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NOTES

Sharing the Wealth: Don't Call Us. We'll Call You: Why Revenue Sharing Is a Permissive Subject and Therefore the Labor Exemption Does Not Apply

Jessica Cohen*

INTRODUCTION

The introduction of free agency to professional sports has contributed to increased competition among teams over top players. Professional team owners are bidding competitively at inflated market prices for highly desired players.¹ Team owners do this with the hope that their franchises will win more games, resulting in increased profits.² Thus, free agency has helped create an increasing disparity among professional sports teams, which often leads to a lower quality product. To survive, leagues must use various mechanisms to equalize the competitive balance among teams, including revenue sharing, the salary cap, and the draft.

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¹ See Mark Conrad, *Mark's View: A-Rod and Baseball's House of Cards*, at <http://www.sportslawnews.com/archive/Articles%202000/Arodcontract.htm> (last visited Feb. 10, 2002). In the 2000 season, Alex Rodriguez signed a 10-year \$252 million contract with the Texas Rangers. *Id.* See also David Rothstein, *The Salary Cap: Legal Analysis of and Practical Suggestions for Collective Bargaining in Professional Basketball*, 11 U. MIAMI ENT. & SPORTS L. REV. 251 (1994) (specifically discussing the way NBA team owners are willing to open their checkbooks to acquire the top players); Jeffrey E. Levine, *The Legality and Efficacy of the National Basketball Association Salary Cap*, 11 CARDOZO ARTS & ENT. L.J. 71, 73 (1992).

² Rothstein, *supra* note 1, at 251-52 (noting that sports team owners pay the top players so that their teams will win more games, thereby increasing gate receipts).

This paper will focus on revenue sharing as one of the many solutions intended to balance competition among teams. Specifically, this paper will examine revenue sharing of income from external sources, such as television broadcast contracts, merchandise licensing, and gate receipts.³ The questions of whether revenue sharing is a mandatory or permissive subject of collective bargaining and whether the labor exemption applies to revenue sharing will be addressed.

Part I surveys the labor history of collective bargaining as it relates to revenue sharing and the salary cap in selected professional sports leagues. Part II focuses on the basics of labor and antitrust law, and their conflicting policies. Part III investigates the statutory labor exemption, the evolution of the non-statutory labor exemption in the Supreme Court, and its application to professional sports. Part IV analyzes whether revenue sharing is a mandatory or permissive subject of collective bargaining. Finally, Part V focuses on whether the labor exemption applies to revenue sharing in two alternative hypothetical situations: first, when revenue sharing is categorized as a permissive subject and is in a labor agreement; and second, when revenue sharing is categorized as a mandatory subject that is unilaterally imposed after impasse.

This paper argues that revenue sharing is a permissive subject of collective bargaining because revenue sharing does not directly affect the players' terms and conditions of employment.⁴ This paper concludes that the labor exemption does not apply to revenue sharing if it is a permissive subject; however, if revenue sharing is found to be a mandatory subject, contrary to the conclusions of this paper, the labor exemption would apply.⁵

³ There are many different types of revenue sharing. Although they are all crucial to the survival of a league, the only type discussed in this paper involves the sharing of external revenues, such as television contracts, gate receipts and merchandise licensing.

⁴ See *infra* Part IV.

⁵ See *infra* Part V.

I. EXAMPLES OF COLLECTIVE BARGAINING IN SELECTED SPORTS: THE NATIONAL BASKETBALL ASSOCIATION & MAJOR LEAGUE BASEBALL

A. National Basketball Association (hereinafter "NBA")

In the late 1970s and early 1980s, with the increase in free agency, the NBA experienced growing competitive disparity among its teams. To solve this problem,⁶ in 1983 the NBA and the National Basketball Players Association (hereinafter "NBPA") negotiated the first-ever "salary cap" in professional sports.⁷ The key to the salary cap was a revenue-sharing formula that guaranteed the players 53% of the league's gross revenues. The parties hoped that this would enable small-market, financially weaker teams to compete with their big-market rivals. Over time, however, it became increasingly obvious that the many loopholes of the "soft" cap⁸ made it easy for creative owners to circumvent the cap.⁹ Following a 191-day labor dispute, on January 7, 1999, the NBA and the NBPA reached an agreement that purported to rectify some of these loopholes through a revised team salary cap¹⁰ and an individual cap.¹¹

⁶ See D. Albert Daspin, *Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap*, 62 IND. L.J. 95, 122 (1986). The purpose of the provision was to level the competition among NBA teams. *Id.*

⁷ Rothstein, *supra* note 1, at 252 n.6.

⁸ The "soft" cap is one in which teams can use creative accounting to shift player salaries to other years to make room in the cap to sign new players.

⁹ Dan Messeloff, Note, *The NBA's Deal with the Devil: The Antitrust Implications of the 1999 NBA-NBPA Collective Bargaining Agreement*, 10 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 521, 523 (2000).

¹⁰ Although the revised team salary cap is still a "soft" cap, it restricted the amount of money a team could spend on its roster to no more than \$30 million in 1999 and \$34 million in 2000. See also Messeloff, *supra* note 9, at 523.

¹¹ The individual salary cap limits the amount that a team can spend on a single player. For example, a player that has up to five years of experience in the NBA can earn no more than \$9 million. Mike Wise, *Pro Basketball: The Settlement; With Little Time on Clock, N.B.A. and Players Settle*, N.Y. TIMES, Jan. 7, 1999, at A1. Unlike the revised team salary cap that is a "soft" cap, this is a "hard" cap and there are virtually no exceptions. *Id.*

B. Major League Baseball (hereinafter "MLB")

In the summer of 1994, MLB and the Major League Baseball Players Association (hereinafter "MLBPA") could not agree on a solution to the economic disparity and competitive imbalance in MLB.¹² The owners claimed that they would not open spring training without a salary cap, while the players maintained that they would not start the season with a salary cap.¹³ So in August 1994, MLB had its eighth work stoppage in twenty-five years. In December of that year, with no settlement reached, the owners unilaterally imposed their salary cap. In 1995, the National Labor Relations Board (hereinafter "NLRB") General Counsel warned the owners that their action was illegal because they had not reached impasse.¹⁴ Those words of advice caused the owners to bring baseball back for the 1995 season without a salary cap.¹⁵

In November 1996, MLB and the MLBPA negotiated a new Collective Bargaining Agreement (hereinafter "CBA"). Even though a "luxury tax"¹⁶ was implemented, the system did not correct the

¹² Mark Conrad, Mark's Sports Law News, *Owners Give Selig Powers to Share Revenues, Reject Trades* (January 20, 2000), at <http://www.sportslawnews.com/archive/Articles%202000/Seligpowers.htm> (last visited Feb. 10, 2002); Charles D. Marvine, Comment, *Baseball's Unilaterally Imposed Salary Cap: This Baseball Cap Doesn't Fit*, 43 KAN. L. REV. 625 n.1 (1995) (citing Richard Justice, *With Baseball's Last Out, a Strike*, WASH. POST, Aug. 12, 1994, at A1); Marcus Leazer, Mark's Sports Law News, *Baseball's Rich Get Richer (No Surprise!)* (Dec. 9, 2000), at <http://www.sportslawnews.com/archive/Articles%202000/Seligtestimony.htm> (last visited Feb. 10, 2002).

¹³ Marvine, *supra* note 12, at 626; Mark Maske, *Baseball Season Wiped Out; Team Owners Cancel Remaining Schedule and World Series*, WASH. POST, Sept. 15, 1994, at A1, A6; Mark Maske, *Baseball's Labor Talks Collapse; Team Owners Install Salary Cap System; Litigation Looms*, WASH. POST, Dec. 23, 1994, at A1.

¹⁴ Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 191 n.32 (2001).

¹⁵ *Id.*

¹⁶ Although it wasn't called a "salary cap," the "luxury tax" acted like a salary cap in that it was a cost-containment plan on player salaries. The luxury tax instituted a system where the five teams with the highest payrolls above a certain threshold (in 1997 - \$51 million; in 1998 - \$55 million; in 1999 - \$58.9 million; and there was no luxury tax for 2000) were required to pay a tax on the excess amount (in 1997 and 1998 - 35%; in 1999 - 34%). The money was paid into a revenue-sharing fund that was redistributed among the thirteen small-market teams. Messeloff, *supra* note 9, at 562.

disparities in professional baseball.¹⁷ Since the CBA expired in 2001, the parties are now in a position to decide how to negotiate a new, more efficacious system.

In anticipation of these daunting problems, MLB appointed a panel of experts, the Blue Ribbon Panel (hereinafter "Panel"),¹⁸ to review the state of professional baseball and recommend some solutions.¹⁹ In July of 2000, the Panel recommended that for the good of professional baseball, the owners should pool some of their resources.²⁰ The Panel issued a ninety-three-page report that suggested various solutions, including a system in which clubs would share 40 to 50% of all local revenues, which would provide assistance to the financially weaker franchises.²¹ The Panel also suggested that a 50% competitive-balance tax be instituted whenever teams would spend above the specified threshold of \$84 million.²² In addition, the Panel recommended that all teams spend a minimum of \$40 million on player salaries.²³ In this proposed system, low-revenue teams would receive resources from an expanded central

¹⁷ Messeloff, *supra*, note 9, at 562. In 1999, the New York Yankees spent \$92 million on their player payroll and paid \$4.8 million in luxury taxes. It is apparent that the luxury tax did not deter the Yankees in their pursuit to bid for top market free agents. Another criticism of the luxury tax is that there are no requirements on small-market teams' use of the money. This results in little or no effect on the competitive balance of the teams. It has been argued that a way to rectify this is to provide incentives for small-market clubs to reinvest the proceeds from the revenue sharing system into their rosters. *Id.* at 561.

¹⁸ The Report of the Independent Members of the Commissioner's Blue Ribbon Panel on Baseball Economics, July 2000 (R. Levin, G. Mitchell, P. Volcker, G. Will) [hereinafter Blue Ribbon Panel] (on file with author). The Panel was comprised of Yale University President Richard C. Levin, former Senate Majority Leader George J. Mitchell, political commentator George F. Will and former Federal Reserve Chair Paul A. Volcker. There were no representatives of either the league or the players association on the Panel. *Id.* at 1.

¹⁹ The Panel found some disturbing facts, including: clubs with payrolls in the upper half of the league have won every playoff game since 1994; and nine of the ten clubs participating in the last five World Series had payrolls ranking in the top 25% of the league. *Id.* at 10.

²⁰ Andrew Goodman, *Mark's Sports Law News: Baseball Commission Calls for More Revenue Sharing* (July 18, 2000), at <http://www.sportslawnews.com/archive/Articles%202000/MLBreport.htm> (last visited Feb. 10, 2002).

²¹ Blue Ribbon Panel, *supra* note 18, at 14.

²² *Id.*

²³ *Id.*

fund of pooled local revenues to aid in balancing the competition.²⁴

It is unclear whether MLB will choose to adopt some or all of these proposed solutions; however, something must be done to save professional baseball from its current state of competitive imbalance. At this time, few teams other than the New York Yankees can meet the salary demands of the most desired free agents in professional baseball.²⁵ During the current off-season, Jason Giambi signed a seven-year contract worth \$120 million with the Yankees.²⁶ Last season, the Yankees' payroll for pitchers alone reached \$40 million, a sum that exceeded the entire payroll of eight MLB teams.²⁷

Competitive-balancing systems must be scrutinized to determine whether they are consistent with labor and antitrust laws. The application of these laws may be in conflict with each other. Therefore, the impact of these statutes on the professional sports industry must be analyzed.

II. LABOR AND ANTITRUST LAW IN PROFESSIONAL SPORTS

In analyzing the application of federal labor and antitrust law to the professional sports industry, it is important to remember that the sports context is unique in several ways. Unlike almost any other industry, in order for any sport to succeed, clubs that compete on the

²⁴ Local revenues (gate receipts, television, radio, ballpark concessions, advertising, publications, parking, suite rentals, post-season and training) are the largest single component of most clubs' annual revenue. The ratio between the teams with the highest and lowest revenues has more than doubled between 1995 and 2000. It is likely that this provision will make up the difference in competitive balance among the teams because this is where the large discrepancy in team revenue lies. *Id.* at 8, 15.

²⁵ Between 1994 and 1999, only three teams made a profit: the New York Yankees, the Cleveland Indians and the Colorado Rockies. The rest of the MLB teams have lost a total of \$1.4 billion dollars. Andrew Goodman, *Mark's Sports Law News: Baseball Commission Calls for More Revenue Sharing* (July 18, 2000), at <http://www.sportslawnews.com/archive/Articles%202000/MLBreport.htm> (last visited Feb. 10, 2002).

²⁶ Mark Feinsand, *Its Official: Giambi a Yankee; Slugger Signs Seven-Year Deal*, MLB.COM (Dec. 13, 2001), at http://www.mlb.com/NASApp/mlb/mlb/news/mlb_news_story.jsp?article_id=mlb_20011213_giambi_news&team_id=mlb (last visited Feb. 10, 2002).

²⁷ Leazer, *supra* note 12.

field must cooperate, to some extent, off the field.²⁸ In most other industries, each business owner is concerned solely with its own success. In contrast, in the sports industry each team's success is dependent upon the success of the other teams in the league, which in turn improves the product.²⁹

The professional sports industry is also unique because unlike most other employment situations, the employer has the power to implement labor-market restraints on its employees.³⁰ Although these restraints might otherwise compell employees to find alternative sources of employment, due to a limited source of alternative employers, the restraints remain. This is known as a monopsony. Monopsonies arise "when the resource is uniquely valuable in its current use, so that even if the price is depressed by monopsony, sellers [players] are unable to find alternative buyers [professional sports leagues]."³¹ For example, professional football players do not have an equivalent alternative to the National Football League (hereinafter "NFL"). While they might have other options in the Arena Football League and the like, those types of opportunities do not compare financially or competitively. Therefore, if the NFL were to implement an unfavorable restraint, NFL players would not have leverage to leave the League. Rather, much of their leverage is from labor and antitrust legal challenges.³²

Lastly, the industry of professional sports presents a situation wherein the fundamental federal policies of antitrust and labor law are in conflict with one another. Antitrust law bars any unreasonable agreements in restraint of trade, whereas labor law organizes the

²⁸ Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117-18 (1984) (explaining that a certain degree of cooperation is necessary if the type of competition that the NCAA seeks to market is to be preserved); United States v. Nat'l Football League, 116 F. Supp. 319, 323 (E.D. Pa. 1953) (explaining that the professional sports industry is unique because competitors cannot compete too hard with each other off-the-field or it would likely lead to financial failure).

²⁹ Rothstein, *supra* note 1, at 271 (citing Donald G. Kempf, Jr., *The Misapplication of Antitrust Law to Professional Sports Leagues*, 32 DEPAUL L. REV. 625, 628 (1983)).

³⁰ Marvine, *supra* note 12, at 648.

³¹ Brown v. Pro Football, Inc., 50 F.3d 1041, 1061 (D.C. Cir. 1995) (Wald, J., dissenting), *aff'd*, 518 U.S. 231 (1996).

³² Brown, 50 F.3d 1041 (Wald, J., dissenting); Marvine, *supra* note 12, at 648.

efforts of employees, usually in the form of an agreement, against their employer.³³ The following section will provide a brief introduction to antitrust and labor law.

A. Antitrust Law

Antitrust law is primarily embodied in the Sherman Act.³⁴ Section 1 of the Sherman Act states, “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”³⁵ The Supreme Court has determined that only unreasonable restraints of trade violate the Sherman Act.³⁶ Courts apply two different standards to decide if a challenged restraint is in violation of the antitrust laws. They are: a) rule of reason, or b) per se. Under the rule of reason, a court will do a comprehensive analysis of the restraint’s effect on market competition by balancing its pro-competitive and anti-competitive effects.³⁷ Alternatively, the per se rule provides that certain restraints are so anti-competitive by nature that they are inherently illegal.³⁸

³³ PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW: TEXT, CASES, PROBLEMS 189 (2d ed. 1998) [hereinafter SPORTS LAW TEXT].

³⁴ E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY, AND PROCEDURE (3d ed. 1994).

³⁵ 15 U.S.C. § 1 (1997).

³⁶ Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98 (1984) (recognizing that because all contracts are restraints of trade, Congress must have intended the Sherman Act to prohibit only unreasonable restraints of trade); Bd. of Trade of City of Chi. v. United States, 246 U.S. 231, 238 (1918); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 63 (1911).

³⁷ *Bd. of Trade*, 246 U.S. at 238. Specifically, to evaluate a restraint under a Rule of Reason analysis, a court should look at whether the restraint merely regulates and promotes competition, or suppresses and destroys competition. *Id.*

³⁸ Under a per se analysis, a court could determine that the restraint violates the Sherman Act without an inquiry into the harm that the restraint causes in the relevant market. In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940), the Court determined that any conspiracy to fix prices was a per se violation of the Sherman Act, even if the plaintiff could not show that the defendants had enough market power.

B. Labor Law

The National Labor Relations Act (hereinafter “NLRA” or the “Act”) was passed in 1935.³⁹ The Act established an administrative body, the NLRB, to serve two main functions: a) to run elections for the selection of a bargaining agent; and b) to adjudicate unfair labor practice (hereinafter “ULP”) charges.⁴⁰ The purposes of the Act are: a) to protect the public from industrial unrest that could lead to work stoppages; b) to facilitate the peaceful negotiation of labor-management disputes over wages, hours, and other terms and conditions of employment; and c) to ensure equal bargaining power between employers and employees for collective bargaining.⁴¹

The Act requires that the employer bargain with the union.⁴² This duty applies to “mandatory subjects” of collective bargaining such as wages, hours, and other terms and conditions of employment.⁴³ The

³⁹ The NLRA, also known as the Wagner Act, was originally passed in 1935. The 1947 Amendments established the NLRB. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1988)). See also *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 26-27 (Patrick Hardin et al. eds., 3d ed. 1992).

⁴⁰ 29 U.S.C. § 151 (1988).

⁴¹ *Id.*

⁴² Section 8(d) of the NLRA provides that:

“[T]o bargain collectively is the performance of 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 of employment, or the negotiation of an agreement, or any question arising there under, and the execution of a written contract incorporating any agreement reached if request by either party, but such an obligation does not compel either party to agree to a proposal or require the making of a concession.”

Section 8(d) of the NLRA. Some labor scholars have noticed, however, that “going through the motions of negotiating” undermines collective bargaining just as much as “bluntly withholding recognition.” Archibald Cox, *The Duty To Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1413 (1958); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984). There must be a distinction between surface bargaining—going through the motions with no real intent to arrive at a settlement, which is unacceptable—and hard bargaining—to stand on the ground of its negotiating position, which is totally permitted by the NLRA. SPORTS LAW TEXT, *supra* note 33, at 273.

⁴³ The duty to bargain only applies to mandatory subjects because of their increased importance to the employer/employee relationship.

duty to bargain includes the obligation to act in “good faith.”⁴⁴ The requirement to bargain over mandatory subjects remains in effect up until the collective bargaining negotiations break down.⁴⁵ The breakdown in negotiations is known as “impasse.”⁴⁶ Once impasse has occurred, the employer is permitted to unilaterally impose conditions, provided that they do not differ from pre-impasse proposals.⁴⁷ However, the duty to bargain may arise once again after the breakdown when there is a reason for the parties to negotiate again, such as when one of the parties has changed its position.⁴⁸

The subjects that are not mandatory are either illegal or permissive.⁴⁹ Illegal subjects are those that violate any law.⁵⁰ Permissive subjects include all subjects that are neither mandatory nor illegal.⁵¹ Permissive subjects present different circumstances than mandatory subjects for two significant reasons. First, the employer has no duty to discuss these topics, or to supply information about them to the union. Second, the union will not be

⁴⁴ *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943) (describing the duty as an “. . . obligation of the parties to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement, and a sincere effort must be made to reach a common ground.”).

⁴⁵ *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (even after bargaining has broken down in good faith, the duty to bargain survives and the employer must be ready to resume collective bargaining).

⁴⁶ In *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404 (1982), the 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.” *Id.* at 412.

⁴⁷ In *NLRB v. Katz*, 369 U.S. 736 (1962), the Court held that the employer violated the requirement in 8(a)(5) to bargain in good faith by unilaterally implementing policies with regard to mandatory subjects of collective bargaining (sick leave, increased wages, and merit increases) without prior discussion of those proposals. According to the Court, if the parties had not reached impasse, the unilateral imposition of mandatory terms amounts to a refusal to negotiate and is a unfair labor practice.

⁴⁸ *Charles D. Bonanno Linen Service, Inc.*, 454 U.S. at 412 (citing *Charles B. Bonanno Linen Service, Inc. v. NLRB*, 243 NLRB 1093, 1093-94 (1979)) (impasse is broken either through a change of mind or the application of economic force).

⁴⁹ *First Nat’l Maint. v. NLRB*, 452 U.S. 666, 675 n.13 (1981); *NLRB v. Wooster Div. Of Borg-Warner Corp.*, 356 U.S. 342 (1958).

⁵⁰ *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849 (5th Cir. 1986) (citing 29 U.S.C.A. § 158 (a)(5); 29 U.S.C.A. § 158(b)(3)) (noting that illegal subjects cannot be bargained over or insisted upon by either party).

⁵¹ *First Nat’l Maint.*, 452 U.S. at 675, n.13; *Borg-Warner Corp.*, 356 U.S. 342.

protected if it strikes or demands that management bargain over these subjects.⁵² The duty to bargain does not extend to decisions that involve “a change in the scope and direction of the enterprise,”⁵³ or those that lie “at the core of entrepreneurial control,”⁵⁴ even if the decisions have a direct impact on employment. This allows management the ability to make fundamental business decisions unencumbered. However, the employer still has an obligation to bargain over the effects of its business decisions on the employees.⁵⁵

III. THE LABOR EXEMPTION

As illustrated in Part II, labor and antitrust law have fundamentally different policies; hence, they may be in conflict in their application to employer-employee relationships. Specifically, if antitrust laws were to apply to the conduct of all professional sports leagues', the leagues and players associations would not be able to collectively bargain. Furthermore, systems that were created in an attempt to even out the competitive imbalance among sports teams (such as revenue sharing), would not be implemented, due to the threat of antitrust liability. Therefore, some accommodations had to be made. The labor exemption enables unions and management to negotiate over conditions of employment without fear of an antitrust violation.⁵⁶

⁵² In *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958) an employer refused to agree to the collective bargaining agreement unless the union agreed to a pre-strike voting provision and the recognition of an additional union. *Id.* at 343. The NLRB and the Supreme Court found that the provision did not involve wages, hours, or terms of employment within the meaning of 8(d) of the NLRA and therefore the employer violated the labor laws by insisting on a permissive subject. *Id.* at 349-50.

⁵³ *First Nat'l Maint. Corp.*, 452 U.S. at 677.

⁵⁴ *Fibreboard Paper Prods. v. NLRB*, 379 U.S. 203, 223, 226 (1964).

⁵⁵ In *First Nat'l Maint. Corp.*, 452 U.S. 666 (1981), the Supreme Court held that the employer had a duty to bargain about the effects of their decision to terminate a contract with one of its commercial customers, even though they had no duty to bargain about the actual decision to terminate the contract since the decision was for purely economic reasons.

⁵⁶ *Mid-Am. Reg'l Bargaining Ass'n v. Will Cty. Carpenters Dist. Council*, 675 F.2d 881, 890 n.22 (7th Cir. 1982) (“The exemptions would serve little purpose in furthering national labor policy if employers risked liability under the antitrust laws for entering into collective bargaining agreements.”).

There are two different labor exemptions from antitrust law – statutory and non-statutory. In the following section, the statutory labor exemption and the limited scope of its application will be described. Next, the purpose of the non-statutory labor exemption will be reviewed. In the third part, two precedent-setting Supreme Court cases will be examined to reveal the foundation of the non-statutory exemption. Finally, the non-statutory labor exemption will be described as it has been applied in a few key sports cases.

A. The Statutory Labor Exemption

The statutory labor exemption from antitrust laws reflects the federal government's strong interest in preserving the national labor policy.⁵⁷ This exemption asserts that labor unions are not

⁵⁷ The labor exemption exists in various sections of the antitrust laws. 15 U.S.C. § 17 (1982); 29 U.S.C. § 52 (1982); 29 U.S.C. § 104 (1982); 29 U.S.C. § 105 (1982); 29 U.S.C. § 113 (1982). These provisions include:

Section 6 of the 1914 Clayton Act:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust law 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; 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.

15 U.S.C. § 17 (1982). Section 20 of the Clayton Act:

No restraining order or injunction shall be granted by any court of the United States . . . involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law.

29 U.S.C. § 52 (1982). Section 104 of the Norris-LaGuardia Act:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing . . . any of the following act: (a) Ceasing or refusing to perform any work or to remain in any relation of employment; (b) Becoming or remaining a member of any labor organization, or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title.

combinations or conspiracies in restraint of trade under section 1 of the Sherman Act.⁵⁸ Other parts of the statutory labor exemption protect collective action by a union, such as strikes, picketing, and boycotts.⁵⁹

The statutory exemption establishes that labor unions are not conspiracies or combinations in restraint of trade, and it protects collective activity by unions furthering union interests and labor policy, even where it is anti-competitive.⁶⁰ The statutory labor

29 U.S.C. § 104 (1982). Section 105 of the Norris-LaGuardia Act:

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

29 U.S.C. § 105 (1982). Section 113 of the Norris-LaGuardia Act:

A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct, or indirect interests therein, or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (a) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or association of employers; or (3) between one or more employees or associations of employees and one or more employees and associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' . . . of 'persons participating or interested' therein . . . (b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry therein, or is a member, officer or agent of any association composed in whole or in part of employers, or employees engaged in such industry, trade, craft or occupation. (c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113 (1982).

⁵⁸ See *supra* note 57 (§ 6 of the Clayton Act); see also *supra* note 36 and accompanying text.

⁵⁹ See *supra* note 57 (§ 20 of the Clayton Act); see also SPORTS LAW TEXT, *supra* note 33, at 190-91.

⁶⁰ *Mackey v. Nat'l Football League*, 543 F.2d 606, 611 (8th Cir. 1976) *cert. denied*, 434 U.S. 801 (1977); *Marvine*, *supra* note 12, at 638.

exemption does not cover concerted activity or agreements when a labor organization ceases to act as a labor group or when it enters into an illegal combination with a non-labor group.⁶¹ While it may seem counter-intuitive, the statutory labor exemption enables union activity to obtain a labor agreement, such as a strike, even though it does not protect the collective bargaining agreement.⁶² The narrow scope of the statutory labor exemption is problematic in most industries, including professional sports. As a result, the Supreme Court developed the non-statutory labor exemption to cover other legitimate labor practices not covered in the statutory labor exemption.

B. The Purpose of the Non-Statutory Labor Exemption

The non-statutory labor exemption was created by the Supreme Court to extend the labor exemption to collective bargaining activities not covered in the statutes.⁶³ The Supreme Court said,

[I]t 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 result mutually acceptable.⁶⁴

This exemption covers certain union-employer collective bargaining agreements, and has been used as a defense by sports

⁶¹ Norris-LaGuardia Act, 20 U.S.C.A. § 101; *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 714-15 (1981) (explaining that statutory antitrust immunity is forfeited when a union combines with one or more employers in an effort to restrain trade); *see also* *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). The statutory exemption does not apply when a union combines with a non-labor group. *Id.*

⁶² SPORTS LAW TEXT, *supra* note 33, at 190-91.

⁶³ *See infra* Part III-C.

⁶⁴ *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996).

leagues in many antitrust challenges by players and players' associations.⁶⁵

C. Supreme Court Precedent for the Non-Statutory Labor Exemption

The Supreme Court was the first to extend the non-statutory labor exemption to collective bargaining agreements between employers and unions.⁶⁶ As discussed previously, there are conflicting interests between labor and antitrust laws. On the one hand, labor policy preserves the rights of a union to better its conditions through collective bargaining.⁶⁷ On the other hand, the chief purpose of antitrust law is to prevent collective, anti-competitive behavior.⁶⁸ The Court's conclusions suggest that where labor policies are advanced properly, anti-competitive market interference will be tolerated.

The next section will review *Local 189, Amalgamated Meat Cutters and Butcher Workmen of N. Am. v. Jewel Tea, Inc.*⁶⁹ and *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*,⁷⁰ two Supreme Court cases that have addressed the non-statutory labor exemption.

⁶⁵ *Brown*, 518 U.S. 231; *Nat'l Basketball Ass'n v. Williams*, 45 F. 3d 684 (2d Cir. 1995); *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987); *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979); *Mackey v. Nat'l Football League*, 543 F.2d 606, 611-12 (8th Cir. 1976) (citing *Local 189, Amalgamated Meat Cutters and Butcher Workmen of N. Am.*, *AFL-CIO v. Jewel Tea Co.*, 381 U.S. 676, 729-30 (1965)); *Powell v. Nat'l Football League*, 690 F. Supp. 812 (D. Minn. 1988).

⁶⁶ *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975); *Jewel Tea*, 381 U.S. 676 (1965); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797 (1945).

⁶⁷ *Allen Bradley*, 325 U.S. at 806.

⁶⁸ THOMAS SULLIVAN & JEFFREY L. HARRISON, *UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS* 1.02 (3d ed. 1994) (discussing the broad policy reasons for the antitrust laws).

⁶⁹ 381 U.S. 676 (1965).

⁷⁰ 421 U.S. 616 (1975).

1. Local 189, Amalgamated Meat Cutters and Butcher Workmen of North America v. Jewel Tea, Inc.

In *Jewel Tea*,⁷¹ the Plaintiff, a meat retailer and a member of a multi-employer bargaining unit, challenged a marketing-hours restriction incorporated in an industry-wide collective bargaining agreement. The Defendant Union, as a representative of butchers in the Chicago area, insisted on a provision that restricted the sale of fresh meat to daytime hours, to protect the unionized butchers from employer pressures to work at night. The Plaintiff claimed the restriction violated sections 1 and 2 of the Sherman Act by impeding his ability to compete freely and effectively in the product market. Justice White, writing for the Supreme Court, held that because the marketing-hours restriction furthered national labor policy and was a mandatory subject of collective bargaining negotiated through arm's-length bargaining, the union-employer agreement was exempt from antitrust scrutiny.⁷²

2. Connell Construction v. Plumbers & Steamfitters

In *Connell*,⁷³ the Union picketed and then contracted with Connell, a general contractor, to subcontract work only to firms that had a current agreement with the Defendant Union. At the time of the contract, Connell did not have any employees that were represented by the Union. The contract made the employee non-members of the Defendant Union ineligible to compete for Connell's available work. Although the Court recognized the need for a limited non-statutory exemption from antitrust scrutiny,⁷⁴ the Union's goal, which was to efficiently organize as many subcontractors as possible, did not serve to further the labor policies of the non-statutory labor exemption.⁷⁵ The restraint dealt with, and adversely affected, non-members of the Defendant Union, which failed to promote labor policy, i.e., to

⁷¹ 381 U.S. 676 (1965).

⁷² *Id.* at 689-92.

⁷³ 421 U.S. 616 (1975).

⁷⁴ *Id.* at 622.

⁷⁵ *Id.* at 624-25.

accomplish union objectives for its own members.⁷⁶ In addition, the restraint had substantial anti-competitive consequences on the industry. It “contravene[d] antitrust policies to a degree not justified by congressional labor policy, and therefore [could not] claim a non-statutory labor exemption from the antitrust laws.”⁷⁷ While the Court recognized that the goals of federal labor law could never be achieved if ordinary anti-competitive effects of collective bargaining were held to violate the antitrust laws, these circumstances were very different. Thus, the Court recognized the existence of the non-statutory labor exemption, but held that it did not apply.

D. The Application of the Non-Statutory Labor Exemption to Sports

The professional sports industry has had numerous opportunities to test the scope of the non-statutory labor exemption. Many sports cases involved legal challenges to league attempts to even out the competitive imbalance among teams by such means as revenue sharing, the salary cap, and the draft. Relying on the Supreme Court’s guidance as to the scope of the non-statutory labor exemption, lower courts have applied the non-statutory labor exemption to professional sports. The following section focuses on the standards developed by two different circuits in *Mackey v. National Football League*⁷⁸ and *Wood v. National Basketball Association*,⁷⁹ and then discusses the Supreme Court’s refinement of the application of the non-statutory labor exemption in *Brown v. Pro Football, Inc.*⁸⁰

1. Mackey v. National Football League

In *Mackey*,⁸¹ several NFL players filed a lawsuit against the League, its member teams, and the NFL commissioner. They

⁷⁶ *Id.* at 622.

⁷⁷ *Id.* at 623.

⁷⁸ 543 F.2d 606 (8th Cir. 1976).

⁷⁹ 809 F.2d 954 (2d Cir. 1987).

⁸⁰ 518 U.S. 231 (1996).

⁸¹ 543 F.2d 606 (8th Cir. 1976).

challenged what was known as the “Rozelle Rule,” which required a franchise signing a player who had played out his option year to compensate the player’s former franchise in the form of cash, player contracts, or draft picks. Although the Rozelle Rule had been in effect during the 1968 and 1970 collective bargaining agreements, the Players Association rejected the provision when the 1970 contract expired.

Relying on the establishment of the non-statutory labor exemption by the Supreme Court,⁸² the Eighth Circuit Court of Appeals developed and applied a three-prong test (hereinafter “Mackey Test”) to determine when a labor-management agreement in the sports industry would be afforded non-statutory immunity from antitrust review.⁸³ 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.”⁸⁴ Second, “federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining.”⁸⁵ And third, “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 a product of bona fide arm’s-length bargaining.”⁸⁶

In applying the Mackey Test, the court held that the Rozelle Rule did not fall within the non-statutory labor exemption and was

⁸² See *supra* Part III-C.

⁸³ *Mackey*, 543 F. 2d at 613. In doing so, the court affirmed the notion that the non-statutory labor exemption is applicable to an employer, even though that is a non-labor group, when the circumstances furthered federal labor policy. *Id.* at 612-13 (relying on *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3d Cir. 1974) (stating: “We reject Scooper Dooper’s contention that the labor exemption is unavailable to employers . . . To preserve the integrity of the negotiating process, employers who bargain in good faith must be entitled to claim the antitrust exemption.”)). See also *Phil. World Hockey Club, Inc. v. Phil. Hockey Club, Inc.*, 351 F. Supp. 462, 499 (E.D. Pa. 1972).

⁸⁴ *Mackey*, 543 F.2d at 613 (citing *Connell Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1976); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Local 189, Amalgamated Meat Cutters and Butcher Workmen of N. Am. v. Jewel Tea, Inc.* 381 U.S. 676 (1965)).

⁸⁵ *Id.* (citing *Jewel Tea*, 381 U.S. 676; *Pennington*, 381 U.S. 657).

⁸⁶ *Id.* (citing *Jewel Tea*, 381 U.S. 676).

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therefore subject to antitrust review.⁸⁷ The court found that the provision passed prong one, that the Rozelle Rule affected only the parties to the bargaining relationship. Similarly, it passed prong two, because it was a mandatory subject of collective bargaining. However, the court found that it failed prong three, stating that the Rozelle Rule had not been the subject of bona fide arm's-length bargaining for either the 1968 or the 1970 agreement, because the provision imposed significant restrictions on the players to which they would never have agreed in good faith bargaining. Even though the NFL claimed that the provision was quid pro quo for the right of players to negotiate their own salaries and for increased pension benefits, the court determined that there was no such quid pro quo, and that there had been inadequate arm's-length bargaining.⁸⁸

2. *Wood v. National Basketball Association*

In *Wood*,⁸⁹ Leon Wood, a successful college basketball player, brought an antitrust suit alleging that certain provisions of the agreement between the NBA and the NBPA, including the salary cap, college draft, and prohibition of player corporations, constituted a violation of section 1 of the Sherman Act. The salary cap provided that if a team went over the cap, it was only permitted to offer a new player a one-year contract for the minimum salary of \$75,000. Even though Wood was a first-round draft pick of the Philadelphia Seventy-Sixers, the team was already over the cap, so it was forced to offer him the minimum salary. Wood brought this suit claiming that he would suffer the irreparable injury of either: a) being forced to sign at far below his market value, or b) having to forego playing basketball altogether for one year.

The district court found that the provisions affected only the parties to the collective bargaining agreement, and involved mandatory subjects of bargaining. It also found that the provisions

⁸⁷ *Id.* at 616 (finding that the Rozelle Rule contravenes the rule of reason and therefore is an unreasonable restraint of trade in violation of section 1 of the Sherman Act).

⁸⁸ *Id.* at 615-16.

⁸⁹ 809 F.2d 954 (2d Cir. 1987).

were the result of bona fide collective bargaining.⁹⁰ The Second Circuit Court of Appeals affirmed the district court's determination that the non-statutory labor exemption applied.

Judge Winter, writing for the court, denied Woods' claim that he could have received his full market value absent the salary cap because that argument was at odds with federal labor policy.⁹¹ An individual member of a union seeking to challenge a labor agreement runs contrary to one of the fundamental policies of labor law, that is, that employees may eliminate "individual-competition" through the selection of an exclusive bargaining representative.⁹² National labor policy favors the collective bargaining agreement over individual needs.⁹³ Therefore, Wood had no right to bargain on his own behalf since it would have violated the collective bargaining agreement.

Judge Winter rejected Wood's argument that the draft and salary cap were illegal because they affected employees outside the bargaining unit, such as players in the draft who were not yet in the NBA.⁹⁴ The court determined that the term "employee" included those outside the bargaining unit.⁹⁵ For these reasons, the restraints were shielded from antitrust scrutiny.

⁹⁰ Wood v. Nat'l Basketball Ass'n, 602 F. Supp. 525, 528 (S.D.N.Y. 1984) *aff'd*, 809 F.2d 954 (2d Cir. 1987). The district court applied the Mackey Test to find that the labor exemption applied.

⁹¹ Wood, 809 F.2d at 959-60 (2d Cir. 1987).

⁹² *Id.* at 959 (citing NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967)).

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 bargaining agreement than he or she would through individual negotiations.

See also 29 U.S.C. § 159(a). Section 9(a) of the NLRA states, "representatives . . . selected . . . by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining." J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

⁹³ Wood, 809 F.2d at 961.

⁹⁴ *Id.* at 960 (refuting Wood's argument that the draft and salary cap are illegal because they affect employees outside the bargaining unit by saying that the NLRA explicitly defines "employee" to include workers outside the bargaining unit).

⁹⁵ Wood, 809 F.2d at 960.

The test used in *Wood* and the Mackey Test, though differently formulated, are not necessarily contradictory. In *Wood*, Judge Winter recognized the similarities and differences between his decision and others. He wrote, “[v]irtually all of the courts that have addressed the present issues have reached a conclusion similar to ours, although on somewhat different grounds.”⁹⁶ The main factual difference between these cases is that in *Wood*, the existing collective bargaining agreement contained challenged provisions, whereas in *Mackey*, the collective bargaining agreement that contained the challenged provisions had expired. The *Mackey* court concluded that the labor exemption did not apply because the provision had not been properly negotiated before the agreement had expired. Therefore, it would be impossible to predict the outcome of either case if the facts had been different, such as if there had been a valid agreement in effect, or if the NFL had negotiated the Rozelle Rule to impasse before implementing it.

In Part V, Section B, this paper will address the issue of whether the labor exemption is applicable in the event that a mandatory subject has been negotiated to impasse and unilaterally implemented by the employer. To have reached impasse, the parties would have had to have participated in bona fide, good-faith bargaining, thus presenting a factual situation different from *Mackey*.⁹⁷ Fortunately, the Supreme Court granted certiorari in *Brown v. Pro Football, Inc.*⁹⁸ and provided more guidance and clarity on this question.

3. *Brown v. Pro Football, Inc.*

In *Brown*,⁹⁹ the club owners wanted to institute a policy permitting

⁹⁶ *Id.* at 962 n.6 (citing *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979); *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976)).

⁹⁷ See *supra* Part III-D-1. In *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), the Rozelle Rule did not receive immunity from the antitrust laws because the court determined that the parties did not participate in good faith collective bargaining. *Id.*

⁹⁸ 518 U.S. 231 (1996). Before granting certiorari in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), the Supreme Court denied certiorari in *Williams v. National Basketball Association*, 518 U.S. 1016 (1996) and *Mackey v. National Football League*, 434 U.S. 801 (1977).

⁹⁹ 518 U.S. 231 (1996).

each club to set up a developmental squad.¹⁰⁰ These players would have been paid a non-negotiable salary of \$1,000 per week to play in practice games, and sometimes to substitute for injured players. The League bargained to impasse with the National Football League Players' Association (hereinafter "NFLPA") and then unilaterally implemented the terms of its last good-faith bargaining offer. The Court determined that the non-statutory labor exemption shielded this action from antitrust scrutiny.

The Court rationalized its determination by noting that labor law protects unions from the harm that antitrust law seeks to prevent; therefore, there was no harm in granting antitrust immunity where labor law policies were being furthered. It is undisputed in labor law, by both the NLRB and the courts, that after impasse, an employer can unilaterally implement changes as long as they are no more or less favorable than the pre-impasse proposals.¹⁰¹ If an employer alters the terms of an implemented provision (from the last rejected proposal), that would be considered a failure to bargain in good faith and a ULP.¹⁰²

In *Brown*, the Court identified a fundamental problem in the application of antitrust law to labor relationships. It noted that if all employers (in the multi-employer bargaining unit) were to impose the terms of their last joint offer upon impasse, they would be inviting an antitrust lawsuit based on the premise that identical behavior may violate the antitrust laws.¹⁰³ On the other hand, if any or all employers, as individuals, would impose their own terms upon impasse, they would be inviting a ULP charge.¹⁰⁴ This would create a situation in which employers could not predict the legal effects of their bargaining positions.

¹⁰⁰ This system was called Resolution G-2. It established that the developmental squad would constitute up to six rookie or "first year" players, who, as free agents, had failed to secure a position on the regular player roster.

¹⁰¹ *Brown*, 518 U.S. at 238.

¹⁰² *Id.* at 238-39 (where employer has not bargained in good faith, it may not implement a term of employment upon impasse).

¹⁰³ *Id.* at 241.

¹⁰⁴ *Id.* at 241-42.

The Court held that the non-statutory labor exemption shields a multi-employer bargaining unit from antitrust attack when it unilaterally implements, after impasse, the terms of its last good-faith offer.¹⁰⁵ However, the holding was limited. The ruling stated,

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 [collective bargaining] process.¹⁰⁶

Although not explicitly, the Court, in essence, applied the Mackey Test. It stated that the agreement “grew out of, and was related to, the lawful operation of the bargaining process [prong three]. It involved a matter that the parties were required to negotiate collectively [prong two]. And it concerned only the parties to the collective bargaining relationship [prong one].”¹⁰⁷ The Supreme Court decision in *Brown* has become the final authority on the application of the non-statutory labor exemption to professional sports restraints.

IV. IS REVENUE SHARING A MANDATORY OR PERMISSIVE SUBJECT?

To apply the non-statutory labor exemption to revenue sharing, one must first determine whether it is a mandatory or a permissive subject. This determination is necessary because some courts have required that the subject be mandatory for the labor exemption to apply.¹⁰⁸ Others have remained silent on the issue.¹⁰⁹ And still

¹⁰⁵ *Id.* at 235-50.

¹⁰⁶ *Id.* at 250.

¹⁰⁷ *Id.*

¹⁰⁸ See *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976).

¹⁰⁹ See *Nat'l Hockey League and its Constituent Member Clubs and Nat'l Hockey League Players Ass'n*, (NLRB, Div. of Judges, 1999, unpublished opinion) [hereinafter *Nat'l Hockey League Case*].

others have extended the labor exemption to permissive subjects that are contained in a labor agreement.¹¹⁰ In any case, to determine whether the antitrust laws apply to revenue sharing, the question of whether revenue sharing is a mandatory or permissive subject should be answered.

The question of whether a revenue-sharing system between owners is a mandatory or permissive subject has only been addressed once.¹¹¹ The issue was litigated in *National Hockey League and its Constituent Member Clubs and National Hockey League Players Association*, (hereinafter “*National Hockey League*”) but the court did not make a determination because the NHLPA had waived its right to assert its claims.¹¹² Although the court in *Wood*¹¹³ found that “revenue sharing” was a mandatory subject of collective bargaining,¹¹⁴ *Wood* involved sharing between NBA owners and players.¹¹⁵ This is an important distinction because the revenue-sharing program in *Wood* directly involved player money, whereas in *National Hockey League*, the effect of revenue sharing on player salaries was secondary. A mandatory subject must “settle an aspect of the relationship between the employer and employees”¹¹⁶ and the revenue-sharing system this paper is analyzing concerns the owners’ relationship, not the owner-player relationship. To determine whether revenue sharing among owners is a mandatory or permissive subject, it is helpful to study *National Hockey League* because it outlines the arguments for both sides.

¹¹⁰ See *Feather v. United Mine Workers of Am.*, 711 F.2d 530, 542 (3d Cir. 1983); *James Julian, Inc. v. Raytheon Co.*, 593 F. Supp. 915 (D.C. Del. 1984).

¹¹¹ *Wood* addressed revenue sharing but that involved sharing between players and clubs. Also, there were cases that addressed systems instituted to rectify competitive imbalance, such as, the Rozelle Rule and the draft, but no cases have address revenue sharing among owners specifically. See *Mackey*, 543 F.2d 606; *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954 (2d Cir. 1987).

¹¹² *Nat’l Hockey League Case*, *supra* note 109.

¹¹³ 809 F.2d 954.

¹¹⁴ *Id.* at 962.

¹¹⁵ In *Wood*, the revenue-sharing system allocated a minimum percentage of league revenue to the players, thus creating a direct effect on the players. *Id.*

¹¹⁶ *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 178 (1971).

A. National Hockey League and its Constituent Member Clubs and National Hockey League Players Association

In *National Hockey League*,¹¹⁷ the National Hockey League Players Association (hereinafter “NHLPA”) filed ULP charges for various acts by the National Hockey League (hereinafter “NHL”), one of which included a revenue-sharing system. The revenue-sharing system was developed because Canadian small-market teams were having difficulty retaining their players after free agency, due to competition from big-market teams, specifically in the right of first refusal context.

In the NHL, there was a system in place that gave an incumbent team the right to offer a player a new contract that included a right of first refusal when the contract expired. This gave the incumbent team a right to match another team’s offer.¹¹⁸ Offers from other teams were often crafted to make it difficult for the incumbent team to match.¹¹⁹ As the value of the Canadian dollar dropped against the U.S. dollar, the Canadian small-market teams’ difficulty in retaining players increased. The discrepancy in the value of the Canadian dollar impeded the League’s ability to keep financially successful franchises in Canada, and it was necessary that it be dealt with through supplemental financing by the NHL. There were many reasons that it was crucial for the League to support having financially viable franchises in Canada. For example, the NHL received more television revenue from the seven teams located in Canada than it did from the nineteen teams located in the United States, not to mention the fact that hockey originated in Canada.¹²⁰ To combat this increasing discrepancy, the League proposed a program to the NHLPA wherein a Canadian team could match the U.S. offer in an equivalent amount of Canadian dollars.

¹¹⁷ Nat’l Hockey League Case, *supra* note 109.

¹¹⁸ The right of first refusal meant that the incumbent team had a right to match an offer by another club within seven days, or in the absence of a matching offer, to draft picks as compensation.

¹¹⁹ Nat’l Hockey League Case, *supra* note 109, at 4.

¹²⁰ *Id.*

The NHLPA rejected this offer and proposed an alternative currency equalization plan in which the League and the NHLPA would contribute money to a fund to help small-market Canadian teams compensate for the currency differential. There was no agreement reached and the currency equalization plan was not negotiated again.¹²¹

In July 1995, the NHL Board of Governors unilaterally adopted its proposed revenue-sharing system (hereinafter "Plan"). It had two phases. Phase One was the Group II Equalization Plan¹²² wherein small-market Canadian teams would receive a subsidy based on a precise formula to match the other team's offer so that the incumbent could compete for its players.¹²³ Phase Two of the Plan funded Canadian teams in the bottom half of League revenues. There were many eligibility requirements for Phase Two, one of which was that the teams' player payroll had to be at or below the average team payroll in the League to receive the full level of assistance. This was referred to as the "player payroll" provision. Teams with higher player payrolls received less funding.¹²⁴

The NHLPA claimed it had no knowledge of the Plan until December 22, 1995 when the League faxed a copy of a memorandum to the NHLPA detailing the Plan. However, the Plan had been widely publicized prior to December 1995.¹²⁵ In March 1996, the NHLPA advised the NHL that they objected to Phases One and Two of the Plan, and specifically to the "player payroll" limitations of Phase Two. In October 1997, the NHL issued a resolution that deleted the "player payroll" aspect of Phase Two

¹²¹ *Id.* at 5-6.

¹²² The Plan defined the eligible teams as those Canadian teams who match a Group II offer sheet from a U.S. team and who are in the bottom two-thirds of the NHL in team revenues.

¹²³ The formula was: the amount of compensation, converted to Canadian dollars, contained in the offer sheet; less the player's prior season's compensation, converted to Canadian dollars, or the Canadian team's qualifying offer, converted to Canadian dollars, whichever is greater; multiplied by the prevailing conversion rate between Canadian and U.S. dollars. Nat'l Hockey League Case, *supra* note 109, at 6. In the 1995-96 season, the League funded Phase One with \$7 million from League generated revenues. *Id.*

¹²⁴ *Id.* at 11. In the 1996-97 season, funding was estimated at \$7.5 million. *Id.*

¹²⁵ *Id.* at 14-18.

because the NHL agreed that the provision “providing for reductions in subsidies based on a club’s payroll exceeding the League average payroll, constituted a mandatory subject for the purposes of collective bargaining under section 9(a) of the Act.”¹²⁶

In its findings, the NLRB held that the NHLPA consented to the continuation of the other eligibility requirements of Phase Two, absent the “player payroll” requirement.¹²⁷ Therefore, the League did not violate section 8(a)(5) with its implementation of the non-player payroll provisions of Phase Two. However, the NHL violated 8(a)(5) with its implementation of the player payroll provision of Phase Two, which had remained in effect from January 1996 until October 1997 when the NHL stipulated that the player payroll provision was a mandatory subject of collective bargaining.¹²⁸

The NHLPA argued that Phase One and its revenue-sharing system was a mandatory subject because it affected player mobility, which is a critical term and condition of employment.¹²⁹ As discussed, the court did not decide the merits of this issue; rather, it dismissed the claim by finding that the NHLPA’s ULP charge was untimely with regard to Phase One, since the filing and service was six months and three days after the NHLPA was “incontrovertibly on notice” of the alleged ULP.¹³⁰

This case analysis illustrates the typical arguments advanced by sports leagues and players’ associations with regard to a revenue-sharing system. Unfortunately, the issue of Phase One was avoided in *National Hockey League*, and it left the following conflicting conclusions, either: a) Phase One’s revenue-sharing system was a mandatory subject, but the duty to bargain was waived by the Players Association; or b) Phase One’s revenue-sharing system was a permissive subject, and thus, there was no requirement to bargain, regardless of the waiver. As a result, the task of determining

¹²⁶ *Id.* at 11-12.

¹²⁷ *Id.* at 19-20.

¹²⁸ *Id.*

¹²⁹ Nat’l Hockey League Case, *supra* note 109, at 12.

¹³⁰ *Id.* at 18.

whether revenue sharing is a mandatory or permissive subject remains.

B. Revenue Sharing Is Not a Mandatory Subject—It Is Permissive Because It Does Not Affect the Players' Terms and Conditions of Employment

Section 8(a)(5) and section 8(d) of the NLRA require bargaining only with respect to “issues that settle an aspect of the relationship between the employer and the employee.”¹³¹ These issues have been termed mandatory subjects of collective bargaining, and include subjects such as “wages, hours and other terms and conditions of employment.”¹³² Permissive subjects may be raised at the bargaining table to be discussed in good faith, and they may be incorporated into an enforceable agreement, but cannot be insisted upon by either party at impasse.¹³³ The relationship between revenue sharing and the players' terms and conditions of employment is too speculative to make revenue sharing a mandatory subject of collective bargaining.

Despite this indirect relationship, some may argue that a revenue-sharing system does not affect the players' terms and conditions of employment on its face, but it has the effect of limiting player salaries and therefore is mandatory. In *Mackey*,¹³⁴ to determine whether the Rozelle Rule was a mandatory subject, the court recognized that on its face, the Rozelle Rule does not deal with wages, hours and other terms or conditions of employment;¹³⁵ but the practical effect of the Rule restricted player mobility and decreased player salaries, and therefore, it was found to be a mandatory subject of collective bargaining.¹³⁶ However, the application of the

¹³¹ *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 178 (1971); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

¹³² *Borg-Warner Corp.*, 356 U.S. at 349.

¹³³ *Id.*

¹³⁴ 543 F.2d 606 (8th Cir. 1976).

¹³⁵ *See supra* Part III-D-1. The Rozelle Rule is a system that required a franchise, signing a player who had played out his option year, to compensate the player's former franchise.

¹³⁶ *Mackey*, 543 F.2d at 615.

“practical effect” test to revenue sharing is less direct than with the Rozelle Rule. There are two ways that revenue sharing could affect the players’ terms and conditions of employment. First, if team owners are required to share revenue, they will not have as much money to pay player salaries. However, this argument is based on the assumption that team owners operate with a limited pool of funds.

Second, team owners might not pay for high-priced players because they may not reap the financial rewards of having those players on their rosters. For example, if the Yankees were to sign Derek Jeter for an exorbitant amount of money, and were required to share local revenues (which arguably would be higher if Jeter were on the roster), then the Yankees might lose their incentive to bid on such high-priced players. However, the validity of this argument is based on a number of assumptions. First, that club owners who have the money to spend, and would have been willing to spend it absent revenue sharing, would not spend it if there was revenue sharing. Second, that team owners would only spend money on top players to make money. And third, that television broadcast contracts, merchandise licensing contracts, and gate receipts would increase as a direct result of signing an individual player.

The validity of each of these assumptions is questionable. Club owners who have the money, might spend it on player salaries even with revenue-sharing measures in effect.¹³⁷ There are many reasons that team owners spend money on particular players aside from wanting to reap the financial benefits of having that player on the roster, such as their passion for the game,¹³⁸ having their teams perform better in the season, and fulfilling their egos.¹³⁹ Most

¹³⁷ In MLB, since the collective bargaining agreement went into effect with their system of revenue sharing, the average player salary has increased from \$1.3 million in 1997 to almost \$2 million in 2000. Jerry Crasnick, *Union Exercises Contract Option Through 2001* (Aug. 29, 2000), at <http://www.detnews.com/2000/tigers/0008/29/sports-112447.htm> (last visited Feb. 1, 2002).

¹³⁸ Steven H. Lee, *Team Owners Sound Off at University of Texas*, DALLAS MORNING NEWS (Apr. 5, 2001) (Mark Cuban, owner of the Dallas Mavericks said, “If you don’t love it as a sport, you won’t love it as a business, sports is a business of passion.”), at http://www.bus.utexas.edu/news/pressreleases/sports_panel.asp (last visited Feb. 10, 2002).

¹³⁹ Mike Bianchi, *A Hunger Beyond The Game Text*, ORLANDO SENTINEL, Nov. 10,

importantly, much of the external revenue received by team owners relates to whether the team is in a big or small market, not whether a team has a specific player on the roster.¹⁴⁰

The practical effect of revenue sharing on player contracts is arguably too remote to make this a mandatory subject of collective bargaining. Management is only required to bargain over a subject when its “relation to conditions of employment is close and immediate, not remote or merely esthetical.”¹⁴¹ Therefore, it is likely that revenue sharing is a permissive subject of collective bargaining. This paper will now address the issue of the labor exemption as it applies to mandatory and/or permissive subjects of collective bargaining.

V. WHETHER THE LABOR EXEMPTION APPLIES TO MANDATORY AND/OR PERMISSIVE SUBJECTS?

Although Part IV concluded that revenue sharing is likely to be a permissive subject, in practice, it is difficult to predict what a court would actually determine because a court has never directly addressed this issue.¹⁴² In the application of the labor exemption to revenue sharing, there are two questions to analyze. First, if revenue sharing is found to be permissive, as this paper has argued, and a revenue-sharing provision is negotiated into a labor agreement, would the labor exemption apply? And second, if revenue sharing is found to be mandatory, contrary to the conclusions of Part IV, and is

2001, available at 2001 WL 28422425 (stating that owners own sports teams for their egos not for business purposes).

¹⁴⁰ Paul Evan Kovatis, *Soaring Baseball Pay Points To Declining Values – Speaking Up*, THE STAR LEDGER, Mar. 27, 2001, available at 2001 WL 16670394 (reporting that big market teams remain unaffected by fans who are bitter about competitive imbalance and overpaid players because of their cable television revenues and corporate season ticket plans, which almost guarantee the outrageous salaries that the teams are paying their players).

¹⁴¹ Nat'l Football League Mgmt. Council and Nat'l Football League Players Ass'n, 203 NLRB 958, 962 (1973), *remanded on other grounds*, 503 F.2d 12 (9th Cir. 1974).

¹⁴² See *supra* Part IV.

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unilaterally implemented by the employer, would the labor exemption apply?¹⁴³

A. The Labor Exemption Does Not Apply to Permissive Subject Provisions in a Labor Agreement

If revenue sharing is determined to be a permissive subject, it is questionable whether the labor exemption would apply when the provision is negotiated into a labor agreement. There is conflicting authority as to whether the non-statutory labor exemption applies to permissive subjects of collective bargaining when the permissive subject provision is in the labor agreement.¹⁴⁴

There are a plethora of cases suggesting that the subject must be mandatory to have the labor exemption apply. In *Mackey*,¹⁴⁵ prong two of the three-prong test to determine whether the labor exemption applies was that the challenged provision must have been a mandatory subject of collective bargaining.¹⁴⁶ In *Brown*,¹⁴⁷ the Court said that in order to have the labor exemption apply, one of the necessary prerequisites was that, “it involved a matter that the parties were required to negotiate collectively.”¹⁴⁸ These cases relied upon the foundation of the labor exemption in the Supreme Court. In *Jewel Tea*,¹⁴⁹ the Court held that the subject had to be mandatory to have the labor exemption apply. However, the grounds for this last holding may be questionable.

Justice White stated in *Jewel Tea*, “if the unions had made such a [permissive] demand and Jewel had agreed and the United States or an injured party had challenged the agreement under the antitrust

¹⁴³ It is not necessary to analyze the hypothetical scenario if revenue sharing is mandatory and it is in the agreement, because it is obvious that the labor exemption would apply. In addition, it is not necessary to analyze if revenue sharing is permissive and not in the agreement, because it is obvious that the labor exemption would not apply.

¹⁴⁴ See *Feather v. United Mine Workers of Am.*, 711 F.2d 530 (3d Cir. 1983); see also *James Julian, Inc. v. Raytheon Co.*, 593 F. Supp. 915 (D.C. Del. 1984).

¹⁴⁵ 543 F.2d 606 (8th Cir. 1976).

¹⁴⁶ See *supra* Part III-D-1.

¹⁴⁷ 518 U.S. 231 (1996).

¹⁴⁸ See *supra* Part III-D-3.

¹⁴⁹ 381 U.S. 676 (1965).

laws, we *seriously doubt* that either the union or Jewel could claim immunity by reason of the labor exemption”¹⁵⁰ The Court relied on this statement to determine that the labor exemption applied to the marketing-hours provision, because it was mandatory. Although the holding required the subject to be mandatory, the analysis is weak. The source of the requirement to make the subject mandatory was the Court’s “doubt” that a permissive subject could be shielded from antitrust scrutiny. Due to the lack of certainty regarding this aspect of the rationale, it is necessary to investigate the issue further.

In *Feather v. United Mine Workers of America*,¹⁵¹ the court recognized that the non-statutory labor exemption “generally applies when a union, acting with a non-labor party seeks to attain goals which are mandatory *or permissive* subjects of bargaining under the National Labor Relations Act, unless the Union acts with predatory anti-competitive purpose.”¹⁵² If this were the standard, a permissive subject could receive antitrust immunity as long as there were no predatory anti-competitive purposes. As discussed, the intent of revenue sharing is to rectify the competitive imbalance in professional sports, which is not a “predatory” anti-competitive purpose. Rather, its purpose is to prevent the product from becoming so unsuccessful that the only alternative is insolvency.

The court cited the Supreme Court in *Connell* and *Pennington* to support this proposition, but those decisions did not support the court’s conclusion.¹⁵³ In *Connell*, the Court did not specify whether the non-statutory labor exemption applied to permissive as well as mandatory subjects. It only said, “a proper accommodation between the congressional policy favoring collective bargaining under the National Labor Relations Act, and the congressional policy favoring free competition in business markets requires *that some union-employer agreements* be accorded limited non-statutory exemption

¹⁵⁰ *Jewel Tea*, 381 U.S. at 689 (emphasis added).

¹⁵¹ 711 F.2d 530 (3d Cir. 1983).

¹⁵² *Feather v. United Mine Workers of Am.*, 711 F.2d 530, 542 (3d Cir. 1983) (emphasis added) (citing *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965)).

¹⁵³ *Feather v. United Mine Workers of Am.*, 711 F.2d 530, 542 (3d Cir. 1983) (citing *Connell*, 421 U.S. 616; *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Jewel Tea Co., Inc.*, 381 U.S. 676, 729-30 (1965)).

for antitrust sanctions.”¹⁵⁴ Similarly, in *Pennington*, there was nothing said that allowed or barred the application of the labor exemption to permissive subjects. However, the rationale used to apply the non-statutory labor exemption suggested that the Court limited the application of the labor exemption to mandatory subjects. It said, “wages lie at the heart of those subjects about which employers and union must bargain.”¹⁵⁵ Furthermore, the Court suggested that the subject being exempted needed to be *more* than just a mandatory subject to have the non-statutory labor exemption apply. It said, “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*.”¹⁵⁶ Therefore, it appears as though *Pennington* supports the opposite proposition, which is that the non-statutory labor exemption only applies to mandatory subjects.

The court in *Feather*¹⁵⁷ claimed that the labor exemption applied to mandatory and permissive subjects of collective bargaining, but this proposition was not supported by any of the cases it cited. Furthermore, there are no subsequent cases that support the holding. *Brown*¹⁵⁸ made it clear that the labor exemption applies only to mandatory subjects. This is the marquee case to determine whether the labor exemption applies in the professional sports context.¹⁵⁹

If revenue sharing is determined to be a permissive subject of collective bargaining, as was argued in this paper, the non-statutory labor exemption would not apply. Therefore, the antitrust laws would be applicable to revenue sharing and the players’ association might have a means of legal recourse via the Sherman Act. That

¹⁵⁴ *Connell*, 421 U.S. at 622 (emphasis added) (citing *Jewel Tea*, 381 U.S. 676).

¹⁵⁵ *Pennington*, 381 U.S. at 664.

¹⁵⁶ *Id.* at 665 (emphasis added).

¹⁵⁷ 711 F.2d 530, 542 (3d Cir. 1983).

¹⁵⁸ 518 U.S. 231 (1996).

¹⁵⁹ *Id.* at 250. In fact, the Supreme Court held that in order to apply the non-statutory antitrust exemption, one of the requirements was that “it involved a matter that the parties were required to negotiate collectively.” *Id.*

does not mean, however, that revenue sharing would necessarily be an antitrust violation.¹⁶⁰

B. The Labor Exemption Applies to the Unilateral Imposition of Mandatory Subjects after Impasse

If revenue sharing were determined to be a mandatory subject, contrary to the conclusions in this paper, and the system were unilaterally imposed by management after impasse, the non-statutory labor exemption would apply. Courts have applied the non-statutory labor exemption to mandatory subjects because it promotes federal labor policies that favor free and unfettered collective bargaining.¹⁶¹ The fact that a subject is unilaterally imposed is irrelevant as to whether the labor exemption would apply, as long as management complies with the other requirements of labor law.¹⁶² To comply with labor law, management must bargain to impasse and impose only the terms of their last good-faith offer.

In *Brown*,¹⁶³ the NFLPA argued that the non-statutory labor exemption should not apply where there is no labor-management agreement.¹⁶⁴ They relied upon the language of *Connell*, which stated that the non-statutory labor exemption applies to “union-employer agreements.”¹⁶⁵ The *Brown* Court rejected this interpretation of the statement and determined that the *Connell* Court had limited its holding to situations where there was a collective bargaining agreement because the Court had not yet had an opportunity to address a challenge without an agreement in place.¹⁶⁶

¹⁶⁰ This paper will not go through an antitrust analysis of revenue sharing.

¹⁶¹ *Id.* at 236 (citing 29 U.S.C. § 158 (a)(5); 158(d); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348-49 (1958)).

¹⁶² *Id.* at 238. “Both the Board and the Courts have held that, after impasse, labor law permits employers unilaterally to implement changes in pre-existing conditions, but only insofar as the new terms meet carefully circumscribed conditions.” *Id.* These “conditions” were described as incorporating pre-impasse proposals into the unilateral imposition, and collective bargaining without committing an unfair labor practice. *Id.* at 239.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 243.

¹⁶⁵ *Id.* (citing *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975)).

¹⁶⁶ *Id.* at 238-39.

Furthermore, the Court responded, “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 an agreement or after an agreement has expired.”¹⁶⁷

Furthermore, the NFLPA argued that the non-statutory labor exemption should not apply without union consent because it leaves the union without a means of recourse for self-protection, and it tips the bargaining scale in favor of the employer.¹⁶⁸ The NFLPA argued that this leaves the union with inadequate protection since the union was already opposed to the last good-faith offer (which brought about the impasse), and the unilateral imposition by the employer would still not be a ULP.¹⁶⁹ The Players Association was concerned that unions might be discouraged from collective bargaining if a provision that was unilaterally implemented without union consent were shielded from antitrust scrutiny. The Union argued that the effect of the exemption should not counter its purpose to encourage collective bargaining.¹⁷⁰

The argument that a union would go unprotected without the shield of the labor exemption does not criticize the application of the non-statutory labor exemption; rather, it criticizes federal labor law. It is established that management can satisfy the good-faith bargaining requirement without union consent as long as the parties have negotiated in good faith to impasse.¹⁷¹ In *NLRB v. Katz*,¹⁷² the Supreme Court barred an employer from making any unilateral changes in existing employment conditions without securing consent from, *or negotiating to an impasse* with the union.¹⁷³ Once the employer has negotiated to impasse, he has the ability to unilaterally impose a mandatory subject of collective bargaining; however, the

¹⁶⁷ *Id.* at 243.

¹⁶⁸ Steven D. Buchholz, *Run Kick, and (Im)passé: Expanding Employers' Ability to Unilaterally Impose Conditions of Employment After Impasse in Brown v. Pro Football*, 81 MINN. L. REV. 1201 (1997).

¹⁶⁹ Marvine, *supra* note 12, at 642.

¹⁷⁰ *Id.* at 646.

¹⁷¹ *Brown*, 518 U.S. at 236-50.

¹⁷² 369 U.S. 736 (1962).

¹⁷³ *Id.*

condition must be “reasonably comprehended” within the employer’s pre-impasse proposals.¹⁷⁴ In other words, the employer cannot impose more or less favorable terms on the union after impasse. To do so would be considered a ULP and that is the union’s protection.¹⁷⁵

Unions have always had legal recourse through a ULP charge if an employer attempted to unilaterally impose a provision before impasse was reached, or if the employer attempted to implement any *new* provisions subsequent to an impasse in negotiations.¹⁷⁶ The labor exemption must apply post-impasse because if it ceased to apply at impasse, it would be too difficult for employers to predict the ramifications of their actions since the parties might reach impasse numerous times during their negotiations.¹⁷⁷ Therefore, if revenue sharing is determined to be a mandatory subject of bargaining, the non-statutory labor exemption will apply.

CONCLUSION

The professional sports industry depends on its club owners and leagues to implement systems, such as revenue sharing, in order to correct competitive imbalances that exist between teams. If revenue sharing is considered to be a permissive subject, as this paper has argued, the non-statutory labor exemption would not apply as an antitrust defense for teams or leagues. On the other hand, if revenue sharing is determined to be a mandatory subject, the non-statutory labor exemption would apply, even if there was no agreement in place, as long as the parties bargained in good faith to impasse. In this paper, it was suggested that leagues should be prepared to defend antitrust claims by players associations if revenue sharing is determined to be a permissive subject. As the market value for players increases, the wealth disparity between club owners will

¹⁷⁴ *Brown*, 518 U.S. at 238 (citing *Storer Communications, Inc. and Nat’l Ass’n of Broad. Employees & Technicians*, AFL-CIO, 294 NLRB 1056, 1090 (1989); *NLRB v. Katz*, 369 U.S. 736, 745 n.12 (1962)).

¹⁷⁵ *Id.* at 238-39.

¹⁷⁶ *Id.* at 238-50.

¹⁷⁷ *Id.* at 245-46.

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become more apparent. Over time, this will have a detrimental effect on on-the-field competition. Revenue sharing equalizes the disparity among club owners by redistributing wealth to financially weaker teams. By sharing revenues, the goals of owners, leagues and sports fans can simultaneously be met.