencing these converse economic effects, both *Pennington* and *Jewel Tea*, as the Court in *Pennington*, and my Brother WHITE's opinion in *Jewel Tea* acknowledge, involve conventional collective bargaining on wages, hours, and working conditions — mandatory subjects of bargaining under the National Labor Relations Act. Yet the Mine Workers' activity in *Pennington* was held subject to an antitrust action by two lower courts. This decision was based upon a jury determination that the Union's economic philosophy is undesirable, and it resulted in an award against the Union of treble damages of $270,000 and $55,000 extra for respondent's attorneys' fees. In *Jewel Tea*, the Union has also been subjected to an antitrust suit in which a court of appeals, with its own notions as to what butchers are legitimately interested in, would subject the Union to a treble damage judgment in an as yet undetermined amount.

Regretfully these cases, both in the lower courts and in expressions in the various opinions filed today in this Court, as I shall demonstrate, constitute a throwback to past days when courts allowed antitrust actions against unions and employers engaged in conventional collective bargaining, because "a judge considered" the union or employer conduct in question to be "socially or economically" objectionable. It is necessary to recall that history to place the cases before us in proper perspective.

[This portion of the opinion discussed the Pre-NLRA treatment of unions by the courts, the *Apex*, *Hutcheson* and *Allen-Bradley* cases as well as the 1947 Taft-Hartley amendments to the NLRA and the restrictions placed on labor therein].

In my view, this history shows a consistent congressional purpose to limit severely judicial intervention in collective bargaining under cover of the wide umbrella of the antitrust laws, and, rather, to deal with what Congress deemed to be specific abuses on the part of labor unions by specific proscriptions in the labor statutes. I believe that the Court should respect this history of congressional purpose and should reaffirm the Court's holdings in *Apex* and *Hutcheson* which, unlike earlier decisions, gave effect to, rather than frustrated, the congressional design. The sound approach of *Hutcheson* is that the labor exemption from the antitrust laws derives from a synthesis of all pertinent congressional legislation — the nature of the Sherman Act itself, §§ 6 and 20 of the Clayton Act, the Norris-La Guardia Act, the Fair Labor Standards Act, the Walsh-Healey and Davis-Bacon Acts, and the Wagner Act with its Taft-Hartley and Landrum-Griffin amendments. This last statute, in particular, provides that both employers and unions must bargain over "wages, hours, and other terms and conditions of employment."

Following the sound analysis of *Hutcheson*, the Court should hold that, in order to effectuate congressional intent, collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws. This rule flows directly from the *Hutcheson* holding that a union acting as a union, in the interests of its members, and not acting to fix prices or allocate markets in aid of an employer conspiracy to accomplish these objects, with only indirect union benefits, is not subject to challenge under the antitrust laws. To hold that mandatory collective bargaining is completely protected would effectuate the congressional policies of encouraging free collective bargaining, subject only to

specific restrictions contained in the labor laws, and of limiting judicial intervention in labor matters via the antitrust route — an intervention which necessarily under the Sherman Act places on judges and juries the determination of "what public policy in regard to the industrial struggle demands."

The National Labor Relations Act declares it to be policy of the United States to promote the establishment of wages, hours, and other terms and conditions of employment by free collective bargaining between employers and unions. The Act further provides that both employers and unions must bargain about such mandatory subjects of bargaining. This national scheme would be virtually destroyed by the imposition of Sherman Act criminal and civil penalties upon employers and unions engaged in such collective bargaining. To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they reach an agreement is to stultify the congressional scheme.

Moreover, mandatory subjects of bargaining are issues as to which union strikes may not be enjoined by either federal or state courts. To say that the union can strike over such issues but that both it and the employer are subject to possible antitrust penalties for making collective bargaining agreements concerning them is to assert that Congress intended to permit the parties to collective bargaining to wage industrial warfare but to prohibit them from peacefully settling their disputes. This would not only be irrational but would fly in the face of the clear congressional intent of promoting "the peaceful settlement of industrial disputes by subjecting labor management controversies to the mediatory influence of negotiation."

The plain fact is that is makes no sense to turn antitrust liability of employers and unions concerning subjects of mandatory bargaining on whether the union acted "unilaterally" or in "agreement" with employers. A union can never achieve substantial benefits for its members through unilateral action; I should have thought that the unsuccessful history of the Industrial Workers of the World, which eschewed collective bargaining and espoused a philosophy of winning benefits by unilateral action, proved this beyond question. Furthermore, I cannot believe that Congress, by adopting the antitrust laws, put its stamp of approval on this discredited IWW philosophy of industrial relations; rather, in the Clayton Act and the labor statutes, Congress has repudiated such a philosophy. Our national labor policy is designed to encourage the peaceful settlement of industrial disputes through the negotiation of agreements between employers and unions. Unions cannot, as the history of the IWW shows, successfully retain employee benefits by unilateral action; nor can employers be assured of continuous operation without contractual safeguards. The history of labor relations in this country shows, as Congress has recognized, that progress and stability for both employers and employees can be achieved only through collective bargaining agreements involving mutual rights and responsibilities.

This history also shows that labor contracts establishing more or less standardized wages, hours, and other terms and conditions of employment in a given industry or market area are often secured either through bargaining with multi-employer associations or through bargaining with market leaders that sets a "pattern" for agreements on labor standards with other employers. These are two similar systems used to achieve the identical result of fostering labor peace through the negotiation of uniform labor standards in an industry. Yet the Court makes antitrust liability for both unions and employers turn on which of these two systems is used. It states that uniform wage agreements may be made with multi-employer units but an agreement cannot be made to affect employers outside the formal bargaining unit. I do not believe that the Court understands the effect of its ruling in terms of the practical realities of the automobile, steel, rubber, shipbuilding, and numerous other industries which follow the policy of pattern collective bargaining. I also do not understand why antitrust liability should turn on the form of unit determination rather than the substance of the collective bargaining impact on the industry.

Finally, it seems clear that the essential error at the core of the Court's reasoning is that it ignores the express command of Congress that "(t)he labor of a human being is not a commodity or article of commerce," and therefore that the antitrust laws do not prohibit the "elimination of price competition based on differences in labor standards." This is made clear by a simple question that the Court does not face.

Where there is an "agreement" to seek uniform wages in an industry, in what item is competition restrained? The answer to this question can only be that competition is restrained in employee wage standards. That is, the union has agreed to restrain the free competitive market for labor by refusing to provide labor to other employers below the uniform rate. Under such an analysis, it would seem to follow that the existence of a union itself constitutes a restraint of trade, for the object of a union is to band together the individual workers in an effort, by common action, to obtain better wages and working conditions — *i.e.*, to obtain a higher price for their labor. The very purpose and effect of a labor union is to limit the power of an employer to use competition among workingmen to drive down wage rates and enforce substandard conditions of employment. If competition between workingmen to see who will work for the lowest wage is the ideal, all labor unions should be eliminated. Indeed the Court itself apparently realizes that its holding that the antitrust laws are violated when a labor union agrees with employers not to compete on wages is premised on the belief that labor is a commodity and that this premise leads to the logical conclusion that unions themselves restrain trade in this commodity. This is the only reason I can imagine for the Court's felt need, in 1965, to assert that "(t)he antitrust laws do not bar the existence and operation of labor unions as such."

My view that Congress intended that collective bargaining activity on mandatory subjects of bargaining under the Labor Act not be subject to the antitrust laws does not mean that I believe that Congress intended that activity involving all nonmandatory subjects of bargaining be similarly exempt. The direct and overriding interest of unions in such subjects as wages, hours, and other working conditions, which Congress has recognized in making them subjects of mandatory bargaining, is clearly lacking where the subject of the agreement is pricefixing and market allocation. Moreover, such activities are at the core of the type of anticompetitive commercial restraint at which the antitrust laws are directed.

Nor does my view mean that where a union operates as a businessman, exercising a proprietary or ownership function, it is beyond the reach of the antitrust laws merely because it is a union. On the contrary, the labor exemption is inapplicable where the union acts not as a union but as an entrepreneur.

Finally, my conclusion that unions and employers are exempt from the operations of the antitrust laws for activities involving subjects of mandatory bargaining is based solely on congressional statutes which I believe clearly grant such an exemption and not on any views past or present as to the economic desirability of such an exemption. Whether it is wise or sound public policy for this exemption to continue to exist in its present form, or at all, or whether the exemption gives too much power to labor organizations, is solely for Congress to determine. The problem of the application of the antitrust laws to collective bargaining is but another aspect of the question of whether it is sound public policy to recognize or to limit the "right of industrial combatants to push their struggle to the limits of the justification of self-interest."

On this issue I am in agreement with the Court in *Hunt v. Crumboch*, *supra*, : "That which Congress has recognized as lawful, this Court has no constitutional power to declare unlawful, by arguing that Congress has accorded too much power to labor organizations."

For the reasons expressed above, I dissent from the opinion of the Court but concur in the reversal of the Court of Appeals in *Pennington*, and concur in the judgment of the Court in *Jewel Tea*.

Questions

1. What was the subject matter of the agreement between the union and the employer that resulted in the restraint? Is that subject a mandatory subject of bargaining? Does the subject matter in *Pennington* or the subject matter in *Jewel Tea* more squarely fall within the statutory formulation for required bargaining?

2. Who is primarily affected by the agreed upon restraint? Is this case more like *Allen-Bradley* or *Jewel Tea* in this regard?

3. What standard would the dissenters apply to labor exemption issues?

Section 2: The Labor Exemption Doctrine in Professional Sports

During the decade of the 1970s, traditional player restraints such as the draft, reserve clauses and free agent indemnity arrangements[9] were successfully challenged by disaffected players in all professional sports except baseball.[10] As has already been described in Chapter Three, Antitrust Law, the players argued that the player restraint rules impermissibly operated to restrain their ability to market their services freely and thus constituted unlawful restraints on trade.

In each of these cases, the various leagues took the position that the alleged restraint on trade was a product of agreement between the employers, negotiating on a multi-employer basis, and the players association, negotiating as the representative of all players. As such, the leagues argued, the collectively bargained agreement should be shielded, under the non-statutory labor exemption, from subsequent attack by players whose representatives had agreed to the arrangement under scrutiny.

Although the argument failed in *Flood v. Kuhn* for reasons other than the labor exemption, that doctrine was addressed by Justice MARSHALL in his dissenting opinion as being an issue unresolved in that litigation. He wrote,

> This Court has faced the interrelationship between the antitrust laws and the labor laws before. The decisions make several things clear. First, "benefits to organized labor cannot be utilized as a cat's-paw to pull employer's chestnuts out of the antitrust fires."[11] Second, the very nature of a collective bargaining agreement mandates that the parties be able to "restrain" trade to a greater degree than management could do unilaterally.[12]

Thereafter, the leagues sought to invoke the labor exemption in the Sherman Act lawsuits challenging the player restraint mechanisms. Indeed, as shall be demonstrated, questions concerning the scope of the labor exemption are very much alive in pending federal court litigation.

---

9 Indemnity arrangements among teams insure that if a player leaves a club to play for another team within the league, then the original team will be compensated in the form of a player, draft rights, or money. During the decade of the 1970's, league by-laws frequently provided that if the former team and the acquiring team could not agree on the type or amount of compensation the former team should receive, then the determination would be made by the league commissioner. In several cases, players claimed that the forced compensation schemes operated go discourage prospective employers from hiring available players and, therefore, restrained player mobility.

10 *See, e.g., Mackey v. NFL*, 407 F. Supp. 1000 (D. Minn 1975), *aff'd in part & rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (football); *Robertson v. NBA*, 389 F. Supp 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977) (basketball); *Denver Rockets v. All-Pro Management Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971) (basketball); *Philadelphia World Hockey Club, Inc. v. California Sports, Inc.*, 460 F. Supp 904 (E.D. Mich. 1978), *vacated*, 600 F.2d 1193 (6th Cir. 1979) (hockey).

11 Quoting from *United States v. Women's Sportswear Manufacturers Assn.*, 336 U.S. 460, 464 (1949)..

12 407 U.S. 258, 288 (1972).

MACKEY v. NATIONAL FOOTBALL LEAGUE
543 F.2d 606 (8th Cir. 1976)

LAY, Circuit Judge

This is an appeal by the National Football League (NFL), twenty-six of its member clubs, and its Commissioner, Alvin Ray "Pete" Rozelle, from a district court judgment holding the "Rozelle Rule"[1] to be violative of § 1 of the Sherman Act, and enjoining its enforcement.

This action was initiated by a group of present and former NFL players, appellees herein.... Their complaint alleged that the defendants' enforcement of the Rozelle Rule constituted an illegal combination and conspiracy in restraint of trade denying professional football players the right to freely contract for their services. Plaintiffs sought injunctive relief and treble damages.

The district court granted the injunctive relief sought by the players and entered judgment in their favor on the issue of liability. This appeal followed.

The district court held that the defendants' enforcement of the Rozelle Rule constituted a concerted refusal to deal and a group boycott, and was therefore a *per se* violation of the Sherman Act. Alternatively, finding that the evidence offered in support of the clubs' contention that the Rozelle Rule is necessary to the successful operation of the NFL insufficient to justify the restrictive effects of the Rule, the court concluded that the Rozelle Rule was invalid under the Rule of Reason standard. Finally, the court rejected the clubs' argument that the Rozelle Rule was immune from attack under the Sherman Act because it had been the subject of a collective bargaining agreement between the club owners and the National Football League Players Association (NFLPA).

The defendants raise two basic issues on this appeal: (1) whether the so-called labor exemption to the antitrust laws immunizes the NFL's enforcement of the Rozelle Rule from antitrust liability; and (2) if not, whether the Rozelle Rule and the manner in which it has been enforced violate the antitrust laws.

We review first the claim that the labor exemption immunizes the Commissioner and the clubs from liability under the antitrust laws. Analysis of this contention requires a basic understanding of the legal principles surrounding the labor exemption and consideration of the factual record developed at trial.

History

The concept of a labor exemption from the antitrust laws finds its basic source in §§ 6 and 20 of the Clayton Act, and the Norris-La Guardia Act. Those provisions declare that labor unions are not combinations or conspiracies in restraint of trade, and specifically exempt certain union activities such as secondary picketing and group boycotts from the coverage of the antitrust laws. The statutory exemption was created to insulate legitimate collective activity by employees, which is inherently anticompetitive but is favored by federal labor policy, from the proscriptions of the antitrust laws. The statutory exemption extends to legitimate labor activities unilaterally undertaken by a union in furtherance of its own interests. It does not extend to concerted action or agreements between unions and non-labor groups.

The Supreme Court has held, however, that in order to properly accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining under the National Labor Relations Act, certain union-employer agreements must be accorded a limited nonstatutory exemption from antitrust sanctions.

The players assert that only employee groups are entitled to the labor exemption and that it cannot be asserted by the defendants, an employer group. We must disagree. Since the basis of the nonstatutory

---

[1] The Rozelle Rule essentially provides that when a player's contractual obligation to a team expires and he signs with a different club, the signing club must provide compensation to the player's former team. If the two clubs are unable to conclude mutually satisfactory arrangements, the Commissioner may award compensation in the form of one or more players and/or draft choices as he deems fair and equitable.

exemption is the national policy favoring collective bargaining, and since the exemption extends to agreements, the benefits of the exemption logically extend to both parties to the agreement. Accordingly, under appropriate circumstances, we find that a non-labor group may avail itself of the labor exemption.

The clubs and the Commissioner claim the benefit of the nonstatutory labor exemption here, arguing that the Rozelle Rule was the subject of an agreement with the players union and that the proper accommodation of federal labor and antitrust policies requires that the agreement be deemed immune from antitrust liability. The plaintiffs assert that the Rozelle Rule was the product of unilateral action by the clubs and that the defendants cannot assert a colorable claim of exemption.

Under the general principles surrounding the labor exemption, the availability of the nonstatutory exemption for a particular agreement turns upon whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case. Although the cases giving rise to the nonstatutory exemption are factually dissimilar from the present case, certain principles can be deduced from those decisions governing the proper accommodation of the competing labor and antitrust interests involved here.

We find the proper accommodation to be: First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of *bona fide* arm's-length bargaining.

Applying these principles to the facts presented here, we think it clear that the alleged restraint on trade effected by the Rozelle Rule affects only the parties to the agreements sought to be exempted. Accordingly, we must inquire as to the other two principles: whether the Rozelle Rule is a mandatory subject of collective bargaining, and whether the agreements thereon were the product of *bona fide* arm's-length negotiation.

Under § 8(d) of the National Labor Relations Act, mandatory subjects of bargaining pertain to "wages, hours, and other terms and conditions of employment...." Whether an agreement concerns a mandatory subject depends not on its form but on its practical effect. Thus, in *Meat Cutters v. Jewel Tea*, *supra*, the Court held that an agreement limiting retail marketing hours concerned a mandatory subject because it affected the particular hours of the day which the employees would be required to work. In *Teamsters Union v. Oliver*, an agreement fixing minimum equipment rental rates paid to truck owner-drivers was held to concern a mandatory bargaining subject because it directly affected the driver wage scale.

In this case the district court held that, in view of the illegality of the Rozelle Rule under the Sherman Act, it was "a nonmandatory, illegal subject of bargaining." We disagree. The labor exemption presupposes a violation of the antitrust laws. To hold that a subject relating to wages, hours and working conditions becomes nonmandatory by virtue of its illegality under the antitrust laws obviates the labor exemption. We conclude that whether the agreements here in question relate to a mandatory subject of collective bargaining should be determined solely under federal labor law.

On its face, the Rozelle Rule does not deal with "wages, hours and other terms or conditions of employment" but with inter-team compensation when a player's contractual obligation to one team expires and he is signed by another. Viewed as such, it would not constitute a mandatory subject of collective bargaining. The district court found, however, that the Rule operates to restrict a player's ability to move from one team to another and depresses player salaries. There is substantial evidence in the record to support these findings. Accordingly, we hold that the Rozelle Rule constitutes a mandatory bargaining subject within the meaning of the National Labor Relations Act.

On the basis of our independent review of the record, including the parties' bargaining history, we

find substantial evidence to support the finding that there was no *bona fide* arm's-length bargaining over the Rozelle Rule preceding the execution of the 1968 and 1970 agreements. The Rule imposes significant restrictions on players, and its form has remained unchanged since it was unilaterally promulgated by the clubs in 1963. The provisions of the collective bargaining agreements which operated to continue the Rozelle Rule do not in and of themselves inure to the benefit of the players or their union. Defendants contend that the players derive indirect benefit from the Rozelle Rule, claiming that the union's agreement to the Rozelle Rule was a *quid pro quo* for increased pension benefits and the right of players to individually negotiate their salaries. The district court found, however, that there was no such *quid pro quo*, and we cannot say, on the basis of our review of the record, that this finding is clearly erroneous.

In view of the foregoing, we hold that the agreements between the clubs and the players embodying the Rozelle Rule do not qualify for the labor exemption. The union's acceptance of the status quo by the continuance of the Rozelle Rule in the initial collective bargaining agreements under the circumstances of this case cannot serve to immunize the Rozelle Rule from the scrutiny of the Sherman Act.

[In the remaining portion of the opinion, the court determined that the Rozelle Rule should be evaluated under the Rule of Reason analysis and that the rule violated Section 1 of the Sherman Act.]

With the exception of the district court's finding that implementation of the Rozelle Rule constitutes a *per se* violation of § 1 of the Sherman Act and except as it is otherwise modified herein, the judgment of the district court is **Affirmed**. The cause is remanded to the district court for further proceedings consistent with this opinion.

Questions

1. Where does the Court derive authority for its three part test for the applicability of the labor exemption? Is this test a proper application of the Supreme Court precedent on which the Court relies?

2. Do you agree that the Rozelle Rule is a mandatory subject of bargaining? Who does the rule primarily affect? Why are these questions important?

3. The court requires, as the third element of the test, that the restraint be the product of *bona fide* arm's length bargaining. Where in the Supreme Court's treatment of the doctrine does this standard emerge? Does the court properly interpret the NLRA in its review of the bargaining in this case?

McCOURT v. CALIFORNIA SPORTS, INC.

600 F.2d 1193 (6th Cir. 1978).

ENGEL, Circuit Judge

The reserve system in professional athletics has been the subject of exhaustive and spirited discussion both in sports and in the legal world. Its supporters urge that it stimulates athletic competition between the teams of a sports league; its opponents urge that it stifles economic competition among those same teams. We have no doubt that there is a measure of truth in both claims.

Involved in this appeal is the validity, under federal antitrust laws, of the reserve system currently in effect in the National Hockey League. In its present form, the system has been termed a "modified Rozelle Rule" because it closely resembles the rule promulgated for the National Football League by its commissioner, Pete Rozelle, but has been modified to the extent that arbitration is not by the commissioner himself but by a professional and independent arbitrator.

On October 10, 1977, Dale McCourt, a 21-year-old hockey player from Canada, signed a NHL Standard Players Contract with the Detroit Hockey Club, Inc. to play professional hockey for three years with the Detroit Red Wings. McCourt was to be paid $325,000 over three years. He subsequently played his rookie year, 1977-78, with the Red Wings and was the leading scorer.

Rogatien Vachon had been a star goaltender for the Los Angeles Kings for six years when he became a free agent in 1978. After rejecting a substantial offer by the Kings, Vachon entered into a contract with the Red Wings at a salary of $1,900,000 for five seasons. By signing Vachon, the Red Wings obligated itself to make an equalization payment under By-Law Section 9A to the Kings and, when no agreement was reached, each club submitted to arbitrator Houston a proposal pursuant to By-Law Section 9A.8. The Red Wings offered two of its players as compensation and the Kings proposed that McCourt's contract be assigned to it. The arbitrator selected the Kings' proposal and accordingly, the Red Wings assigned McCourt's contract to Los Angeles. Rather than report to the Kings, however, Dale McCourt brought suit in the United States District Court for the Eastern District of Michigan.

Named as defendants in that suit were the National Hockey League, the Los Angeles Kings, the National Hockey League Players Association, and the Detroit Red Wings. Count I of McCourt's complaint alleged that the reserve system, and consequently the assignment of his contract to the Los Angeles Kings as the compensation for free agent Vachon, violated Section 1 of the Sherman Act, and sought injunctive relief to prevent the defendants from enforcing the arbitration award and to require that his contract be reassigned to the Detroit Red Wings.

On September 19, 1978, following an extensive evidentiary hearing, the district court entered a preliminary injunction restraining the defendants from enforcing the arbitration award and from penalizing McCourt for refusing to play professional hockey with the Los Angeles Kings pursuant to the award. This appeal followed.

The district judge held that By-Law Section 9A unreasonably restrains trade in commerce, in violation of Section 1 of the Sherman Act:

> Like the "Rozelle Rule," bylaw 9A applies to all players without regard to status or ability; it applies to the average player and to the superstar alike; it is unlimited in duration and acts as a perpetual restriction upon a player's ability to freely contract for his services....

The trial judge went on to hold that the defendants were not entitled to the benefit of the non-statutory labor exemption from antitrust sanctions because "(t)he preponderance of evidence ... establishes that bylaw 9A was not the product of *bona fide* arm's length bargaining over any of its anticompetitive provisions. The evidence establishes that the bylaw was unilaterally imposed upon the NHLPA and was incorporated into the collective bargaining agreement in the identical language it contained when it was first adopted by the League."

While the Supreme Court has ruled that other professional sports do not enjoy the unique exemption from antitrust laws which has historically been reserved for the game of baseball, it has never directly ruled upon whether the reserve system common to most professional athletics comes within the ban of the Sherman Act, nor has it expressly determined whether the reserve system is a mandatory subject of collective bargaining and, therefore, exempt under federal labor policy from the operation of the federal antitrust laws.

Assuming without deciding that reserve systems such a those here are subject to Section 1 of the Sherman Act and could otherwise be violative of it, we proceed to determine whether the non-statutory labor exemption applies upon the facts here.

The trial court and the parties before us in this appeal have all relied upon *Mackey* as properly enunciating the governing principles in determining whether the non-statutory labor exemption applies to the reserve system provisions of a collective bargaining agreement in professional sports.

We see no reason to disagree with the judgment of the district court and of the attorneys on both

sides that the proper standards are set out in *Mackey*. In short, it was proper to apply *Mackey's* standards; the issue is whether those standards were properly applied.

We have little difficulty in determining that the first two policy considerations favor the exemption. Clearly here the restraint on trade primarily affects the parties to the bargaining relationship. It is the hockey players themselves who are primarily affected by any restraint, reasonable or not. Second, the agreement concerning the reserve system involves in a very real sense the terms and conditions of employment of the hockey players both in form and in practical effect. As *Mackey* correctly points out, the restriction upon a player's ability to move from one team to another within the league, the financial interest which the hockey players have and their interest in the mechanics of the operation and enforcement of the rule strongly indicate that it is a mandatory bargaining subject within the meaning of the National Labor Relations Act.

The issue, therefore, in our judgment is narrowed to whether, upon the facts of this case, the agreement sought to be exempted was the product of *bona fide* arm's-length bargaining.

We emphasize today, that the subject of player movement restrictions is a proper one for resolution in the collective bargaining context. When so resolved, as it appears to have been in the current collective bargaining agreement, the labor exemption to antitrust attack applies, and the merits of the bargaining agreement are not an issue for court determination. The bargaining agreement is subject to change from time to time as it expires and is up for renegotiation.

We believe that in holding that the reserve system had not been the subject of good faith, arm's-length bargaining, the trial court failed to recognize the well established principle that nothing in the labor law compels either party negotiating over mandatory subjects of collective bargaining to yield on its initial bargaining position. Good faith bargaining is all that is required. That the position of one party on an issue prevails unchanged does not mandate the conclusion that there was no collective bargaining over the issue.

In a case where the collective bargaining negotiations proceeded much like those on By-Law Section 9A, our circuit followed *American National Insurance Co.* to hold that good faith bargaining did not require the employer to alter its position. In *N.L.R.B. v. United Clay Mines Corp.*, 219 F.2d 120 (6th Cir. 1955) the NLRB sought enforcement of its order directing the company to bargain collectively with the union. The court refused, holding:

> In the present case, the respondent promptly met with the Union at its request, and interposed no objections or delays to later meetings whenever requested by the Union. Its negotiators were fully authorized to act. It submitted a proposed contract which it was willing to execute. The Union's proposals and its own proposals were discussed in detail in lengthy sessions. From the start respondent made its position clear that it would insist upon certain provisions, which, in its opinion, were basically important to the continued successful operation of the Company, such as the unqualified no-strike clause and settlement of grievances by Company management without compulsory arbitration. The Company's position on these issues was not acceptable to the Union. The Union's counterproposals on these issues were not acceptable to the Company. The negotiations, after a period of months, finally resulted in a tentative agreement with respect to all matters except the settlement of grievances. The failure to execute a contract was not because of a failure or refusal to negotiate, but in the final analysis was because the parties would not agree on one remaining issue, considered by both of them as basically important. To say that the Company should have accepted the Union's proposal on this issue is to ignore the language of the statute that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."
>
> The Board also stresses the fact that the Company refused to submit alternate proposals about the grievance issue at the request of the Union after it had refused to

> accept the Company's original proposal, and that the inflexible attitude of the Company contributed nothing to the success of the negotiations. But the statutory right to decline to make a concession includes the right to firmly stand on a proposal previously made and not accepted.
>
> In our opinion, the matter resolves itself into purely a question of hard bargaining on the part of the respondent. It is not for the Board or the Court to determine what in their opinion the respondent should have agreed to, and, in effect, make the contract for the parties. To decree enforcement of the order, would, as a practical matter, force the respondent to make a concession or be proceeded against for contempt of court. While the Act compels negotiations, which usually result in reaching an agreement, it contains no authority to force an agreement where the parties have reached an impasse.

Contrary to the trial judge's conclusion, the very facts relied upon by him in his opinion illustrate a classic case of collective bargaining in which the reserve system was a central issue. It is apparent from those very findings that the NHLPA used every form of negotiating pressure it could muster. It developed an alternate reserve system and secured tentative agreement from the owner and player representatives, only to have the proposal rejected by the players. It refused to attend a proposed meeting with the owners to discuss the reserve system further. It threatened to strike. It threatened to commence an antitrust suit and to recommend that the players not attend training camp.

For its part, the NHL, while not budging in its insistence upon By-Law Section 9A, at least in the absence of any satisfactory counter proposal by the players, yielded significantly on other issues. It agreed as a price of By-Law Section 9A to the inclusion in the collective bargaining agreement of a provision that the entire agreement could be voided if the NHL and the World Hockey Association should merge. The undisputed reason for this provision was player concern that with a merger of the two leagues, the reserve system would be rendered too onerous because the players would, by the merger, lose the competitive advantage of threatening to move to the WHA. Likewise, the NHL team owners obtained a provision voiding the entire agreement should the reserve system be invalidated by the courts.

The trial court, while acknowledging that the new collective bargaining agreement contained significant new benefits to the players, held that they were not "directly related to collective bargaining on bylaw 9A." This observation and the trial court's conclusion that "the NHLPA never bargained for bylaw 9A in the first instance" typifies its approach. It is true that the NHLPA did not "bargain for" By-Law Section 9A; it bargained "against" it, vigorously. That the trial judge concluded the benefits in the new contract were wrung from management by threat of an antitrust suit to void the By-Law merely demonstrates that the benefits were bargained for in connection with the reserve system, although he opined that the threat of a suit was a more effective bargaining tool than the threat of a strike. And while we agree with the trial judge that inclusion of language in the collective bargaining agreement that the reserve system provisions were "fair and reasonable" would not immunize it from antitrust attack, it is manifest from the entire facts found by the court that there was no collusion between management and the players association. Thus, the trial court found that "(t)he NHLPA agreed to include bylaw 9A in the collective bargaining agreement only after the NHL conceded that the NHLPA could terminate the entire agreement if the NHL merged with the World Hockey Association." Finally, the trial court found that "(t)he NHLPA's acceptance of bylaw 9A was essential to get the parties off dead center. The players had no other alternative. The Standard Player's Contract required them to accept all the bylaws adopted by the NHL."

From the express findings of the trial court, fully supported by the record, it is apparent that the inclusion of the reserve system in the collective bargaining agreement was the product of good faith, arm's-length bargaining, and that what the trial court saw as a failure to negotiate was in fact simply the failure to succeed, after the most intensive negotiations, in keeping an unwanted provision out of the contract. This failure was a part of and not apart from the collective bargaining process, a process which achieved its ultimate objective of an agreement accepted by the parties.

Assuming without deciding that the reserve system incorporated in the collective bargaining agreement was otherwise subject to the antitrust laws, whether the good faith, arm's-length requirement necessary to entitle it to the non-statutory labor exemption from the antitrust laws applies is to be governed by the developed standards of law applicable elsewhere in the field of labor law and as set forth in *Mackey*, *supra*. So viewed, the evidence here, as credited by the trial court, compels the conclusion that the reserve system was incorporated in the agreement as a result of good faith, arm's-length bargaining between the parties. As such it is entitled to the exemption, and the trial court's conclusion to the contrary must be deemed clearly erroneous.

The injunction is vacated, and the cause remanded for entry of judgment in favor of defendants upon Count I of the complaint. The cause is also remanded for further proceedings not inconsistent herewith.

EDWARDS, Chief Judge, dissenting

I respectfully dissent. My basic disagreement with the majority opinion is planted on the proposition that if sports clubs organized for profit are to be exempted from the antitrust laws, this should be accomplished by statutory amendment, in accordance with the Constitution of the United States. Any such amendment would necessarily follow extensive hearings on the possible implications of the exemption, not only on organized sports, but also on the whole of the American economy a process not available to the Judicial Branch.

The essence of the restriction on competition involved in this case is an agreement between all National Hockey League clubs not to hire any hockey player who has become a free agent (by refusing reemployment contract terms offered by his previous club) without undertaking to "equalize" the loss to his former club by agreed on or arbitrated transfer of players or cash.

The restriction by its terms is upon the NHL constituent clubs. Its impact, however, is clearly upon star hockey players. Clause 9A.6 obviously diminishes the hockey star's bargaining power, both with his previous employer and any prospective employer. It also may require any player who is transferred under the equalization clause to live in a city and play for a club against his professional (or private) best interests.

The legal question posed by this case is whether an association of employers may in the organized sports industry (here it is hockey) gain exemption from the antitrust laws for an agreement among themselves to restrict otherwise free competition in employment of hockey players by imposing their employer-devised agreement upon a union representing that class of employees through use of economic inducement or compulsion. Before we give judicial sanction to such a practice as consistent with the antitrust and labor-management laws of this country, we should take a long, hard look at the implications for sections of the national economy other than organized sports.

Superstars whose services are at a high premium can be found in many areas of industry and commerce other than the world of sports. Is there any distinction to be drawn between Clause 9A and similar restrictions in, for example, the field of dress manufacturing for the services of highly talented designers, or in the metalworking industries for the services of highly talented engineers, designers, or die shop leaders, or the entertainment field for highly talented personnel, or in the publishing field for highly talented writers?

Such a restriction on freedom of competition (and human freedom in choice of employment) in the interest of promotion or maintenance of business profits, has a distinctly predatory ring. While the majority opinion declines to answer the question as to whether, without benefit of an exemption, Clause 9A would be violative of the Sherman Act, I believe that 9A does violate the antitrust laws and that no "labor union exemption" or nonstatutory exemption is applicable.

The most distinguishing feature of the economy of the United States is the statutory prohibition upon monopoly and upon contracts and devices designed to restrict free competition.

The Exemption Claim

The majority opinion relies solely upon judicial extrapolation from one of the rare exceptions to the strictures of the Sherman Act. It was adopted in 1914 and provides:

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

It should be noted that the amendment applies only to organizations "not having capital stock or conducted for profit." Obviously, by its terms, the clubs of the National Hockey League are specifically excluded because they are not "labor, agricultural, or horticultural organizations," and because they do have capital stock and are organized for profit. But in fact, neither the appellants nor my colleagues in the majority rely upon the terms of the statute. What is relied upon is case law in which the federal courts have sought to reconcile the conflict between the antitrust laws (with their prohibitions against restraint of trade and antimonopoly practices) and the labor union exemption. From the beginning of this conflict it has been recognized that the very purpose of labor organization was to remove wages from the pressures which would otherwise be placed on them by cost competition between competing employers.

Until this case, I do not know of any instance where profitmaking businesses have succeeded in justifying a cartel arrangement which suits their purposes by dint of securing that arrangement's introduction into a collective bargaining agreement and thus acquiring the right to the "labor union exemption." The majority's approval of this arrangement in this case in fact stands the labor union exemption squarely on its head.

The District Judge heard evidence on plaintiff's complaint for a preliminary injunction so fully that the parties have now stipulated to submit the issues as if the case had been fully tried.

In 1972 the Supreme Court majority in an opinion authored by Mr. Justice BLACKMUN held that baseball's reserve clause was protected by "positive inaction" of Congress in allowing the *Federal Baseball* decision to stand without statutory correction. But that opinion also included a clear-cut warning to all other sports not so blessed: "other professional sports operating interstate football, boxing, basketball, and, presumably, hockey and golf are not so exempt." *Flood v. Kuhn*, *supra*, 407 U.S. at 282-83, 92 S. Ct. at 2112.

Turning from the thus historically protected great American pastime to other less fortunate sports, I simply find no authoritative support for legalizing the sort of reserve clause sought to be imposed by the National Hockey League on its players.

The majority opinion cites and quotes from *Mackey v. National Football League*. But there the Eighth Circuit held:

> The district court found, however, that the Rule operates to restrict a player's ability to move from one team to another and depresses player salaries. There is substantial evidence in the record to support these findings. Accordingly, we hold that the Rozelle Rule constitutes a mandatory bargaining subject within the meaning of the National Labor Relations Act.
>
> On the basis of our independent review of the record, including the parties' bargaining history as set forth above, we find substantial evidence to support the finding that there was no *bona fide* arm's-length bargaining over the Rozelle Rule preceding the execution of the 1968 and 1970 agreements.

The attempt to distinguish these findings and conclusions in *Mackey* from those of the District Court in our instant case seems completely unpersuasive to me.

The majority opinion seems to argue that *Mackey's* holding that the Rozelle rule violated the Sherman Act was reversed in effect by a settlement between the National Football League and the Players' Association. A voluntary settlement of a lawsuit after remand for trial does not diminish the legal value of the remanding opinion. The *Mackey* case, in my judgment, stands squarely in favor of the result reached by the District Court in this case and is by no means weakened as precedent by a settlement arrived at during subsequent litigation.

In the *Mackey* case the District Court had held that the Rozelle rule represented a *per se* violation of the Sherman Act. The Eighth Circuit was not so sure. As a consequence, its opinion weighed the Rozelle rule under the "Rule of Reason" standard and concluded, "We hold that restraints on competition within the market for players' services fall within the ambit of the Sherman Act." Assuming that "it (is) more appropriate to test the validity of the Rozelle Rule under the Rule of Reason," I agree with the analysis of the Eighth Circuit opinion which did not find any legitimate business purpose for the restraints imposed by the Rozelle rule but also held that there were other less onerous (and legally less dubious) methods of achieving reasonable competitive balance in the National Football League.

The kind of restrictions sought to be applied there and here are anti-competitive in purpose and anti-competitive in effect. They are not novel and have frequently been found violative of the antitrust laws in the courts.

I do reject one feature of the *Mackey* and *Reynolds* decisions upon which the majority relies. The fact that a particular provision restricting competition is a mandatory subject of collective bargaining and has been agreed upon by management and labor in a collective bargaining contract does not necessarily exempt the restriction from the Sherman Act. The antitrust laws were adopted to protect the free enterprise system and the general public. It is easy to postulate situations where the profit interests of capital and the wage-hour interests of labor could be mutually served by introducing into collective bargaining agreements restrictions upon competition which are greatly contrary to the public interest and have nothing to do with the labor interests protected by the Clayton and Norris-La Guardia Acts.

The District Judge's findings of fact are not clearly erroneous and the relief he ordered did not constitute abuse of his discretion.

I would affirm the District Judge in granting injunctive relief against Clause 9A.

Questions

1. How does the holding in *McCourt* differ from that in *Mackey*? Which is the better reading of the NLRA?

2. Are *Mackey* and *McCourt* more like *Jewel Tea* or *Pennington*?

REYNOLDS v. NFL
584 F.2d. 280 (8th Cir. 1978)

[In this opinion, the court renders a decision on a challenge by the plaintiffs to the settlement entered into by the NFL and the NFLPA following the decision in *Mackey*.]

GIBSON, Chief Judge

In these cases, fifteen active and one inactive National Football League players object to the settlement of an action brought on behalf of 5,706 former and present professional football players. The class action was prosecuted to secure monetary damages and other relief for the players from the National Football League, individual teams, and other defendants for violations of the antitrust laws. The settlement approved by the District Court will provide a total of $13,675,000 for distribution to members of the plaintiff class. After carefully considering the record and the briefs and oral arguments of the parties and the objecting class members, we affirm the order of the District Court approving the settlement.

The present suit is an outgrowth of this court's decision in *Mackey v. National Football League*. The District Court in *Mackey* had concluded that the Rozelle Rule was a *Per se* violation of the Sherman Act. A panel of this court concluded that it was not a *Per se* violation of the Sherman Act, but was a violation when considered under the standard of reasonableness, as being more restrictive than reasonably necessary to meet legitimate business needs. We also noted that the matter of restrictions on player movement was a subject of mandatory collective bargaining under § 8(d) of the National Labor Relations Act. Had the Rozelle Rule been a result of *bona fide* arms-length bargaining between the National Football League Players Association (Players Association) and the league teams, it would have qualified for the labor exemption from antitrust scrutiny. Since there was evidence to support the District Court's decision that the Rozelle Rule had not been the result of arms-length bargaining, we concluded that the labor exemption did not apply.

The National Football League applied to the Supreme Court for *certiorari* in *Mackey*. That petition was not acted upon prior to its being withdrawn by the football league as a part of the settlement of the present action. Thus, this court's decision in *Mackey* stands as the final decision regarding the antitrust implications of the Rozelle Rule.

Following our decision in *Mackey*, the Players Association sponsored the present class action seeking damages and other relief. The Players Association is the bargaining representative for the National Football League players.

Appellant-objectors' primary complaint relates to Article XV of the collective bargaining agreement denominated First Refusal/Compensation Rule, which replaced the discarded Rozelle Rule. The objectors, in argument, viewed the new rule as a perpetual option rule more restrictive in thwarting freedom of movement than the old Rozelle Rule. The record, however, does not support the objectors' complaint, as 168 players played out their options in two years under the present rule as contrasted with 176 players who played out their options during eleven years under the Rozelle Rule.

It appears from the objectors' brief and argument that they desire complete, unrestricted freedom of movement from club to club, offering their services to the highest bidder. This position ignores the structured nature of any professional sport based on league competition. Precise and detailed rules must of necessity govern how the sport is played, the rules of the game, and the acquisition, number, and engagement of players. While some freedom of movement after playing out a contract is in order, complete freedom of movement would result in the best franchises acquiring most of the top players. Some leveling and balancing rules appear necessary to keep the various teams on a competitive basis, without which public interest in any sport quickly fades. This, of course, is the crux of most of the past restrictive rules and those now in force. Professional sports are set up for the enjoyment of the paying customers and not solely for

the benefit of the owners or the benefit of the players. Without public support any professional sport would soon become unprofitable to the owners and the participants.

Although a collective bargaining agreement more favorable to the objectors as above average players might have been obtained, that is no reason for the court to enter into the picture and pass upon the merits of any collective bargaining agreement. In other words, the issue here is not whether the optimum collective bargaining agreement has been obtained. The objectors are few in number: 15 out of 1,400 active players and one retired player out of 4,300. This certainly does not indicate any substantial dissatisfaction with the settlement agreement. No settlement agreement arrived at between antagonists can provide the best possible world to all members of a relatively large class. Pragmatically, the settlement here appears fair, reasonable and substantial.

We have considered the other arguments raised in the appellant-objectors' briefs and in the brief of the plaintiff class seeking remand of the case, and find them to be without merit. The findings of fact made by the District Court are not clearly erroneous and it applied correct principles of law. There was no abuse of discretion in approving this substantial settlement and the necessarily complicated distribution formula.

We emphasize today, as we did in *Mackey*, *supra*, that the subject of player movement restrictions is a proper one for resolution in the collective bargaining context. When so resolved, as it appears to have been in the current collective bargaining agreement, the labor exemption to antitrust attack applies, and the merits of the bargaining agreement are not an issue for court determination. The bargaining agreement is subject to change from time to time as it expires and is up for renegotiation.

* * *

WOOD v. NATIONAL BASKETBALL ASSOCIATION

809 F.2d 954 (2d Cir. 1987)

WINTER, Circuit Judge

... Wood contends that the "salary cap," college draft, and prohibition of player corporations violate Section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), and are not exempt from the Sherman Act by reason and the non-statutory "labor exemption." We disagree and affirm.

The challenged provisions are in part the result of the settlement of an earlier anti-trust action brought by players against the NBA....

[The Settlement Agreement modified the college draft system by limiting to one year the period during which a team has exclusive rights to negotiate with and sign its draftees. If a draftee remains unsigned at the time of the next year's draft, he could re-enter the draft. The Settlement Agreement also instituted a system of free agency allowing veteran players to sell their services to the highest bidder subject only to their current team's right of first refusal that allows it to match the best offer.

On October 10, 1980, the NBA and NBPA signed a collective bargaining agreement that incorporated the provisions of the Settlement Agreement. The 1980 collective agreement expired on June 1, 1982, however, and the 1982-83 season began before a new agreement had been reached. Negotiations between the NBA and the NBPA continued and a new agreement was reached which continued the college draft and free agency/first refusal provisions of the earlier agreements. The new agreement also established a minimum for individual salaries and a minimum and maximum for aggregate team salaries. The latter are styled the salary cap provisions, even though they establish a floor as well as a ceiling. Under the salary cap, a team that has reached its maximum allowable team salary may sign a first-round draft choice like Wood only to a one-year contract for $75,000. An integral part of the method by which the floor and ceiling on aggregate team salaries were to be determined was a guarantee that the players would receive

53 percent of the NBA's gross revenues, including new revenues, in salaries and benefits. This combination of fringe benefits, draft, free agency, a floor and a ceiling on aggregate team salaries, and guaranteed revenue sharing was unique in professional sports negotiations.]

* * *

Because the Memorandum altered certain terms and conditions of the Settlement Agreement, the NBA and NBPA jointly requested district court approval of a modification of the Settlement Agreement. FED. R. CIV. P. 23(e). After a hearing at which class members were invited to address the fairness and adequacy of the modification, Judge Carter approved it on June 13, 1983.

Against this background, the Philadelphia 76ers drafted Wood in the first round of the 1984 college draft. At the time of the draft, the 76ers' team payroll exceeded the amount permitted under the salary cap. The 76ers therefore tendered to Wood a one-year $75,000 contract, the amount stipulated under the salary cap. This offer was a formality, however, necessary to preserve its exclusive rights to sign him. In fact, the team informed Wood's agent of its intention to adjust its roster so as to enable it to negotiate a long-term contract with Wood for substantially more money. Wood understandably did not sign the proffered contract.

On September 13, 1984, he turned from the basketball court to the district court and sought a preliminary injunction restraining enforcement of the agreement between the NBA and NBPA and compelling teams other than the 76ers to cease their refusal to deal with him except on the terms set out in the collective bargaining agreement and Memorandum.

Judge Carter denied Wood's motion. *Wood v. National Basketball Ass'n*, 602 F. Supp. 525 (S.D.N.Y. 1984). He found that both the salary cap and college draft provisions affect only the parties to the collective bargaining agreement — the NBA and the players — involve mandatory subjects of bargaining as defined by federal labor laws, and are the result of bona fide arms-length negotiations. Both are proper subjects of concern by the Players Association. As such these provisions come under the protective shield of our national labor policy and are exempt from the reach of the Sherman Act.

* * *

In January 1986, the parties made an evidentiary submission to Judge Carter for a decision on the merits. This consisted of papers submitted with the motion for a preliminary injunction and a stipulation of additional facts. On February 5, 1986, Judge Carter granted judgment to the defendants. This appeal followed.

Discussion

Plaintiff views the salary cap, college draft and prohibition of player corporations as an agreement among horizontal competitors, the NBA teams, to eliminate competition for the services of college basketball players. As such, he claims, they constitute per se violations of Section 1 of the Sherman Act.

... We may assume for purposes of this decision that the individual NBA teams and not the league are the relevant employers and that Wood would obtain considerably more favorable employment terms were the draft and salary cap eliminated so as to allow him to offer his services to the highest bidder among NBA teams. We may further assume that were these arrangements agreed upon by the NBA teams in the absence of a collective bargaining relationship with a union representing the players, they would be illegal and plaintiff would be entitled to relief.

The draft and salary cap are not, however, the product solely of an agreement among horizontal competitors but are embodied in a collective agreement between the employer or employers and a labor organization reached through procedures mandated by federal labor legislation. Their legality therefore, cannot be assessed without reference to that legislation. The interaction of the Sherman Act and federal labor legislation is an area of law marked more by controversy than by clarity. *See* R. GORMAN, LABOR LAW 631-35 (1976) ("Gorman"). We need not enter this debate or probe the exact contours of the so-called statutory or non-statutory "labor exemptions," however, because no one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy as set out in the National

Labor Relations Act. 29 U.S.C. §§ 151-169 (1982). Wood's claim is just such a wholesale subversion of that policy, and it must be rejected out of hand. As a result, whether the draft and salary cap are per se violations of the antitrust laws or subject to rule of reason analysis need not be decided.

Although the combination of the college draft and salary cap may seem unique in collective bargaining (as are the team salary floor and 53 percent revenue sharing agreement), the uniqueness is strictly a matter of appearance. The nature of professional sports as a business and professional sports teams as employers calls for contractual arrangements suited to the unusual commercial context. However, these arrangements result from the same federally mandated processes as do collective agreements in the more familiar industrial context. Moreover, examination of the particular arrangements arrived at by the NBA and NBPA discloses that they have functionally identical, and identically anticompetitive, counterparts that are routinely included in industrial collective agreements.

Among the fundamental principles of federal labor policy is the legal rule that employees may eliminate competition among themselves through a governmentally supervised majority vote selecting an exclusive bargaining representative. Section 9(a) of the National Labor Relations Act explicitly provides that "representatives ... selected ... by the majority of the employees in a unit ... shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." 29 U.S.C. § 159(a). Federal labor policy thus allows employees to seek the best deal for the greatest number by the exercise of collective rather than individual bargaining power. Once an exclusive representative has been selected, the individual employee is forbidden by federal law from negotiating directly with the employer absent the representative's consent, even though that employee may actually receive less compensation under the collective bargain than he or she would through individual negotiations.

The gravamen of Wood's complaint, namely that the NBA-NBPA collective agreement is illegal because it prevents him from achieving his full free market value, is therefore at odds with, and destructive of, federal labor policy. It is true that the diversity of talent and specialization among professional athletes and the widespread exposure and discussions of their "work" in the media make the differences in value among them as "workers" more visible than the differences in efficiency and in value among industrial workers. High public visibility, however, is no reason to ignore federal legislation that explicitly prevents employees, whether in or out of a bargaining unit, from seeking a better deal where the deal is inconsistent with the terms of a collective agreement.

Indeed, examination of the criteria that Wood advances as the basis for striking down the draft and salary cap reveals that there is hardly a collective agreement in the nation that would survive his legal theory. For example, Wood emphasizes his superior abilities as a point-guard and his selection in the first round of the college draft as grounds for enabling him to bargain individually for a higher salary. However, collective agreements routinely set standard wages for employees with differing responsibilities, skills, and levels of efficiency. Wood's theory would allow any employee dissatisfied with his salary relative to those of other workers to insist upon individual bargaining, contrary to explicit federal labor policy. As one commentator has noted, "Congress gave to the majority representative the task of harmonizing and adjusting the conflicting interests of employees within the bargaining unit, no matter how diverse their skills, experience, age, race or economic level." Gorman at 379. And the Supreme Court has observed, "The complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 97 L. Ed. 1048, 73 S. Ct. 681 (1953).

Wood also attacks the draft and salary cap because they assign him to work for a particular employer at a diminished wage. However, collective agreements in a number of industries provide for the exclusive referral of workers by a hiring hall to particular employers at a specified wage. *See Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667, 6 L. Ed. 2d 11, 81 S. Ct. 835 (1961). The choice of employer is governed by the rules of the hiring hall, not the preference of the individual worker. There is nothing that prevents such agreements from providing that the employee either work for the designated employer at the stipulated wage or not be referred at that time. Otherwise, a union might find

it difficult to provide the requisite number of workers to employers. Such an arrangement is functionally indistinguishable from the college draft.

Wood further attacks the draft and salary cap as disadvantaging new employees. However, newcomers in the industrial context routinely find themselves disadvantaged vis-à-vis those already hired. A collective agreement may thus provide that salaries, layoffs, and promotions be governed by seniority, even though some individuals with less seniority would fare better if allowed to negotiate individually.

Finally, Wood argues that the draft and salary cap are illegal because they affect employees outside the bargaining unit. However, that is also a commonplace consequence of collective agreements. Seniority clauses may thus prevent outsiders from bidding for particular jobs, and other provisions may regulate the allocation or subcontracting of work to other groups of workers. Indeed, the National Labor Relations Act explicitly defines "employee" in a way that includes workers outside the bargaining unit. 29 U.S.C. § 152(3).

If Wood's antitrust claim were to succeed, all of these commonplace arrangements would be subject to similar challenges, and federal labor policy would essentially collapse unless a wholly unprincipled, judge-made exception were created for professional athletes. Employers would have no assurance that they could enter into any collective agreement without exposing themselves to an action for treble damages. Moreover, recognition of a right to individual bargaining without the consent of the exclusive representative would undermine the status and effectiveness of the exclusive representative, and result in individual contracts that reduce the amount of wages or other benefits available for other workers. Wood's assertion that he would be paid more in the absence of the draft and salary cap also implies that others would receive less if he were successful. It can hardly be denied that the NBA teams would be more resistant to benefits guaranteed to all, such as pensions, minimum salaries, and medical and insurance benefits. In fact, the salary cap challenged by Wood is one part of a complex formula including minimum team salaries and guaranteed revenue sharing.

The policy claim that one can do better through individual bargaining is nothing but the flip side of the policy claim that other employees need unions to protect their interests. Congress has accepted the latter position, and we are bound by that legislative choice.

The fact that one cannot alter important provisions of a collective agreement without undermining other provisions demonstrates that Wood's antitrust claim fundamentally conflicts in yet another way with national labor policy. That policy attaches prime importance to freedom of contract between the parties to a collective agreement. Freedom of contract is an important cornerstone of national labor policy for two reasons. First, it allows an employer and a union to agree upon those arrangements that best suit their particular interests. Courts cannot hope to fashion contract terms more efficient than those arrived at by the parties who are to be governed by them. Second, freedom of contract furthers the goal of labor peace. To the extent that courts prohibit particular solutions for particular problems, they reduce the number and quality of compromises available to unions and employers for resolving their differences.

Freedom of contract is particularly important in the context of collective bargaining between professional athletes and their leagues. Such bargaining relationships raise numerous problems with little or no precedent in standard industrial relations. As a result, leagues and player unions may reach seemingly unfamiliar or strange agreements. If courts were to intrude and to outlaw such solutions, leagues and their player unions would have to arrange their affairs in a less efficient way. It would also increase the chances of strikes by reducing the number and quality of possible compromises.

The issues of free agency and entry draft are at the center of collective bargaining in much of the professional sports industry. It is to be expected that the parties will arrive at unique solutions to these problems in the different sports both because sports generally differ from the industrial model and because each sport has its own peculiar economic imperatives. The NBA/NBPA agreement is just such a unique bundle of compromises. The draft and the salary cap reflect the interests of the employers in stabilizing salary costs and spreading talent among the various teams. Minimum individual salaries, fringe benefits,

minimum aggregate team salaries, and guaranteed revenue sharing reflect the interests of the union in enhancing standard benefits applicable to all players. The free agency/first refusal provisions in turn allow individual players to exercise a degree of individual bargaining power. Were a court to intervene and strike down the draft and salary cap, the entire agreement would unravel. This would force the NBA and NBPA to search for other avenues of compromise that would be less satisfactory to them than the agreement struck down. It would also measurably increase the chances of a strike. We decline to take that step.

We also agree with the district court that all of the above matters are mandatory subjects of bargaining under 29 U.S.C. § 158(d). Each of them clearly is intimately related to "wages, hours, and other terms and conditions of employment." Indeed, it is precisely because of their direct relationship to wages and conditions of employment that such matters are so controversial and so much the focus of bargaining in professional sports. Wood's claim for damages, for example, is based on an allegation of lost wages....

It is true that the combination of the draft and salary cap places new players coming out of college ranks at a disadvantage. However, as noted earlier, that is hardly an unusual feature of collective agreements. In the industrial context salaries, promotions, and layoffs are routinely governed by seniority, with the benefits going to the older employees, the burdens to the newer. Wood has offered us no reason whatsoever to fashion a rule based on antitrust grounds prohibiting agreements between employers and players that use seniority as a criterion for certain employment decisions. Even if some such arrangements might be illegal because of discrimination against new employees (players), the proper action would be one for breach of the duty of fair representation.

Wood relies for legal support primarily upon the Supreme Court's decisions in *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975); Local Union 189, *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 14 L. Ed. 2d 640, 85 S. Ct. 1596 (1965); and *United Mine Workers v. Pennington*, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965). He reads those decisions as holding generally that a person outside the bargaining unit, in his case an unsigned first-round draft choice, who is injured in an anticompetitive fashion by a collective agreement may challenge that agreement on antitrust grounds. However, these cases are so clearly distinguishable that they need not detain us. Each of the decisions involved injuries to employers who asserted that they were being excluded from competition in the product market. Wood cites no case in which an employee or potential employee was able to invalidate a collective agreement on antitrust grounds because he or she might have been able to extract more favorable terms through individual bargaining. We need not determine the precise limits of the rules laid down by the cases cited or consider fine distinctions going to whether product- or labor-market activities are in issue. Wood's claim is beyond per-adventure one that implicates the labor market and subverts federal labor policy. It must, therefore, be rejected.

Affirmed.

Question

How would Judge Winter have decided *Mackey* and *McCourt*. What is his view of the scope of the exemption?

Section 3: The Duration of the Exemption

Having determined that the non-statutory labor exemption may serve to insulate collectively bargained player restraints, a question regarding how long that exemption lasted inevitably arose. In the following cases the courts sought standards for determining the duration of the immunity.

After the Eighth Circuit denied its motion in *Powell* for a rehearing by the Eighth Circuit and its petition for certiorari in the Supreme Court, the NFLPA terminated its status as the players' collective bargaining representative. The NFLPA took this unusual, even extreme, step for the avowed purpose of ending its collective bargaining relationship with the League and thereby extinguishing the labor exemption as a barrier to individual antitrust actions by players. The NFLPA and its members declared themselves no longer a labor union engaged in collective bargaining. NFLPA then brought another antitrust suit challenging the NFL's current player restraints, which in 1988 had been unilaterally adopted by the owners following an impasse. This was the Plan B system, under which each club could name 37 players on its roster who would be protected. If the players remained under contract, they were still bound to their team; if they were free agents, they could sign with another team, but were subject to a right of first refusal. The new suit, filed on behalf of the NFLPA president Freeman McNeil and five other players claim that the restraint system had been unilaterally implemented by the owners without any earlier agreement.

McNeil v. NFL went to trial and the jury found that plan B violated the Sherman Antitrust Act, awarding a judgment of $1.6 million in damages. Within two weeks, Reggie White and four other players lodged a similar suit against the NFL seeking free agency in damages. Before *McNeil* and *White* could be appealed, the NFL and the NFLPA settled the case. That settlement, which comprised nearly 200 pages, included the specific terms of what would later become the parties collective bargaining agreement after the NFL again recognized the NFLPA as the players' representative. At the time of the parties' settlement, the NFLPA was not the players' collective bargaining representative.

BRIDGEMAN v. NATIONAL BASKETBALL ASSOCIATION

675 F. Supp. 960 (N.J.D.C. 1987)

[Players in professional sports league brought action against league and its individual clubs alleging violation of antitrust laws.]

DEBEVOISE, District Judge

Plaintiffs, a group of current and former players and first round draft choices in the NBA ("the players"), brought this action pursuant to sections 4 and 16 of the Clayton Act, 15 U.S.C. sections 15 and 26, and the Sherman Antitrust Act, 15 U.S.C. section 1 *et seq*. Their complaint alleges that the enforcement by the National Basketball Association and its 23 member teams (collectively referred to as "the NBA") of the college player draft, the salary cap, and the right of first refusal constitutes an antitrust violation.

The practices at issue are the college player draft, the salary cap, and the right of first refusal. Under the college player draft, the NBA defendants allocate the exclusive rights to negotiate with and sign rookie players. The salary cap is a system whereby the NBA defendants agree to set maximum limits on the aggregate amount teams can spend to compensate their players. Under the right of first refusal, an NBA team has the right to retain a veteran free agent's services indefinitely by matching offers received by that player from other NBA teams. As described below, the players agreed to these practices for a limited period of time in a settlement agreement that arose out of an antitrust class action lawsuit.

In 1970, the NBA players commenced a class action suit against the NBA in the federal district court for the Southern District of New York, challenging on antitrust grounds certain player restrictions

imposed by the NBA team owners, including the NBA college player draft and the reserve system. The NBA defendants moved for summary judgment, arguing, among other things, that the practices were shielded from the anti-trust laws by a labor exemption. The district court denied the NBA's motion. *Robertson v. National Basketball Association*, 389 F. Supp. 867.

In 1976, the parties in the Robertson litigation entered and the district court approved a settlement agreement. When the Robertson settlement agreement was adopted in 1976, the Players' Association and the NBA also entered into a multi-year collective bargaining agreement that incorporated the substantive terms of the settlement agreement. The 1976 collective bargaining agreement expired on June 1, 1979, and on October 10, 1980, the parties again entered into a multi-year collective bargaining agreement that expressly incorporated the terms of the Robertson settlement agreement.

The 1980 agreement expired on June 1, 1982. In 1983, the NBA defendants sought for the first time to introduce the salary cap, contending that such a restriction was necessary because the majority of NBA teams were losing money, in part because of rising player salaries and benefits. The players responded by filing a lawsuit challenging the legality of the proposed practice. A Special Master appointed to hear disputes under the Robertson settlement agreement determined that the salary cap would violate the terms of the settlement agreement, and therefore could not be imposed absent a modification of that agreement.

The Players Association and the NBA entered into a Memorandum of Understanding that modified the expired 1980 collective bargaining agreement to include, among other things, a salary cap, and continued the agreement in force through the end of the 1986-87 season. On June 13, 1983, the district court approved a modification of the Robertson settlement agreement to incorporate the terms of the Memorandum of Understanding.

By letter dated October 14, 1987, the Players Association stated that it would not engage in any further collective bargaining negotiations until this lawsuit had been resolved. On November 3, 1987, the NBA filed an unfair labor practice charge with the National Labor Relations Board seeking a directive that the Players Association return to the bargaining table. The NBA has continued to operate under the terms of the most recent collective bargaining agreement, including the practices at issue in this case.

The concept of a labor exemption finds its source in sections 6 and 20 of the Clayton Act, and the Norris-La Guardia Act, 29 U.S.C. Those provisions declare that labor unions are not combinations or conspiracies in restraint of trade, and specifically exempt certain union activities such as secondary picketing and group boycotts from the coverage of the antitrust laws. This statutory exemption insulates inherently anticompetitive collective activities by employees because they are favored by federal labor policy.

The statutory exemption extends to legitimate labor activities unilaterally undertaken by a union in furtherance of its own interests. It does not extend to concerted action or agreements between unions and non-labor groups. The Supreme Court has held that in order to properly accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining under the National Labor Relations Act, ("NLRA"), certain union-employer agreements must be accorded a limited nonstatutory exemption from antitrust sanctions.

The practices challenged by plaintiffs — the player draft, the right of first refusal, and the salary cap — were included in the most recent collective bargaining agreement between the players and the NBA. The players do not dispute that the restrictions at issue were covered by the labor exemption when the collective bargaining agreement was still in effect. However, the players, noting that courts have generally refused to find antitrust immunity in the absence of a collective bargaining agreement, argue that the practices are not protected by the nonstatutory exemption because they are not the subject of any currently effective collective bargaining agreement, and because the players have not otherwise consented to them. The NBA vigorously disputes this reading of the exemption, proposing instead that antitrust immunity should continue after expiration of the agreement as long as the league continues to apply without modification the player restrictions that were included in the agreement.

As the players observe, courts have generally applied the nonstatutory exemption only where the challenged practices are authorized by a collective bargaining agreement, rejecting broad arguments that labor principles should automatically override antitrust principles as long as an exclusive bargaining representative is in place, or that the antitrust laws do not reach labor market restraints at all.

The nonstatutory exemption represents an effort to balance the concerns of the federal antitrust and labor laws. The availability of the exemption turns upon whether the federal labor interest in collective bargaining is deserving of pre-eminence over the federal antitrust interest in free competition under the circumstances of the particular case. By protecting only those practices that were included in a collective bargaining agreement after being subject to arm's-length bargaining, the exemption encourages substantive, good faith bargaining on important issues and guards against unilateral imposition of terms as to which there is no agreement.

Applying these considerations, I find no merit in the players' contention that restrictions included in a collective bargaining agreement should lose their antitrust immunity the moment the agreement expires. At the outset, such a rule is unrealistic in light of the requirement that employers must bargain fully and in good faith before altering a term or condition of employment subject to mandatory bargaining even after the collective bargaining agreement expires. If an employer unilaterally alters such a term or condition of employment before negotiations reach an "impasse," it may be guilty of committing an unfair labor practice under [Section 8(a)(5)]. This obligation to maintain the status quo until impasse means that, in a practical sense, terms and conditions of employment that are subjects of mandatory bargaining survive expiration of the collective bargaining agreement.

Stripping player restraints of their antitrust immunity the instant a collective bargaining agreement expires would also inhibit the collective bargaining process, a result that is contrary to the purpose of the nonstatutory exemption. Because agreements often expire without immediate replacement, employers operating under such a rule would in many cases be reluctant to agree to potentially anticompetitive restraints, even where desired by their employees, for fear that such practices would expose them to antitrust suits during any period between agreements.

The federal labor policy of encouraging collective bargaining also requires rejection of the NBA's position that the exemption should continue indefinitely after an agreement expires so long as the employer maintains the status quo by not imposing any new restraints. This facile manner of evading the antitrust laws would discourage unions from entering collective bargaining agreements, since doing so might forever bar them from challenging those restraints in court. Although, as noted above, the rules embodied in a collective bargaining agreement are not automatically disregarded the instant the clock runs out on the agreement, the game cannot last forever.

Thus, a time will come after expiration of the agreement when the practices that were included in the agreement can no longer be said to exist as an extension of the agreement. At such time, those practices are no longer protected by the labor exemption. The relevant question is when that moment occurs.

The players argue that the exemption cannot extend beyond an "impasse" in the negotiations because at that moment, there is no longer mutual consent to the restraints. Impasse is certainly a plausible point at which to end the labor exemption, for by its very definition it implies a deadlock in negotiations, which could in some cases imply that the employees' consent to the restraints of the prior agreement has ended. The moment of impasse in negotiations is significant, for an employer may, after bargaining with the union to an impasse, make "unilateral changes that are reasonably comprehended within his pre-impasse proposals."

However, an impasse is not equivalent to the end of negotiations, or the loss of hope that any of the practices subject to negotiation will be incorporated in a new agreement. "As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations `which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" An impasse may be brought about intentionally by one or both parties as a device to further, rather than halt,

the bargaining process. "Suspension of the process as a result of an impasse may provide time for reflection and a cooling of tempers; it may be used to demonstrate the depth of a party's commitment to a position taken in the bargaining; or it may increase economic pressure on one or both sides, and thus increase the desire for agreement."

Because an impasse occurs only when the entire negotiating process has come to a standstill, the prospects for incorporating a particular practice into a collective bargaining agreement may also disappear before a full impasse in the negotiations is actually reached. It is at least theoretically possible for the parties, without ever reaching impasse, to enter a collective bargaining agreement that omits one or more of the practices that were included in the previous agreement.

An extension of the *Mackey* formulation produces a rational criterion for declaring when the labor extension expires after termination of the collective bargaining agreement. I find that the exemption for a particular practice survives only as long as the employer continues to impose that restriction unchanged, and reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement. When the employer no longer has such a reasonable belief, it is then unilaterally imposing the restriction on its employees, and the restraint can no longer be deemed the product of arm's-length negotiation between the union and the employer.

This result is not hampered in this case by the provision in the Robertson settlement agreement reserving the players' "right to challenge in a court of competent jurisdiction any future unilateral imposition [of any practice] by the NBA...." This provision, which appears to be a mutual reservation of rights by the Players Association and the NBA, simply applies where the league unilaterally imposes restrictions. As long as the NBA has a reasonable belief that a practice may be included in the agreement being negotiated, it is not imposing the practice unilaterally; rather, the restriction is deemed a product of arm's-length negotiations.

Quite obviously, application of this rule in the present case involves issues of material fact that cannot be decided on a motion for summary judgment on the present state of the record. Indeed, resolution of this factual matter may not be possible until after the parties have resolved their differences and entered a new collective bargaining agreement.

The NBA's motion to require joinder of the Players Association is denied, and the players' and the NBA's motions for summary judgment are denied.

Question

According to the *Bridgeman* Court, how long does the exemption serve to insulate player restraints? What will be the probable effect upon collective bargaining?

POWELL v. NATIONAL FOOTBALL LEAGUE

888 F.2d 559 (8th Cir. 1989)

[Professional football players and players' association brought antitrust action against professional football league and its member clubs. The United States District Court denied league's motion for partial summary judgment. League appealed.]

John R. GIBSON, Circuit Judge

The National Football League appeals from a district court order which denied the League's motion for partial summary judgment, ruling that the nonstatutory labor exemption to the antitrust laws expires

when, as here, the parties have reached "impasse" in negotiations following the conclusion of a collective bargaining agreement. This antitrust action was brought by Marvin Powell, eight other professional football players, and the players' collective bargaining representative, the National Football League Players Association (hereinafter the "Players").

In 1977, the League and the Players entered into a collective bargaining agreement containing a new system governing veteran free agent players. The First Refusal/Compensation system provided that a team could retain a veteran free agent by exercising a right of first refusal and by matching a competing club's offer. If the old team decided not to match the offer, the old team would receive compensation from the new team in the form of additional draft choices. This system was substantially modified and incorporated into a successor agreement executed in 1982, which was reached at the end of a 57-day strike.

After the 1982 Agreement expired in August, 1987, the League maintained the status quo on all mandatory subjects of bargaining covered by the Agreement, including the First Refusal/Compensation system. In September, 1987, after intermittent negotiations on a successor collective bargaining agreement proved unsuccessful, the Players initiated a strike over veteran free agency and other issues. The strike ended in mid-October, 1987, without producing a new agreement. The Players commenced this antitrust action immediately thereafter, attacking the League's continued adherence to the expired 1982 Agreement.

In late November, 1987, the Players moved for a preliminary injunction to bar the League's twenty-eight constituent football clubs, as members of a multi-employer bargaining unit, from continuing to abide by the terms of the 1982 Agreement on veteran free agent salaries and movement among clubs. The Players also moved for partial summary judgment on the issue of whether the League's continued imposition of the First Refusal/Compensation system was protected by the labor exemption to the antitrust laws, or instead violated sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2.

On January 29, 1988, the district court held that, after expiration of a bargaining agreement, the labor exemption from the antitrust laws terminates with respect to a mandatory subject of bargaining when employers and a union reach a bargaining impasse as to the contested issue. On February 1, 1988, one day after the district court filed its opinion, the Players advised the League that, in their view, the parties had indeed reached impasse on the free agency issue.

The Players then renewed their motion for a preliminary injunction, contending that the district court should adopt the decision of the General Counsel of the National Labor Relations Board that impasse existed. The district court granted the Players' motion for summary judgment on June 17, 1988, holding that the parties had reached an impasse on the free agency issue as of that date. This ruling opened the doors for a trial on whether the League, in adhering to the First Refusal/Compensation system, had violated the Sherman Act's Rule of Reason. The court declined to issue a temporary injunction, however, reasoning that it lacked jurisdiction to grant injunctive relief in a labor dispute governed by the Norris-La Guardia Act.

The League argues that federal labor laws control exclusively where the challenged "restraint" relates to a mandatory subject of collective bargaining, the restraint has been developed and implemented through the lawful observance of the collective bargaining process, the employees are represented by a union vested with collective bargaining authority, and the restraint affects only a labor market involving the parties to the collective bargaining agreement. According to the League, such circumstances exist in this case and recourse to antitrust sanctions by a bargaining party such as the Players is incompatible with the purpose and operation of the federal labor laws.

I

This is not the first time that this court has considered whether a labor exemption shields the League from antitrust liability for the restraints it imposes on its players. In *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), the League appealed from a district court ruling that the "Rozelle Rule," a restraint on competition for player services, violated section 1 of the Sherman Act. We first analyzed the statutory labor exemption to the application of the antitrust laws, observing that while the

exemption applies to legitimate labor activities unilaterally undertaken by a union in furtherance of its own interest, it does not extend to concerted action or agreements between unions and nonlabor groups such as employers. We further held, however, that employer groups such as the League may invoke the nonstatutory labor exemption to their benefit where there has been an agreement between management and labor with regard to the challenged restraint.

We held that the Rozelle Rule affected only the parties to the labor agreements sought to be exempted from the antitrust laws, and that it constituted a subject of mandatory bargaining within the meaning of the National Labor Relations Act. *Id.* at 615-16.

We rejected the League's argument in *Mackey* that the Rozelle Rule was exempt from Sherman Act scrutiny as a restraint which affected only player services and not a traditional product market.

Turning to the issue of whether the Rozelle Rule violated the Sherman Act, we rejected the district court's conclusion that the Rule was *per se* illegal, reasoning that the challenged restraints were not between business competitors in the traditional sense. We therefore proceeded under a Rule of Reason analysis to hold that the Rozelle Rule was, for many reasons, far more restrictive than necessary to fulfill the legitimate needs of the League, and that it unreasonably restrained trade in violation of section 1 of the Sherman Act. Finally, after carefully noting the limitation of our holding, we urged the League and Players to resolve problems of interteam player transfers through collective bargaining. The result was the 1977 Agreement.

The Players contend that the League in essence asks this court to overrule *Mackey*. The Players argue that although in the case before us the Players' collective bargaining agreement has expired, the *Mackey* court conditioned its application of the labor exemption upon the existence of an agreement between the union and management and specifically referred to the existence of an agreement in two of its three requirements for invoking the labor exemption. We cannot accept this interpretation. Our discussion in *Mackey* was couched in terms of "agreements" because in that case we were presented with unlawful restraints which, although initiated years before football players had been represented by a union, had been incorporated by two bargaining agreements. Against those facts, we held that the mere incorporation of unlawful restraints into a collective bargaining agreement without *bona fide* bargaining was not sufficient to place them beyond the reach of the Sherman Act.

The district court found that the present case was distinguishable from *Mackey* because the player restraints challenged here were the result of collective bargaining. While we agree with the district court that *Mackey* is not controlling, we feel that the analytic framework which it adopts with respect to the nonstatutory labor exemption must be employed in this case.

Now that the 1982 Agreement is terminated, however, we must decide whether the nonstatutory labor exemption has also expired or, alternatively, whether under the circumstances of this case the exemption continues to protect the League from potential antitrust liability.

The district court adopted "impasse" as the point at which the nonstatutory labor exemption expires, holding that "once the parties reach impasse concerning player restraint provisions, those provisions will lose their immunity and further imposition of those conditions may result in antitrust liability."

In *Charles D. Bonanno Linen Service, Inc. v. N.L.R.B.*, 454 U.S. 404 (1982), the Supreme Court defined "impasse" as:

> a temporary deadlock or hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force."
>
> * * *
>
> Furthermore, an impasse may be "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process."

The Supreme Court characterized impasse as a recurring feature in the bargaining process and one which is not sufficiently destructive of group bargaining to justify unilateral withdrawal. The Court agreed with the National Labor Relations Board that "permitting withdrawal at impasse would as a practical matter

undermine the utility of multi-employer bargaining."

Our evaluation of the district court's impasse standard cannot proceed without a firm appreciation of the remedies available under the federal labor laws to the parties involved in labor negotiations or disputes. After the expiration of a collective bargaining agreement, a comprehensive array of labor law principles govern union and employer conduct. For both sides, there is a continuing obligation to bargain. Before the parties reach impasse in negotiations, employers are obligated to "maintain the status quo as to wages and working conditions." *Producers Dairy Delivery Co. v. Western Conference of Teamsters Trust Fund*, 654 F.2d 625, 627 (9th Cir. 1981).

The Supreme Court has recognized that disputes over employment terms and conditions are not the central focus of the Sherman Act. For example, in holding that a union did not have standing to assert antitrust claims against a multi-employer bargaining association with which it had a collective bargaining relationship, the Court stated that Congress has developed "a separate body of labor law specifically designed to protect and encourage the organizational and representational activities of labor unions." *Associated Gen. Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519. We must decide the extent to which a labor union may employ the antitrust laws to attack restraints imposed by management which are derived from an expired collective bargaining agreement.

A collective bargaining agreement is not always essential to a finding that challenged employment terms fall within the labor exemption. In *Amalgamated Meat Cutters v. Wetterau Foods*, 597 F.2d 133 (8th Cir. 1979), employer agreements adopted in response to a strike caused plaintiffs to be denied employment. After first determining that the challenged employer conduct was lawful under the labor laws, this court affirmed the dismissal of plaintiffs' treble damage claims:

> Since any injury to [plaintiffs] would flow naturally from the replacement of striking workers, which conduct federal labor policy sanctions, the agreement ... cannot constitute a violation of the antitrust law. Federal labor policy sanctions both the goal of resisting union demands and the method of replacing striking workers and the magnitude and nature of any restraint of trade or commerce in this case directly follows from the sanctioned conduct. The agreement had no anticompetitive effect unrelated to the collective bargaining negotiations.

Our reading of the authorities leads us to conclude that the League and the Players have not yet reached the point in negotiations where it would be appropriate to permit an action under the Sherman Act. The district court's impasse standard treats a lawful stage of the collective bargaining process as misconduct by defendants, and in this way conflicts with federal labor laws that establish the collective bargaining process, under the supervision of the National Labor Relations Board, as the method for resolution of labor disputes.

To now allow the Players to pursue an action for treble damages under the Sherman Act would, we conclude, improperly upset the careful balance established by Congress through the labor law.

Both relevant case law and the more persuasive commentators establish that labor law provides a comprehensive array of remedies to management and union, even after impasse. After a collective bargaining agreement has expired, an employer is under an obligation to bargain with the union before it may permissibly make any unilateral change in terms and conditions of employment which constitute mandatory subjects of collective bargaining. *Hinson*, 428 F.2d at 137. After impasse, an employer may make unilateral changes that are reasonably comprehended within its pre-impasse proposals. We are influenced by those commentators who suggest that, given the array of remedies available to management and unions after impasse, a dispute such as the one before us "ought to be resolved free of intervention by the courts" where "the union has had a sufficient impact in shaping the content of the employer's offers'

and where the challenged restraint is "clothed with union approval."[2]

To allow the claim here asserted by the Players would, we conclude, be inconsistent with federal labor policy. The labor arena is one with well established rules which are intended to foster negotiated settlements rather than intervention by the courts. The League and the Players have accepted this "level playing field" as the basis for their often tempestuous relationship, and we believe that there is substantial justification for requiring the parties to continue to fight on it, so that bargaining and the exertion of economic force may be used to bring about legitimate compromise.

The First Refusal/Compensation system, a mandatory subject of collective bargaining, was twice set forth in collective bargaining agreements negotiated in good faith and at arm's-length. Following the expiration of the 1982 Agreement, the challenged restraints were imposed by the League only after they had been forwarded in negotiations and subsequently rejected by the Players. The Players do not contend that these proposals were put forward by the League in bad faith. We therefore hold that the present lawsuit cannot be maintained under the Sherman Act. Importantly, this does not entail that once a union and management enter into collective bargaining, management is forever exempt from the antitrust laws, and we do not hold that restraints on player services can never offend the Sherman Act. We believe, however, that the nonstatutory labor exemption protects agreements conceived in an ongoing collective bargaining relationship from challenges under the antitrust laws. "[N]ational labor policy should sometimes override antitrust policy," *Continental Maritime of San Francisco v. Pacific Coast Metal Trades Dist. Council*, 817 F.2d 1391, 1393 (9th Cir. 1987).

Upon the facts currently presented by this case, we are not compelled to look into the future and pick a termination point for the labor exemption. The parties are now faced with several choices. They may bargain further, which we would strongly urge that they do. They may resort to economic force. And finally, if appropriate issues arise, they may present claims to the National Labor Relations Board. We are satisfied that as long as there is a possibility that proceedings may be commenced before the Board, or until final resolution of Board proceedings and appeals therefrom, the labor relationship continues and the labor exemption applies.

In sum, we hold that the antitrust laws are inapplicable under the circumstances of this case as the nonstatutory labor exemption extends beyond impasse.

HEANEY, Senior Circuit Judge, dissenting

Today, the majority permits the owners to violate the antitrust laws indefinitely. Because such a result is not justified by the labor laws, I dissent.

After carefully reviewing the record and the briefs, it seems clear to me that we improvidently granted the owners permission to file an interlocutory appeal. The owners conceded at oral argument that the district court has yet to determine whether the parties have reached an impasse on the college draft issue. Because the college draft is an essential element of the package of player restraints, it is difficult to understand how either the district court or this Court can determine whether an impasse has, in fact, been reached on the important question of player restraints.

Because, and only because, the majority reverses the district court and holds that the nonstatutory labor exemption to the antitrust laws does not expire at impasse, do I state my agreement with the district court that the exemption ends when the parties have reached an impasse in negotiations.

The district court's opinion is well reasoned and fully consistent with this Court's holding in *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976). In *Mackey*, we held that only those collective bargaining agreements which are the products of *bona fide* arm's length bargaining are immune from the application of the antitrust laws. While *Mackey* left open the question of when the labor exemption

---

[2] J. WEISTART & C. LOWELL, THE LAW OF SPORTS § 5.06.

expires, the clear implication of that case is that the exemption should protect illegal restraints only as long as such restraints are part of *bona fide* collective bargaining. The logic of *Mackey* as applied to this case is clear. The labor exemption will not immunize restraints which are unilaterally continued after impasse because such restraints are not agreed to during good faith bargaining. Similarly, new restraints, unilaterally implemented, are not protected by the labor exemption. Union approval is a prerequisite to the application or continuation of the exemption.

The majority purports to reject the owners' argument that the labor exemption in this case continues indefinitely. The practical effect of the majority's opinion, however, is just that — because the labor exemption will continue until the bargaining relationship is terminated either by a NLRB decertification proceeding or by abandonment of bargaining rights by the union.

The majority asserts that the players can seek a cease and desist order from the NLRB to prohibit conduct constituting an unfair labor practice. Implicit in this assertion is the idea that it may be an unfair labor practice for employers to insist on a package of player restraints which violate the antitrust laws. The problem is that the NLRB will not decide that question. The NLRB will say that it is for the courts to decide whether the antitrust laws are being violated. We should accept our responsibility and direct the district court to make that determination. The majority also suggests that the union can strike to eliminate or modify the player restraints. This is, of course, an alternative, but should players be forced to strike to alter owner conduct which violates the antitrust laws? I think not.

Neither scenario, decertification nor economic strife, harmonizes the antitrust laws with the labor laws. The majority opinion will, moreover, discourage collective bargaining. Players will be considerably less likely to enter into any agreement with respect to player restraints because of the certainty that the terms of the agreement will become the terms of employment ad infinitum, unless they strike and win. In practical terms the majority has eliminated the owners' fear of the antitrust lever; therefore, little incentive exists for the owners to ameliorate anticompetitive behavior damaging to the players.

To argue that continuing the exemption beyond impasse is conducive to a stable bargaining environment and judicial nonintervention, as the majority has done, is untenable. Rather, the majority's view undercuts the labor law principles of freedom to contract and the promotion of *bona fide*, arm's length negotiations. Under the majority's rule, an agreement to a particular restraint for a finite period of time operates to waive, indefinitely or permanently, a union's right to challenge that restraint after the expiration of the agreement under the antitrust laws. The ultimate result is that the majority has intervened to remove the players' rights under the antitrust laws from the bargaining table and has unjustifiably given the owners a continuing right to circumvent the antitrust laws.

It may be argued that both successful and unsuccessful strikes and lockouts are normal parts of the collective bargaining process and that this Court should not give the players through court action what they are unable to win at the bargaining table or through economic action. I subscribe to that view, but this view cannot be controlling where the employers are engaging in practices which may well be illegal. There must be a point at which the validity of the package of player restraints can be tested without the union resorting to a strike or terminating its collective bargaining rights. In my view, impasse is the appropriate point at which to do this.

LAY, Chief Judge, with whom McMILLIAN, Circuit Judge, joins, dissenting

I dissent from this court's denial of rehearing *en banc*. This case is undoubtedly one of the more significant cases this court has confronted in several years. A 2-1 panel opinion now serves as an important precedent of newly-declared law in the accommodation of congressional policies favoring both free competition and collective bargaining. In all due respect, two judges of this court have impliedly overruled this court's long-standing, well-recognized precedent in *Mackey*. In doing so, the panel majority concedes its own uncertainty as to when the antitrust exemption ends, and, in addition, needlessly treats the issues as ripe for resolution.

This court's *Mackey* decision, which I authored in 1976 and which then Chief Judge Floyd GIBSON and Judge William WEBSTER joined, declared "the policy favoring collective bargaining is further to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of *Mackey* is founded on the principles that an employer's exemption owes its existence to union consent, and is aimed at preserving the integrity of the negotiating process."

The panel majority notes that *Mackey* left open the question whether the exemption continues after a *bona fide* agreement formally terminates. However, the panel then proceeds to extend the law based on a premise which completely ignores the rationale of *Mackey*. In the present case the collective bargaining agreement containing the exempted restraint has not only come to an end, but, under the panel majority's erroneous assumption, the parties have unsuccessfully bargained over its continuance to the point of impasse. Clearly, at this point the restraint can no longer be considered "the product of *bona fide* arm's-length negotiation." Once impasse has been reached, after termination of an agreement, it is a complete nonsequitur to hold that continued restraints are protected as an accommodation of the good faith bargaining of the parties.

The panel decision destroys the very foundation of the limits we carefully constructed in *Mackey*. The panel majority reasons that, notwithstanding impasse, as long as the restraint was at onetime contained within a terminated agreement it retains immunity as the "product" of collective bargaining. Surely this cannot be the law. If the exemption does not end at impasse, when does it end? The majority's view does not accommodate labor policy, it instead offers an employer's Shangri-la of everlasting immunity from the antitrust laws.

In *Mackey* we based our analysis on the Supreme Court's requirement that "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Mackey* did not rely solely on the existence of an agreement. Rather it turned on whether the restraints were obtained through the *bona fide* collective bargaining process. We held that the exemption was not available, notwithstanding the Rozelle Rule's incorporation into earlier agreements, because the club owners had refused to bargain in good faith over the Rozelle Rule. Here there can be no question but that once the contract ended and an impasse in attempting to negotiate further restraints on player's services was reached, the exemption no longer was effective because the *bona fide* bargaining process has ceased. Assuming impasse, both sides are free to act unilaterally. At this point, the restraint is no longer a product of collective bargaining; it is simply a unilateral rule imposed by management. To hold otherwise undermines basic, rudimentary labor policy and law.

Discussion

As regards *Bridgeman* and *Powell*, it has been observed that:

> In each case, the issue was whether, upon the expiration of the collective bargaining agreement, the continued maintenance of the player restraint system took the matter outside the labor exemption and back within the ambit of the antitrust laws. And, in each of these recent cases, the courts left open the possibility that they will inappropriately involve themselves in the collective bargaining process.
>
> In *Powell*, the court determined that the labor exemption would continue to shield the player restraint system at least until impasse in bargaining was reached, after which, the court indicated, it would entertain the issue of whether the player restraint system violated the antitrust laws. In *Bridgeman*, the court held that the player restraint system would be exempt from antitrust scrutiny so long as the owners left the system unchanged

and so long as the owners "reasonably believe[d] that the practice of a close variant of it would be incorporated in the next collective bargaining agreement."

These two rulings vividly highlight the problems inherent in any court review of collective bargaining. In *Powell*, of course, the court's willingness to intercede should bargaining fail removes any incentive on the part of the union to reach an agreement with the owners, knowing, should bargaining reach impasse, that it can return to court. In *Bridgeman*, the court indicated that it was prepared, somehow, to determine whether one of the parties reasonably believed that the player restraint would be incorporated in the next collective bargaining agreement. This standard not only appears plainly unworkable, it again encourages the union to take an intransigent stand in opposition to the player restraint system, thereby making any claim by the owners that it will be incorporated in the next agreement appear unreasonable.[3]

Do you agree with this assessment? What alternative would you suggest?

BROWN v. PRO FOOTBALL, INC.

518 U.S. 231; 116 S. Ct. 2116; 135 L. Ed. 2d 521 (1996)

JUSTICE BREYER delivered the opinion of the Court.

The question in this case arises at the intersection of the Nation's labor and antitrust laws. A group of professional football players brought this antitrust suit against football club owners. The club owners had bargained with the players' union over a wage issue until they reached impasse. The owners then had agreed among themselves (but not with the union) to implement the terms of their own last best bargaining offer. The question before us is whether federal labor laws shield such an agreement from antitrust attack. We believe that they do. This Court has previously found in the labor laws an implicit antitrust exemption that applies where needed to make the collective bargaining process work. Like the Court of Appeals, we conclude that this need makes the exemption applicable in this case.

I

We can state the relevant facts briefly. In 1987, a collective-bargaining agreement between the National Football League (NFL), a group of football clubs, and the NFL Players Association, a labor union, expired. The NFL and the Players Association began to negotiate a new contract. In March 1989, during the negotiations, the NFL adopted Resolution G-2, a plan that would permit each club to establish a "developmental squad" of up to six rookie or "first-year" players who, as free agents, had failed to secure a position on a regular player roster. Squad members would play in practice games and sometimes in regular games as substitutes for injured players. Resolution G-2 provided that the club owners would pay all squad members the same weekly salary.

The next month, April, the NFL presented the developmental squad plan to the Players Association. The NFL proposed a squad player salary of $ 1,000 per week. The Players Association disagreed. It insisted that the club owners give developmental squad players benefits and protections similar to those provided regular players, and that they leave individual squad members free to negotiate their own salaries.

Two months later, in June, negotiations on the issue of developmental squad salaries reached an impasse. The NFL then unilaterally implemented the developmental squad program by distributing to the

---

[3] Robert McCormick, *Labor Relations in Professional Sports - Lessons in Collective Bargaining*, 14 EMP. REL. L. J. 501 (1989).

clubs a uniform contract that embodied the terms of Resolution G-2 and the $ 1,000 proposed weekly salary. The League advised club owners that paying developmental squad players more or less than $ 1,000 per week would result in disciplinary action, including the loss of draft choices.

In May 1990, 235 developmental squad players brought this antitrust suit against the League and its member clubs. The players claimed that their employers' agreement to pay them a $ 1,000 weekly salary violated the Sherman Act. *See* 15 U.S.C. sec. 1 (forbidding agreements in restraint of trade). The Federal District Court denied the employers' claim of exemption from the antitrust laws; it permitted the case to reach the jury; and it subsequently entered judgment on a jury treble-damage award that exceeded $ 30 million. The NFL and its member clubs appealed.

The Court of Appeals (by a split 2-to-1 vote) reversed. The majority interpreted the labor laws as "waiving antitrust liability for restraints on competition imposed through the collective-bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining." The Court held, consequently, that the club owners were immune from antitrust liability. We granted certiorari to review that determination. Although we do not interpret the exemption as broadly as did the Appeals Court, we nonetheless find the exemption applicable, and we affirm that Court's immunity conclusion.

II

The immunity before us rests upon what this Court has called the "nonstatutory" labor exemption from the antitrust laws. *Connell Constr. Co. v. Plumbers*, 421 U.S. 616, 622, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975); *see also Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 14 L. Ed. 2d 640, 85 S. Ct. 1596 (1965); *Mine Workers v. Pennington*, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965). The Court has implied this exemption from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining, *see* 29 U.S.C. sec. 151; *Teamsters v. Oliver*, 358 U.S. 283, 295, 3 L. Ed. 2d 312, 79 S. Ct. 297 (1959); which require good-faith bargaining over wages, hours and working conditions, see 29 U.S.C. sec. 158(a)(5), 158(d); *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348-349, 2 L. Ed. 2d 823, 78 S. Ct. 718 (1958); and which delegate related rulemaking and interpretive authority to the National Labor Relations Board, *see* 29 U.S.C. sec. 153; *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242-245, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959).

This implicit exemption reflects both history and logic. As a matter of history, Congress intended the labor statutes (from which the Court has implied the exemption) in part to adopt the views of dissenting justices in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 65 L. Ed. 349, 41 S. Ct. 172 (1921), which justices had urged the Court to interpret broadly a different explicit "statutory" labor exemption that Congress earlier (in 1914) had written directly into the antitrust laws. *Id.*, at 483-488 (Brandeis, J., joined by Holmes and Clarke, JJ., dissenting) (interpreting sec. 20 of the Clayton Act, 38 Stat. 738, 29 U.S.C. 52); *see also United States v. Hutcheson*, 312 U.S. 219, 230-236, 85 L. Ed. 788, 61 S. Ct. 463 (1941) (discussing congressional reaction to Duplex). In the 1930's, when it subsequently enacted the labor statutes, Congress, as in 1914, hoped to prevent judicial use of antitrust law to resolve labor disputes--a kind of dispute normally inappropriate for antitrust law resolution. *See Jewel Tea, supra,* at 700-709 (opinion of Goldberg, J.); *Marine Cooks v. Panama S. S. Co.*, 362 U.S. 365, 370, n. 7, 4 L. Ed. 2d 797, 80 S. Ct. 779 (1960); A. Cox, LAW AND THE NATIONAL LABOR POLICY 3-8 (1960); cf. *Duplex, supra*, at 485 (Brandeis, J., dissenting) (explicit "statutory" labor exemption reflected view that "Congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands"). The implicit ("nonstatutory") exemption interprets the labor statutes in accordance with this intent, namely, as limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a "reasonable" practice. It thereby substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict. *See Jewel Tea, supra*, at 709-710.

As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each

other any of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable. Thus, the implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions. *See Connell, supra*, at 622 (federal labor law's "goals" could "never" be achieved if ordinary anticompetitive effects of collective bargaining were held to violate the antitrust laws); *Jewel Tea, supra*, at 711 (national labor law scheme would be "virtually destroyed" by the routine imposition of antitrust penalties upon parties engaged in collective bargaining); *Pennington, supra*, at 665 (implicit exemption necessary to harmonize Sherman Act with "national policy . . . of promoting 'the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation'") (quoting *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211, 13 L. Ed. 2d 233, 85 S. Ct. 398 (1964)).

The petitioners and their supporters concede, as they must, the legal existence of the exemption we have described. They also concede that, where its application is necessary to make the statutorily authorized collective-bargaining process work as Congress intended, the exemption must apply both to employers and to employees. Accord *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261, 287, n. 5, 19 L. Ed. 2d 1090, 88 S. Ct. 929 (1968) (Harlan, J., concurring); *Jewel Tea, supra*, at 729-732, 735 (opinion of Goldberg, J.); ... Consequently, the question before us is one of determining the exemption's scope: Does it apply to an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer? We assume that such conduct, as practiced in this case, is unobjectionable as a matter of labor law and policy. On that assumption, we conclude that the exemption applies.

Labor law itself regulates directly, and considerably, the kind of behavior here at issue--the postimpasse imposition of a proposed employment term concerning a mandatory subject of bargaining. Both the Board and the courts have held that, after impasse, labor law permits employers unilaterally to implement changes in preexisting conditions, but only insofar as the new terms meet carefully circumscribed conditions. For example, the new terms must be "reasonably comprehended" within the employer's preimpasse proposals (typically the last rejected proposals), lest by imposing more or less favorable terms, the employer unfairly undermined the union's status. *Storer Communications, Inc.*, 294 N.L.R.B. 1056, 1090 (1989); *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), enf'd, 395 F.2d 622 (CADC 1968); *see also NLRB v. Katz*, 369 U.S. 736, 745, 8 L. Ed. 2d 230, 82 S. Ct. 1107, and n. 12 (1962). The collective-bargaining proceeding itself must be free of any unfair labor practice, such as an employer's failure to have bargained in good faith. *See Akron Novelty Mfg. Co.*, 224 N.L.R.B. 998, 1002 (1976) (where employer has not bargained in good faith, it may not implement a term of employment); 1 P. Hardin, THE DEVELOPING LABOR LAW 697 (3d ed. 1992) (same). These regulations reflect the fact that impasse and an accompanying implementation of proposals constitute an integral part of the bargaining process.

Although the caselaw we have cited focuses upon bargaining by a single employer, no one here has argued that labor law does, or should, treat multiemployer bargaining differently in this respect. Indeed, Board and court decisions suggest that the joint implementation of proposed terms after impasse is a familiar practice in the context of multiemployer bargaining. (Citations omitted) We proceed on that assumption.

Multiemployer bargaining itself is a well-established, important, pervasive method of collective bargaining, offering advantages to both management and labor.... The upshot is that the practice at issue here plays a significant role in a collective-bargaining process that itself comprises an important part of the Nation's industrial relations system.

In these circumstances, to subject the practice to antitrust law is to require antitrust courts to answer a host of important practical questions about how collective bargaining over wages, hours and working conditions is to proceed--the very result that the implicit labor exemption seeks to avoid. And it is to place

in jeopardy some of the potentially beneficial labor-related effects that multiemployer bargaining can achieve. That is because unlike labor law, which sometimes welcomes anticompetitive agreements conducive to industrial harmony, antitrust law forbids all agreements among competitors (Citations omitted)

If the antitrust laws apply, what are employers to do once impasse is reached? If all impose terms similar to their last joint offer, they invite an antitrust action premised upon identical behavior (along with prior or accompanying conversations) as tending to show a common understanding or agreement. If any, or all, of them individually impose terms that differ significantly from that offer, they invite an unfair labor practice charge. Indeed, how can employers safely discuss their offers together even before a bargaining impasse occurs? A preimpasse discussion about, say, the practical advantages or disadvantages of a particular proposal, invites a later antitrust claim that they agreed to limit the kinds of action each would later take should an impasse occur. The same is true of postimpasse discussions aimed at renewed negotiations with the union. Nor would adherence to the terms of an expired collective-bargaining agreement eliminate a potentially plausible antitrust claim charging that they had "conspired" or tacitly "agreed" to do so, particularly if maintaining the status quo were not in the immediate economic self-interest of some. (Citations omitted) All this is to say that to permit antitrust liability here threatens to introduce instability and uncertainty into the collective-bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires.

We do not see any obvious answer to this problem. We recognize, as the Government suggests, that, in principle, antitrust courts might themselves try to evaluate particular kinds of employer understandings, finding them "reasonable" (hence lawful) where justified by collective-bargaining necessity. But any such evaluation means a web of detailed rules spun by many different nonexpert antitrust judges and juries, not a set of labor rules enforced by a single expert administrative body, namely the Labor Board. The labor laws give the Board, not antitrust courts, primary responsibility for policing the collective-bargaining process. And one of their objectives was to take from antitrust courts the authority to determine, through application of the antitrust laws, what is socially or economically desirable collective-bargaining policy. *See supra*, at 3-4; *see also Jewel Tea*, 381 U.S. at 716-719 (opinion of Goldberg, J.).

III

Both petitioners and their supporters advance several suggestions for drawing the exemption boundary line short of this case. We shall explain why we find them unsatisfactory.

A

Petitioners claim that the implicit exemption applies only to labor-management agreements--a limitation that they deduce from caselaw language, *see, e.g., Connell*, 421 U.S. at 622 (exemption for "some union-employer agreements") (emphasis added), and from a proposed principle--that the exemption must rest upon labor-management consent. The language, however, reflects only the fact that the cases previously before the Court involved collective-bargaining agreements, *see Connell, supra*, at 619-620; *Pennington*, 381 U.S. at 660; *Jewel Tea, supra*, at 679-680; the language does not reflect the exemption's rationale. See 50 F.3d at 1050.

Nor do we see how an exemption limited by petitioners' principle of labor-management consent could work. One cannot mean the principle literally--that the exemption applies only to understandings embodied in a collective-bargaining agreement--for the collective-bargaining process may take place before the making of any agreement or after an agreement has expired. Yet a multiemployer bargaining process itself necessarily involves many procedural and substantive understandings among participating employers as well as with the union. Petitioners cannot rescue their principle by claiming that the exemption applies only insofar as both labor and management consent to those understandings. Often labor will not (and should not) consent to certain common bargaining positions that employers intend to maintain. *Cf.* AREEDA

& HOVENKAMP, ANTITRUST LAW, at P229'd, p. 277 (Supp. 1995) ("Joint employer preparation and bargaining in the context of a formal multi-employer bargaining unit is clearly exempt"). Similarly, labor need not consent to certain tactics that this Court has approved as part of the multiemployer bargaining process, such as unit-wide lockouts and the use of temporary replacements. *See NLRB v. Brown*, 380 U.S. 278, 284, 13 L. Ed. 2d 839, 85 S. Ct. 980 (1965); *Buffalo Linen,* 353 U.S. at 97.

Petitioners cannot save their consent principle by weakening it, as by requiring union consent only to the multiemployer bargaining process itself. This general consent is automatically present whenever multiemployer bargaining takes place. (Citations omitted) As so weakened, the principle cannot help decide which related practices are, or are not, subject to antitrust immunity.

B

The Solicitor General argues that the exemption should terminate at the point of impasse. After impasse, he says, "employers no longer have a duty under the labor laws to maintain the status quo," and "are free as a matter of labor law to negotiate individual arrangements on an interim basis with the union."

Employers, however, are not completely free at impasse to act independently. The multiemployer bargaining unit ordinarily remains intact; individual employers cannot withdraw. . The duty to bargain survives; employers must stand ready to resume collective bargaining.. And individual employers can negotiate individual interim agreements with the union only insofar as those agreements are consistent with "the duty to abide by the results of group bargaining." Regardless, the absence of a legal "duty" to act jointly is not determinative. This Court has implied antitrust immunities that extend beyond statutorily required joint action to joint action that a statute "expressly or impliedly allows or assumes must also be immune." (Citations omitted)

More importantly, the simple "impasse" line would not solve the basic problem we have described above. Labor law permits employers, after impasse, to engage in considerable joint behavior, including joint lockouts and replacement hiring. Indeed, as a general matter, labor law often limits employers to four options at impasse: (1) maintain the status quo, (2) implement their last offer, (3) lock out their workers (and either shut down or hire temporary replacements), or (4) negotiate separate interim agreements with the union. What is to happen if the parties cannot reach an interim agreement? The other alternatives are limited. Uniform employer conduct is likely. Uniformity--at least when accompanied by discussion of the matter--invites antitrust attack. And such attack would ask antitrust courts to decide the lawfulness of activities intimately related to the bargaining process.

The problem is aggravated by the fact that "impasse" is often temporary, (Citations omitted) and it may occur several times during the course of a single labor dispute, since the bargaining process is not over when the first impasse is reached. How are employers to discuss future bargaining positions during a temporary impasse? Consider, too, the adverse consequences that flow from failing to guess how an antitrust court would later draw the impasse line. Employers who erroneously concluded that impasse had not been reached would risk antitrust liability were they collectively to maintain the status quo, while employers who erroneously concluded that impasse had occurred would risk unfair labor practice charges for prematurely suspending multiemployer negotiations.

The Solicitor General responds with suggestions for softening an "impasse" rule by extending the exemption after impasse "for such time as would be reasonable in the circumstances" for employers to consult with counsel, confirm that impasse has occurred, and adjust their business operations, by reestablishing the exemption once there is a "resumption of good-faith bargaining," and by looking to antitrust law's "rule of reason" to shield--"in some circumstances"--such joint actions as the unit-wide lockout or the concerted maintenance of previously-established joint benefit or retirement plans, ibid. But even as so modified, the impasse-related rule creates an exemption that can evaporate in the middle of the bargaining process, leaving later antitrust courts free to second-guess the parties' bargaining decisions and consequently forcing them to choose their collective-bargaining responses in light of what they predict or fear that antitrust courts, not labor law administrators, will eventually decide. (Citations omitted)

C

Petitioners and their supporters argue in the alternative for a rule that would exempt postimpasse agreement about bargaining "tactics," but not postimpasse agreement about substantive "terms," from the reach of antitrust. *See* 50 F.3d at 1066-1069 (Wald, J., dissenting). They recognize, however, that both the Board and the courts have said that employers can, and often do, employ the imposition of "terms" as a bargaining "tactic." (Citations omitted) This concession as to joint "tactical" implementation would turn the presence of an antitrust exemption upon a determination of the employers' primary purpose or motive. See, e.g., 50 F.3d at 1069 (Wald, J., dissenting). But to ask antitrust courts, insulated from the bargaining process, to investigate an employer group's subjective motive is to ask them to conduct an inquiry often more amorphous than those we have previously discussed. And, in our view, a labor/antitrust line drawn on such a basis would too often raise the same related (previously discussed) problems. *See supra*, at 4-5, 9-10; *Jewel Tea*, 381 U.S. at 716 (opinion of Goldberg, J.) (expressing concern about antitrust judges "roaming at large" through the bargaining process).

D

The petitioners make several other arguments. They point, for example, to cases holding applicable, in collective-bargaining contexts, general "backdrop" statutes, such as a state statute requiring a plant-closing employer to make employee severance payments, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 96 L. Ed. 2d 1, 107 S. Ct. 2211 (1987), and a state statute mandating certain minimum health benefits, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985). Those statutes, however, "'neither encouraged nor discouraged the collective-bargaining processes that are the subject of the [federal labor laws].'" *Fort Halifax, supra*, at 21 (*quoting Metropolitan Life, supra*, at 755). Neither did those statutes come accompanied with antitrust's labor-related history. *Cf. Oliver*, 358 U.S. at 295-297 (state antitrust law interferes with collective bargaining and is not applicable to labor-management agreement).

Petitioners also say that irrespective of how the labor exemption applies elsewhere to multiemployer collective bargaining, professional sports is "special." We can understand how professional sports may be special in terms of, say, interest, excitement, or concern. But we do not understand how they are special in respect to labor law's antitrust exemption. We concede that the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101-102, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984). In the present context, however, that circumstance makes the league more like a single bargaining employer, which analogy seems irrelevant to the legal issue before us.

We also concede that football players often have special individual talents, and, unlike many unionized workers, they often negotiate their pay individually with their employers. *See Post*, at 5 (STEVENS, J., dissenting). But this characteristic seems simply a feature, like so many others, that might give employees (or employers) more (or less) bargaining power, that might lead some (or all) of them to favor a particular kind of bargaining, or that might lead to certain demands at the bargaining table. We do not see how it could make a critical legal difference in determining the underlying framework in which bargaining is to take place. *See* generally Jacobs & Winter, *ANTITRUST PRINCIPLES AND COLLECTIVE BARGAINING BY ATHLETES: OF SUPERSTARS IN PEONAGE*, 81 YALE L. J. 1 (1971). Indeed, it would be odd to fashion an antitrust exemption that gave additional advantages to professional football players (by virtue of their superior bargaining power) that transport workers, coal miners, or meat packers would not enjoy.

The dissent points to other "unique features" of the parties' collective bargaining relationship, which, in the dissent's view, make the case "atypical." *Post*, at 5. It says, for example, that the employers imposed the restraint simply to enforce compliance with league-wide rules, and that the bargaining consisted of nothing more than the sending of a "notice," and therefore amounted only to "so-called" bargaining.

Post, at 6-7. Insofar as these features underlie an argument for looking to the employers' true purpose, we have already discussed them. *See supra*, at 15-16. Insofar as they suggest that there was not a genuine impasse, they fight the basic assumption upon which the District Court, the Court of Appeals, the petitioners, and this Court, rest the case. *See* 782 F. Supp. 125, 134 (DC 1991); 50 F.3d at 1056-1057. Ultimately, we cannot find a satisfactory basis for distinguishing football players from other organized workers. We therefore conclude that all must abide by the same legal rules.

* * *

For these reasons, we hold that the implicit ("nonstatutory") antitrust exemption applies to the employer conduct at issue here. That conduct took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship.

Our holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process. (Citations omitted). We need not decide in this case whether, or where, within these extreme outer boundaries to draw that line. Nor would it be appropriate for us to do so without the detailed views of the Board, to whose "specialized judgment" Congress "intended to leave" many of the "inevitable questions concerning multiemployer bargaining bound to arise in the future." *Buffalo Linen*, 353 U.S. at 96 (internal quotation marks omitted); *see also Jewel Tea*, 381 U.S. at 710, n. 18.

The judgment of the Court of Appeals is affirmed.

Questions

In her dissenting opinion to the Court of Appeals decision, Judge Wald described the Hobson's choice facing players when she wrote:

> [t]hus, employees must now choose between foregoing collective bargaining altogether, thereby retaining antitrust protection against employer restraints on the labor market; or engaging in collective bargaining at the risk of forfeiting all antitrust remedies if bargaining fails and the employers unilaterally foist unagreed-to industry-wide terms upon them.[4]

Is this a fair assessment of the Hobson's choice facing players? If so, is there anything wrong with requiring players to make this choice?

Problems

1. Your firm represents the owners of a new professional sports league. The owners have stated they would like to impose the following player restraints:

a. A draft and an exclusive right of negotiation

---

[4] *Brown v. Pro-Football, Inc.* 50 F.3d at 1058 (Wald, J., dissenting).

b. An option clause for a six year term.

c. A compensation rule for players becoming free agents after six years.

d. A college draft eligibility rule.

2. The owners have heard that one or more of these restraints may violate the antitrust laws. They would, nevertheless, like to adopt these rules if you can find a legal way to do it. Advise.

3. Assume a new league and no union.

a. Can the league form, or aid the players in forming, a union and thereby immunize these rules?

4. Assume a union which is weak, cannot withstand a strike and therefore, despite mild resistance, acquiesces in the rule and incorporates the rules into the contract.

a. Does this agreement constitute bargaining under *Mackey*? Under *McCourt*?

b. Do all of these matters constitute mandatory subjects of bargaining?

c. Why is it important that the matter be a mandatory subject of bargaining?

d. May the employer utilize the exemption?

5. Assume a union and vigorous bargaining.

a. Why would the union agree to these restraints?

b. If agreement is reached on each of these restraints, is it insulated from later attack by dissatisfied players?