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Donald Novick*

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Abstract

Traditional rules designed to control player movement within the National Football League (NFL) have recently been challenged in two federal district courts. In *Kapp v. NFL* Judge Sweigert concluded that these rules constitute a violation of the antitrust laws. In *Mackey v. NFL* Judge Larson held that the Rozelle Rule is in violation of the antitrust laws. A prospective NFL player must sign a contract that contains an option clause which gives the employing team the right to renew a player's contract for one year beyond the time stipulated in the contract, at a compensation rate of 90% of the expired contract. Once this option year is over, the player is a free agent. The NFL Constitution and By-Laws provide that a team which signs a player who has become a free agent in this way must compensate the former team. According to the Rozelle Rule, if the teams cannot reach a mutually satisfactory agreement on compensation, the League Commissioner has the power to fix compensation. The present system of player control in the NFL violates the antitrust laws. Under the rule of reason, the availability of less-restrictive means of accomplishing the same results leads to the conclusion that the present system is unreasonable and therefore illegal.

KEYWORDS: NFL, antitrust laws, free agent, Rozelle Rule, collective bargaining, per se, rule of reason

THE LEGALITY OF THE ROZELLE RULE AND RELATED PRACTICES IN THE NATIONAL FOOTBALL LEAGUE

I. Introduction

Traditional rules designed to control player movement within the National Football League (NFL)¹ have recently been challenged in two federal district courts. In *Kapp v. NFL*² Judge Sweigert concluded that these rules constitute a violation of the antitrust laws.³ In *Mackey v. NFL*⁴ Judge Larson held that the Rozelle Rule⁵ is in violation of the antitrust laws.⁶

The system of player control in the NFL begins with a draft of college seniors held annually by the 28 member clubs.⁷ Once a team selects a player in the draft and places him on its reserve list, that team has the exclusive right to negotiate for his services.⁸ A team which attempts to negotiate with a player reserved by another team is subject to severe disciplinary action, known as the Tampering Rule.⁹ A prospective player must sign the Standard Player Contract,¹⁰ one clause of which binds him to the NFL Constitution and

1. The National Football League (NFL) is an unincorporated association of football clubs. There are currently 28 teams, each operating in the United States. The NFL schedules and organizes the games played between the teams, providing the officials and formulating the rules. Pete Rozelle, after whom the Rozelle Rule is named, is an employee of the NFL., and its chief executive officer and Commissioner. *Mackey v. NFL*, No. 4-72-Civil 277, at 1 (D. Minn. Dec. 30, 1975). At the time *Mackey* was decided the NFL had 26 teams but has since expanded to 28.

2. 390 F. Supp. 73 (N.D. Cal. 1974).

3. *Id.* at 82.

4. No. 4-72-Civil 277 (D. Minn. Dec. 30, 1975).

5. NFL CONST. AND BY-LAWS art. XII, § 12.1(H). For a discussion of this rule, see text accompanying notes 14-15 *infra*.

6. No. 4-72-Civil 277, at 9.

7. NFL CONST. AND BY-LAWS art. XIV, § 14.3(A) [hereinafter cited as Draft Rule]. The current rules provide for a draft by the 26 member clubs, but the league has expanded and now has 28. The draft is conducted in the following way:

Each club picks one player in each round. Selection is made in the reverse order of the final standings the year before. The team with the worst won-lost record the previous year selects first, the team with the best record picks last, and so on.

Id.

8. *Id.* art. XIV, § 14.5.

9. *Id.* art. IX, § 9.2 [hereinafter cited as Tampering Rule].

10. *Id.* art. XV, § 15.6(a) [hereinafter cited as Standard Player Contract Rule].

By-Laws.¹¹ This contract also contains an option clause which gives the employing team the right to renew a player's contract for one year beyond the time stipulated in the contract, at a compensation rate of 90% of the expired contract.¹² Once this option year is over, the player is then a free agent; free to sign a contract with any team in the league.¹³ The NFL Constitution and By-Laws provide that a team which signs a player who has become a free agent in this way must compensate the former employing team.¹⁴ If the two teams are unable to reach a mutually satisfactory agreement on compensation, the League Commissioner has the right, in his sole discretion, to fix the rate of compensation.¹⁵ The rule requiring compensation and giving the Commissioner the power to fix compensation is the Rozelle Rule.

In *Kapp*, plaintiff signed a two year contract with the Minnesota Vikings in 1967. He played for that team during the 1967 and 1968 seasons, and in 1969 he played without a contract, as the Vikings invoked the option clause. Plaintiff refused to sign a contract in 1970 and the New England Patriots, agreeing to compensate the Vikings in satisfaction of the Rozelle Rule, contracted with Kapp for the 1970 season and the following two years. Kapp did not sign the Standard Player Contract. He played in 1970, but when he refused to sign the Standard Player Contract in 1971 he was told to leave the team at the summer training camp prior to the start of that season.¹⁶

Plaintiff alleged in his complaint that enforcement of these rules constituted a combination among the clubs in the NFL to refuse to deal with players except under the above stated conditions. He claimed that in effect this was a boycott or blacklist and as such a

11. "The Player agrees at all times to comply with and be bound by: the Constitution and By-Laws" National Football League Standard Players Contracts § 4.

12. *Id.* § 10. This section states:

The Club may, by sending notice in writing to the Player, on or before the first day of May following the football season . . . renew this contract for a further term of one (1) year on the same terms as are provided by this contract, except that (1) the Club may fix the rate of compensation to be paid by the Club to the Player during said further term, which rate of compensation shall not be less than ninety percent (90%) of the sum set forth

13. *Id.*

14. *Id.*

15. *Id.*

16. 390 F. Supp. at 76-78.

per se violation of the Sherman Act. He further contended that even if the challenged rules were not a per se violation, they were illegal under the rule of reason, because they go beyond what is reasonably necessary to achieve the business goals involved. He claimed that enforcement of these rules drove him out of professional football, and sought damages for this injury.¹⁷

Mackey was an action brought by present and former professional football players in the NFL. The complaint consisted of two counts, both of which alleged the illegality of the Rozelle Rule as a per se violation of the Sherman Act, or in the alternative, as illegal under the rule of reason. In Count I plaintiffs sought an injunction against enforcement of the Rozelle Rule. In Count II they sought damages sustained as a result of previous enforcement of the Rozelle Rule.¹⁸ In both cases, the NFL based its defense on two major issues. The first involved the standard to be used in determining the legality of the challenged rules.

II. Per Se v. Rule of Reason

Unlike baseball which has received an exemption from the Supreme Court,¹⁹ football was held subject to the antitrust laws in *Radovich v. NFL*.²⁰ Plaintiffs in *Kapp*²¹ and *Mackey*²² claimed that the challenged rules were per se violations of sections 1 and 2 of the Sherman Act.²³

The per se doctrine in antitrust law was explained by the Supreme Court in *United States v. Trenton Potteries Co.*²⁴ The Court noted that price-fixing agreements are prohibited by the Sherman

17. *Id.* at 79.

18. No. 4-72-Civil 277, at 1-2.

19. *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953).

20. 352 U.S. 445, 452 (1957).

21. 390 F. Supp. at 75.

22. No. 4-72-Civil 277, at 2.

23. 15 U.S.C. § 1 (1970) provides in part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal

15 U.S.C. § 2 (1970) states that:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor

24. 273 U.S. 392 (1927).

Act because of their unavoidable effects, and they are illegal regardless of whether the prices agreed to are reasonable.²⁵

Other categories of agreements have also been found to cause prohibited injuries to competition. Once it is established that an agreement falls within one of these categories, it automatically comes within the prohibitions of the Act without the necessity of further inquiry under the rule of reason.²⁶ Where a certain trade practice has been before the courts on numerous occasions and has been uniformly condemned, the courts take judicial notice that its effect is substantially to restrain trade. They infer that the only intent underlying the practice is to achieve such an anti-competitive effect.²⁷

The net effect of the challenged NFL practices is analogous to trade association practices which have been declared illegal in the past. The draft and the restraints on player movement imposed by the owners are analogous to trade association action requiring all members to deal with prospective employees only on uniform terms. The Supreme Court has found this to be illegal.²⁸ The Option Rule, the Rozelle Rule, and the Standard Player Contract Rule are ultimately enforceable against uncooperative players by boycott, as occurred in *Kapp*.²⁹ This practice has been held to be a per se violation of the antitrust laws.³⁰

The defendants in *Kapp* and *Mackey* contended that professional league sports are unique by virtue of the fact that the league mem-

25. *Id.* at 397.

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed.

Id.

26. J. BURNS, *A STUDY OF THE ANTITRUST LAWS* 39 (1958).

27. J. VAN CISE, *UNDERSTANDING THE ANTITRUST LAWS* 123 (rev. ed. 1966).

28. See *Anderson v. Shipowners Ass'n of the Pacific Coast*, 272 U.S. 359 (1926); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930); cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) in which the Court found that a division of the market among buyers was an incidental result of a price fixing scheme and therefore was illegal. *Id.* at 223. The player draft in the NFL is, in effect, a division of the market among buyers.

29. 390 F. Supp. at 81.

30. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941).

bers are not true competitors.³¹ In other words, although teams compete on the playing field, it is in their mutual interests that all the teams in the league prosper financially. This analysis has received recognition in the courts.³² Whether this justifies application of the rule of reason is an issue on which authority is divided.

In *Klor's v. Broadway-Hale Stores*³³ the Supreme Court stated:³⁴

Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances

. . . .

This case and *Fashion Originator's Guild v. FTC*³⁵ have been widely cited as establishing that collective refusals to do business cannot be justified by any motive or ultimate goal, however reasonable.³⁶

However, in *Silver v. New York Stock Exchange*,³⁷ a case involving a group boycott, the Court suggested that a boycott may be removed from the per se category by a "justification derived from the policy of another statute or otherwise."³⁸ It has been suggested that where collective group action is inherent in the structure of the industry, as in the sports industry, the "or otherwise" justification is present.³⁹ *Silver* may be distinguishable in that it involved a regulated industry, and the justification was derived from the policy of the Securities Exchange Act.⁴⁰

31. No. 4-72-Civil 277, at 2; 390 F. Supp. at 79.

32. *Philadelphia World Hockey Club, Inc., v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 503-04 (E.D. Pa. 1972); *Flood v. Kuhn*, 316 F. Supp. 271, 273-76 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972); *United States v. NFL*, 116 F. Supp. 319, 323 (E.D. Pa. 1953).

33. 359 U.S. 207 (1959).

34. *Id.* at 212.

35. 312 U.S. 457 (1941). The court stated "the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination." *Id.* at 468.

36. See Handler, *Recent Developments in Antitrust Law: 1958-1959*, 59 COLUM. L. REV. 843, 863-64 (1959); Comment, "Political" Blacklisting in the Motion Picture Industry: A Sherman Act Violation, 74 YALE L. J. 567, 570-71 (1965).

37. 373 U.S. 341 (1963).

38. *Id.* at 348-49.

39. Note, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV. 1486, 1501 (1966).

40. Securities Exchange Act of 1934, 15 U.S.C. § 78. *But see* *Cowen v. New York Stock Exchange*, 256 F. Supp. 462, 468 (N.D.N.Y. 1966), *aff'd*, 371 F.2d 661 (2d Cir. 1967). In *Cowen* the court upheld disciplinary rules of the New York Stock Exchange which would ordinarily

However, whether or not *Silver* is reliable authority, there are lower court cases which have reviewed trade association programs labelled *per se* in the past and nonetheless applied the rule of reason.⁴¹ Thus the broad language of *Klor's* seems to have received a narrower application. This is necessitated by the fact that certain practices are essential for the continued existence of particular industries. It is illogical to condemn and judicially eliminate practices within the NFL or any other industry simply because similar practices within a totally unrelated industry have been condemned. A rule of law which fails to take into account the possible unique nature of certain industries is inappropriate.

Application of the rule of reason, on the other hand, provides the court with the opportunity to examine the challenged practices with regard to the needs of the particular industry involved.⁴²

[E]xclusionary measures designed to enforce schemes of self-regulation should be permitted when justified by public policy or essential for efficient operation of an entire industry. Rather than condemning all such activities, the antitrust laws should assume an affirmative role in controlling and limiting them.

Kapp and *Mackey* reached different results in the resolution of this issue. In *Kapp*, on a motion for summary judgment, the court concluded that the rule of reason was the appropriate test for determining the legality of the challenged rules.⁴³ It based its decision on several factors. It noted the cases recognizing the unique nature and

have been antitrust violations. Unlike the view that *Silver* is distinguishable because it involves a statutory justification, the court in *Cowen* stated that the result would have been the same even if there were no implied statutory authorization for the challenged rules.

41. *Deesen v. Professional Golfers' Ass'n of America*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966); *Molinas v. National Basketball Ass'n.*, 190 F. Supp. 241 (S.D.N.Y. 1961).

42. Note, *supra* note 39, at 1487. See also *United States v. Columbia Pictures*, 189 F. Supp. 153 (S.D.N.Y. 1960); *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961).

Any judicially, as opposed to legislatively, declared *per se* rule is not conclusively binding on this court as to any set of facts not basically the same as those in the cases in which the rule was applied. . . . Therefore, while the *per se* rule should be followed in almost all cases, the court must always be conscious of the fact that a case might arise in which the facts indicate that an injustice would be done by blindly accepting the *per se* rule.

Id. at 556.

43. 390 F. Supp. at 81.

purposes of sports league activities,⁴⁴ as well as the history of federal executive and congressional interpretation of the antitrust laws, as they relate to sports league activities.⁴⁵ The court then held that "league enforcement of most of the challenged rules is so patently unreasonable that there is no genuine issue for trial."⁴⁶

In *Mackey* the court held that "the Rozelle Rule constitutes a per se violation of the antitrust laws"⁴⁷ and that "the Rozelle Rule and its related practices constitute a concerted refusal to deal and a group boycott on the part of defendants."⁴⁸

For the reasons previously stated, the decision in *Kapp* to apply the rule of reason appears to be the better view. It is to this issue that this Note now turns.

III. The Reasonableness of the Challenged Rules

In determining the reasonableness of a challenged agreement among defendants in an antitrust case the court should examine the purpose of the agreement and its effects. In addition, the court should determine whether the purpose, if legitimate, can be achieved by a less anti-competitive alternative. If a less anti-competitive alternative is available, then the present system is unreasonable.⁴⁹

A. Purpose

Teams within a sports league need some means of maintaining competitive balance on the playing field. This fact has been recog-

44. *Id.*, citing *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972); *Flood v. Kuhn*, 407 U.S. 258 (1972).

45. 390 F. Supp. at 81. As to Congress the court cited: the enactment of legislation exempting joint arrangements for club television rights from the antitrust laws, 15 U.S.C. §§ 1291-94 (1970); the sponsorship of a bill by Senator John F. Kennedy in 1958 that would have provided a substantially unqualified antitrust exemption for the player rules of all professional sports leagues (citation omitted); and the enactment of legislation authorizing merger of the American Football League and the National Football League, 15 U.S.C. § 1291 (1970). As to the Executive branch, the court noted a 1961 acknowledgement by the Department of Justice that professional leagues need some joint arrangements to assure their continued existence, and a similar acknowledgement in 1971 (citations omitted).

46. 390 F. Supp. at 82.

47. No. 4-72-Civil 277, at 9.

48. *Id.*

49. This was the approach of the analysis in *Mackey* on the issue of reasonableness. See text accompanying notes 61-67 *infra*. See also *Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

nized in cases dealing with anti-competitive practices in baseball and hockey, as well as football.⁵⁰ A league which is unable to maintain the interest of the fans cannot survive, and it is fair to say that balanced competition helps to maintain that interest. Accepting the premise that some method for equalization of players among member teams in a sports league is a necessary element of league organization and that the challenged rules achieve equalization,⁵¹ the issue remains whether the current rules are a reasonable method of achieving this result.

B. Effects

The *Mackey* court, even though it found a per se violation, did not ignore the issue of reasonableness. It held that the Rozelle Rule when viewed in conjunction with the other anti-competitive practices of the league (the Draft, the Standard Player Contract, the Option Clause, and the Tampering Rule) is unreasonable.⁵² Although not specifically stated, the conclusion drawn from the opinion is that the Rozelle Rule makes the system unreasonable. Furthermore, absent the Rozelle Rule and assuming the remaining rules contribute to competitive balance, the system would be reasonable.⁵³

The court found that the Rozelle Rule discourages a team from

50. Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F. Supp. 462, 504 (E.D. Pa. 1972); United States v. NFL, 116 F. Supp. 319, 323-26 (E.D. Pa. 1953); State v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 717, 144 N.W.2d 1, 10, cert. denied, 385 U.S. 990 (1966). See also *Hearings on H.R. 2355 Before the Subcomm. on Monopolies of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975). [hereinafter cited as *Hearings*]. During these hearings Pete Rozelle stated "[t]hat is what all the player controls in professional football are all about—to bring about a dispersion of the more talented players among all of the teams so that on any given Sunday the outcome of each contest is in doubt." *Id.* at _____.

51. In support of the contention that these rules achieve competitive balance, see Statement of Pete Rozelle, *Hearings*, *supra* note 61, wherein he pointed out that during the 1974 season exactly one-half of all the regular season games were decided by seven points or less. *Id.* at _____.

The *Mackey* court clearly adopted a minority view when it stated "the existence of the Rozelle Rule and the other restrictive devices on players have not had any material effect on competitive balance in the National Football League." No. 4-72-Civil 277, at 11.

52. No. 4-72-Civil 277, at 10.

53. This conclusion is reached from language in the decision such as "[a]bsent the Rozelle Rule there would be increased movement in interstate commerce of players from one club to another." *Id.* at 9.

signing a free agent.⁵⁴ Unless a team is willing to risk an unknown compensation award, it cannot sign a free agent without an agreement with the former employing club on the compensation it will pay. This "has been an effective deterrent to clubs signing free agents" without an agreement on compensation.⁵⁵

The Rozelle Rule acts as a substantial deterrent to players becoming free agents.⁵⁶ The player knows the likelihood that no other team may be willing to sign him. The net result is that after he plays out his option the player will either leave football or sign with the same team. Meanwhile, he would have played that option year for only 90 percent of his original salary. "Under the Rozelle Rule each individual player is denied the right to sell his services in a free and open market."⁵⁷ The court felt that these results outweigh any possible justifications and therefore held the rules unreasonable.⁵⁸

Determining whether it is unreasonable for a football player to be denied the right to sell his services in a free and open market is a difficult task. The players point out that higher salaries would be paid if competitive bidding was permitted.⁵⁹ Since many of these players are already receiving high rates of compensation, this effect of the Rozelle Rule may not be unreasonable. For example, Kapp's last contract with the New England Patriots for the 1970, 1971, and 1972 seasons provided for \$600,000 in salary. It is difficult to perceive an undue hardship in this and similar cases. However, the Rozelle Rule and its related practices do not apply only to these highly paid players, the so-called "superstars." The fact that there are viable alternatives makes the present system unreasonable.

C. Alternatives

The court in *Mackey* indirectly suggested an alternative when it criticized the fact that these rules apply to average players as well as the "superstars."⁶⁰ Since the objective of the rules is to achieve

54. *Id.* at 8.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 10.

59. See Statement of Kermit Alexander, President of the NFL Players' Association, *Hearings, supra* note 50 at _____. The *Mackey* court stated "the salaries paid by each club are lower than if competitive bidding were allowed to prevail." No. 4-72-Civil 277, at 9.

60. No. 4-72-Civil 277, at 9.

competitive balance, there is no reason why the average player should be covered by them. If an average player leaves one team and joins another this will neither appreciably strengthen the new team nor weaken the old one. It would therefore seem feasible to apply these rules only to the better players. Subjecting these players to the restrictions would not be unfair since they are paid substantially more for their services. The difficulty would be devising a method of classifying the players as "average" or "better." However, this could be done by a classification based upon the salary a player receives. Thus, if a team wanted to retain a player's services by means of these rules or wanted to be compensated when he played out his option and signed with another team, it would have to pay him at least a specified minimum amount.

Another way to retain the services of a player without the use of the present system is to sign a multi-year contract with that player, ensuring the continued benefit of his services.

Recent negotiated settlements in the National Hockey League and the National Basketball Association complicate the issue of reasonableness, rather than clarify it. In hockey, the players have accepted a system very similar to the challenged system in the NFL. Their collective bargaining agreement provides for an option clause as well as compensation.⁶¹

In basketball, which previously had a similar system, major reforms have been accepted by management. Under the current agreement teams retain the rights to drafted players for only one year. If a team is unable to sign a player it drafts, he becomes eligible for the draft in the following year. If the team which drafts him the following year is unable to sign him, he then becomes a free agent. Beginning next year the option clause will be removed from all contracts, except those of first-year players signing for only one year. They will have a one year option clause. Compensation for signing a player previously under contract with another team will continue until the 1980-81 season. At that time it will be replaced by the right of first refusal. Under this rule, a player will be free to negotiate and obtain an offer from any team in the league when the terms of his previous contract are satisfied. However, his previous employer will

61. N.Y. Times, Oct. 7, 1975, at 27, col. 4.

have the right to retain that player's services, if he is willing to match the offer.⁶²

Neither of these settlements answers the issue of reasonableness. However, the acceptance by the National Hockey League players' association of a system similar to the NFL supports the NFL contention that its system is reasonable. On the other hand, the recent settlement in the National Basketball Association suggests a possibly less restrictive alternative, an indication that the present system in the NFL is unreasonable. There is, of course, no guarantee that this alternative will be successful.

IV. Collective Bargaining

The second major issue on which the NFL based its defense in *Kapp* and *Mackey* was the collective bargaining agreement signed by the players' association and the management council in 1970. The NFL argued that any illegality in the challenged rules was immunized by that agreement.⁶³ Whether such an agreement would "legalize" these rules is an issue which neither case resolved.

In *Kapp* the court ruled that at the time plaintiff signed his contract with the New England Patriots the collective bargaining agreement was not yet in effect.⁶⁴ In *Mackey* the court held that the players' union did not accept the Rozelle Rule in the collective bargaining agreement, and that the Rozelle Rule was never the subject of serious, intensive arms length collective bargaining.⁶⁵

In both cases the NFL claimed that by its terms the collective bargaining agreement incorporated the challenged rules in the following way. The agreement states: "All players in the NFL shall sign the Standard Player Contract"⁶⁶ The Standard Player Contract states that "[t]he Player agrees at all times to comply with and be bound by: the Constitution and By-Laws, Rules and Regulations of the League"⁶⁷ Since the By-Laws contain the Rozelle Rule, the NFL argued that the collective bargaining agreement included acceptance by the players of the rules they were

62. N.Y. Times, Feb. 3, 1976, at 25, col. 6.

63. No. 4-72-Civil 277, at 12-13; 390 F. Supp. at 78-79.

64. 390 F. Supp. at 85-86.

65. No. 4-72-Civil 277, at 14.

66. 1970 Collective Bargaining Agreement between the NFL Management Council and the NFL Players' Association art. III, § 1.

67. National Football League Standard Player Contract § 4.

challenging.⁶⁸ As previously stated, the court ruled against the NFL on this point in both cases.⁶⁹

However, the issue remains whether a collective bargaining agreement which accepts these rules will provide a valid defense to a claim by a player that the rules violate the antitrust laws. A resolution of this issue is important because such an agreement may eventually be reached in negotiations between the NFL and the players' union.⁷⁰

The importance of this issue was recognized by Justice Marshall in his dissenting opinion in *Flood v. Kuhn*.⁷¹ He questioned the limits to which labor and management can agree on rules that would be illegal under the antitrust laws.⁷² Authority on this question is split.

On the one hand, if player challenges to the contract provisions reached during collective bargaining were successful, the process of collective bargaining would be an exercise in futility. However, if there is no means of challenging an agreement, the door is left open for conspiracy between management and the players' representative. Some means of harmoniously resolving the competing policies of the antitrust and labor laws is therefore necessary.

*Amalgamated Meat Cutters, Local 189 v. Jewel Tea Co.*⁷³ presented the issue of whether a collective bargaining agreement is immune from attack by one of its signatories because of the labor exemption from the antitrust laws.⁷⁴ The Supreme Court held that a collective bargaining agreement provision is exempt where it relates to wages, hours, and working conditions, and its purpose is to effectuate a beneficial policy of the union and not the employer.⁷⁵ The requirement that employers and unions bargain about wages, hours, and working conditions weighs heavily in favor of antitrust exemptions for agreements on these subjects.⁷⁶

68. 390 F. Supp. at 84.

69. No. 4-72-Civil 277, at 11; 390 F. Supp. at 85-86.

70. See text accompanying notes 66-67 *supra*.

71. 407 U.S. 258 (1972).

72. *Id.* at 295-96 (Marshall, J., dissenting).

73. 381 U.S. 676 (1965).

74. *Id.* at 689. For a discussion of the labor exemption from the antitrust laws, see note 80 *infra*.

75. 381 U.S. at 689.

76. *Id.* at 689-90. The rules challenged in *Kapp* and *Mackey* are mandatory subjects of

Justice Goldberg concurred in the result in *Jewel Tea*⁷⁷ but was in favor of a different test for deciding whether a collective bargaining agreement should receive an antitrust exemption.⁷⁸ He read the majority opinion as holding that an antitrust action will lie if the court finds the union or employer conduct in question socially or economically objectionable even though it results from collective bargaining.⁷⁹ He disagreed with the majority and concluded that collective bargaining activity concerning mandatory subjects of bargaining under the National Labor Relations Act should not be subject to the antitrust laws.⁸⁰

bargaining under the National Labor Relations Act. Under the Act "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." 29 U.S.C. § 158(d) (1970).

The *Mackey* court took the position that the Rozelle Rule, "being a *per se* violation of the antitrust laws and otherwise violative of the antitrust laws under the Rule of Reason standard, cannot, because of its illegality, constitute a mandatory subject of bargaining as that phrase is used in labor law." No. 4-72-Civil 277, at 12. This, of course, does not answer the question of whether such an agreement, if it includes the Rozelle Rule, should be upheld.

77. 381 U.S. at 697-735.

78. *Id.*

79. *Id.* at 697.

80. *Id.* at 732. Goldberg traced the history of the labor exemption from the antitrust laws and the application of that exemption to collective bargaining agreements. The labor exemption from the Sherman Act is found in sections 6 and 20 of the Clayton Act. Section 6 states:

Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof . . .

15 U.S.C. § 17 (1970).

Section 20 bars federal court injunctions "in any case between an employer and employees . . . [involving] a dispute concerning terms or conditions of employment. . . ." 29 U.S.C. § 52 (1970).

Cases following the enactment of the Clayton Act severely cut back on the Act's mandates. See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), in which the Court held that § 6 did not confer immunity from antitrust liabilities "where . . . [unions] depart from . . . normal and legitimate objects . . ." *Id.* at 469.

In 1939 Congress passed the Norris-LaGuardia Act, 29 U.S.C. § 101 (1970), to nullify *Duplex*. See H.R. REP. No. 669, 72d Cong., 1st Sess. 3, 6-8 (1932). In *United States v. Hutcheson*, 312 U.S. 219 (1941), the Court stated that the underlying aim of the Norris-LaGuardia Act was to "restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated . . ." *Id.* at 235-36. The Court also said that "[s]o long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit . . . are not to be distinguished by any 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." *Id.* at 232. In light of this history, Goldberg

Applying the test of the majority opinion in *Jewel Tea* to the Rozelle Rule and its related practices does not result in a conclusive resolution of the issue. The rules relate to "wages, hours and working conditions." However, it is certainly questionable whether their purpose is to effectuate a beneficial policy of the union and not the employer. It is difficult to envision how these practices could be ruled per se violations of the antitrust laws and at the same time satisfy the *Jewel Tea* test. Also, if Goldberg's interpretation of the majority opinion in *Jewel Tea* is correct, and the court finds that the challenged rules are socially objectionable, it can find an anti-trust violation even though the rules were agreed to in collective bargaining.⁸¹

The court in *Kapp* adopted this reasoning in dictum wherein it stated:⁸²

We are of the opinion that, however broad may be the exemption from anti-trust laws of collective bargaining agreements dealing with wages, hours and other conditions of employment, that exemption does not and should not go so far as to permit immunized combinations to enforce employer-employee agreements which, being unreasonable restrictions on an employee's right to freely seek and choose his employment, have been held illegal on grounds of *public policy* long before and entirely apart from the antitrust laws.

In the *Mackey* case, however, the court implied that such an agreement would be upheld. It stated "[i]n neither of the two collective bargaining sessions which resulted in collective bargaining agreements was there any trade-off or quid pro quo whereby the union agreed to the Rozelle Rule in return for other benefits."⁸³ The implication is that if the Rule was a trade-off for an employer concession, the NFL would have a valid defense.

Legislation introduced in the House of Representatives on January 29, 1975,⁸⁴ by Rep. John F. Seiberling adopts the position taken by the dictum of the *Kapp* case. Under his proposal, even if these practices were agreed to by the union, they would be illegal. The bill provides in part:⁸⁵

felt that "collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws." 381 U.S. at 710.

81. See note 80 *supra* and accompanying text.

82. 390 F. Supp. at 86.

83. No. 4-72-Civil 277, at 12.

84. H.R. 2355, 94th Cong., 1st Sess. (1975).

85. *Id.* Rep. Seiberling stated that the effect of his proposal would be to ban the option

Any provision of a contract which requires . . . an individual (1) to agree to permit the other party to the contract to control his right, upon the expiration of that contract, to enter into a contract with any other person for the purpose of engaging in an organized professional team sport, (2) to secure a release from the other party to the contract before entering into or performing under such a contract with any other person for such purpose, or (3) to perform under that contract for an unreasonable period of time shall be unenforceable.

The fact that collective bargaining would not be permitted to reach an agreement on these issues was one reason given by the Department of Justice for its recommendation against enactment of the bill.⁸⁶

The position taken by the dictum in *Kapp* and the Seiberling bill is unrealistic in that it arbitrarily rules out the possibility that an equitable agreement that includes some restrictions on player movement can be arrived at through collective bargaining. The dictum in *Kapp* discourages both sides from reaching an agreement by making such an agreement totally ineffective. It is entirely possible that the players' association will conclude that some restrictions on player movement are necessary in order to ensure the continued existence of the league. As such, it may wish to accept them in return for other compensation. The players and management should not be discouraged from entering into such an agreement.⁸⁷

V. Conclusion

The present system of player control in the NFL violates the antitrust laws. Whether it constitutes a per se violation is an issue

clause, the anti-tampering rule, the Rozelle Rule, boycotting players who tried to change teams, and any other rules which unreasonably limit the ability of an athlete to sell his skills and services to any employer in the industry. Statement of John Seiberling, *Hearings, supra* note 50.

86. [T]he bill could prevent a players' union, certified to collectively bargain with a sports league, from determining that a "reserve clause" or a similar contract provision would serve the players' interest as part of a complex agreement and negotiating for such a package with a sports league. In that circumstance, we can see no persuasive reason for prohibiting such contract provisions.

Letter from A. Mitchell McConnell, Jr., to Hon. Peter Rodino, June 19, 1975.

87. It should be noted that the inquiry is altered when the collective bargaining agreement is used to justify the application of these restrictive rules against a third party competitor, e.g., a rival league. In that case the NFL would be attempting to prevent competition by means of the labor exemption. This would not and indeed should not be upheld by the courts. See *UMW v. Pennington*, 381 U.S. 657, 663 (1965); *Allen Bradley Co. v. Electrical Local 3*, 325 U.S. 797, 809 (1945); *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).

on which authority is divided. However, under the rule of reason, the availability of less-restrictive means of accomplishing the same results leads to the conclusion that the present system is unreasonable and therefore illegal. A solution to the present controversy between the players and management could be found by means of collective bargaining. Despite the dictum in *Kapp* which indicates that such an agreement would not "legalize" the challenged rules, the better view is that it should.

The agreements between the players and management in the National Hockey League and the National Basketball League are important not only for their substantive arrangements but also for the lesson they provide that negotiated settlements are possible. The results of negotiations in hockey and basketball were completely dissimilar, leading to the conclusion that the objectives sought by both sides were tailored to the needs of the particular sport. Survival of professional football is in the interest of both sides to this dispute. Agreements reached through good faith, arms-length negotiations should be encouraged and upheld by the courts.

Donald Novick