

1975

The True Story of What Happens When the Big Kids Say, "It's My Football, and You'll Either Play by My Rules or You Won't Play at All": *Kapp v. National Football League*, 390 F. Supp. 973 (N.D. Cal. 1974)

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Recommended Citation

Keith A. Prettyman, *The True Story of What Happens When the Big Kids Say, "It's My Football, and You'll Either Play by My Rules or You Won't Play at All": Kapp v. National Football League*, 390 F. Supp. 973 (N.D. Cal. 1974), 55 Neb. L. Rev. 335 (1976)
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The True Story of What Happens When the Big Kids Say, "It's my football, and you'll either play by my rules or you won't play at all."

Kapp v. National Football League,
390 F. Supp. 973 (N.D. Cal. 1974).

I. INTRODUCTION

Professional football exists on all levels as a league sport.¹ The importance of that simple statement is manifest. First, it means that football is not a loose confederation of independent personnel rosters, but an organization of interdependent units. Furthermore, if a team is to continue in existence, it must remain competitive with every other team in its league. As a result, if all or at least the majority of teams in a league fail to maintain competitive equality, not only the lackluster teams, but the league as well, will probably face extinction.²

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1. Note generally in this regard that major league professional football exists as the National Football League, the Canadian Football League, and the World Football League. The following succinct statement expresses the essential nature of the league concept of professional sport.

The product of professional sports is league sports, as differentiated from the periodic exhibition of sporting contests for profit. No professional team sport can or does rest its long term customer attractiveness upon the entertainment value of any single exhibition, as a theatre enterprise or a boxing promotion might. Rather, the product of professional sports is league sports, a concept which entails making every game of some importance in terms of its impact upon the league race for playoff spots, and ultimately upon the league championship. . . . Balanced competition is the necessary corollary of the league sports framework.

Comment, *Player Control Mechanisms in Professional Team Sports*, 34 U. Prrt. L. Rev. 645, 651 (1973).

2. The classic example of professional football league destruction as a result of monolithic capability was the demise of the All-American Conference. There is little doubt that the complete dominance of that league by the Cleveland Browns from the late 1940s to 1950 eliminated the unique commodity of balanced competition from the league and killed it as a result. The Browns were in fact so competitively superior that in 1950, the same year in which they entered the NFL, they

In an effort to maintain the competitive life-blood of professional football, the leagues have established and enforced rules which restrict the method by which member teams shop for talent and which direct how players, once selected, can change partners. This note will examine the antitrust implications of imposing such restrictive rules, and secondarily it will study the applicability of the antitrust laws to rules which have been endorsed through collective bargaining. The rules to be examined are those of the National Football League ("NFL"), and the vehicle for examining these rules will be the questions raised in *Kapp v. National Football League*,³ wherein the court held that those rules were unreasonable restraints on trade.

II. THE FACTS

While at the University of California, Joe Kapp displayed exceptional potential for a career in professional football.⁴ After graduation, he was drafted by the Washington Redskins of the NFL pursuant to the "draft rule" found in sections 14.3A⁵ and 14.5⁶ of the NFL Constitution and By-Laws. The primacy of the rights that a team gains through the draft is kept unbesmirched by the so-called "tampering rule" contained in section 9.2⁷ of the NFL Consti-

captured the league crown by defeating the championship team. Pro, Aug. 18, 1975, at 6B.

3. 390 F. Supp. 73 (N.D. Cal. 1974) [hereinafter cited in the text as *Kapp*].
4. Kapp was selected as an All-American by several groups while a quarterback for the Golden Bears of the University of California.
5. "At each Selection Meeting each club participating therein, shall select players of its own choice; selection shall be made by the clubs in each round in the reverse order of their standing." NFL CONST. & BY-LAWS § 14.3(A) (1974).
6. "The selecting club shall have the exclusive right to negotiate for the services of each player selected by it in the Selection Meeting. Selected players shall be placed on the Reserve List of that club." *Id.* at § 14.5.
7. If a member club or any officer, shareholder, director, partner, employee, agent or representative thereof, or any person holding an interest in said club shall tamper, negotiate with, or make an offer to a player on the Active, Reserve or Selection List of another member club, then unless the offending club shall clearly prove to the Commissioner that such action was unintentional, the offending club, in addition to being subject to all other penalties provided in the Constitution and By-Laws shall lose its selection choice in the next succeeding Selection Meeting in the same round in which the affected player was originally selected in the Selection Meeting in which he was originally chosen. If such affected player was never selected in any Selection Meeting, the Commissioner shall determine the round in which the offending club shall lose its selection choice. Additionally, if the Com-

tution and By-Laws. Washington, however, never made an offer that was acceptable to Kapp. As a result, he opted for the cold cash and colder climate of the Canadian Football League ("CFL"). Kapp played in the CFL for the seven years between 1959 and 1966. During this time his professional potential became proven professional prowess.

While Kapp was under contract to the CFL, Washington retained NFL rights to his services; therefore, no other NFL team could negotiate with him without first paying Washington for the right to do so.⁸ At that time (1967), however, the NFL and CFL were not the only professional football leagues. There was also the American Football League ("AFL") whose Houston Oilers franchise did in fact negotiate with Kapp.

With the Oilers having greased the gears for Kapp's departure from the tundra, his CFL relationship was understandably less than stable. Kapp's CFL team had the option to renew his contract for the 1967 season, exercised it, but then suspended him from playing because of his unconcealed attempt to switch leagues.

Kapp's AFL contract with the Oilers was for \$100,000 per year for two years beginning with the 1967 or 1968 season depending on whether or not the CFL exercised its option. In addition to his basic compensation, he was to receive a \$10,000 bonus for signing. On April 12, 1967, for unknown reasons, the Kapp-Oiler contract was declared invalid by a joint pronouncement of NFL Commissioner, Pete Rozelle, and the AFL Commissioner.⁹

Kapp finally ended up playing the 1967 football season, not in Houston, but in sunny Bloomington, Minnesota, a result which cost the Vikings \$50,000 for Kapp's CFL release, and presumably some payment to Washington as well. Kapp signed a two year contract

missioner decided such offense was intentional, the Commissioner shall have the power to fine the offending club and may award the offended club 50% of the amount of the fine imposed by the Commissioner. In all such cases the offended club must first certify to the Commissioner that such an offense has been committed.

Id. at § 9.2.

8. See note 5 *supra*.

9. Kapp alleged that the invalidation of his Oilers contract was done pursuant to an understanding between the NFL and CFL that players shall not be allowed to contract to jump leagues during the time they are already under contract. See 390 F. Supp. at 76.

If indeed this allegation is true and such an understanding does exist (no attempt was made in the case to ascertain the truth of the allegation), it raises serious questions of conspiracy to maintain a monopoly under section 2 of the Sherman Act. That question, however, will not be dealt with in this note.

with Minnesota covering the 1967 and 1968 seasons for \$300,000. He played during those two years and then again in 1969, when Minnesota exercised its option, and Kapp vaulted the Vikings to the 1969 Super Bowl.

Thereafter, the Vikings offered Kapp another two year contract at the same rate of compensation, but he refused to sign. Although other NFL teams approached him,¹⁰ none of them followed up with offers.¹¹ Finally, the New England Patriots sought Kapp. They ascertained from Minnesota what the Vikings would require to release him, and then entered into a transfer agreement with Minnesota.¹²

Under these conditions, Kapp entered into a contract with New England on October 6, 1970 to play out the remainder of the 1970 season and the 1971 and 1972 seasons. The total compensation package was \$600,000.¹³ Kapp did in fact play the remaining eleven

10. Purportedly both the Philadelphia Eagles and the Houston Oilers (then a member of the NFL because of the NFL-AFL merger) expressed interest in Kapp. *Id.*

11. Kapp alleged (and experience and common sense tend to back him up) that the reason neither team made an offer was because of the price they feared they would have to pay to get Kapp released under the "Rozelle Rule."

Any player, whose contract with a League club has expired, shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signed a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players, from the Active, Reserve, or Selection List (including future selection choices) of the acquiring club as the Commissioner in his sole discretion deems fair and equitable: any such decision by the Commissioner shall be final and conclusive.

NFL CONST. & BY-LAWS § 12.1(H) (1974).

12. Minnesota in its agreement with New England got a two-for-one bargain. Kapp's playing rights were released in an arrangement whereby Minnesota was to get New England's number one draft selection of 1967 and its purple ribbon selection rights in the 1972 draft in exchange for New England's getting Kapp. It must be remembered that agreements like this maintain balance in the league. The truth of this contention is nowhere clearer than in an example such as this wherein a then perennial door-mat gives up two players with tremendous potential for super-stardom to a team which is so incapable of vigorous competition that it could only prove itself to be the league's second best team in the previous year.

13. The term "contract" is used advisedly in this instance as the NFL showed some evidence that the document under which Kapp played eleven games in 1970 was merely an interim agreement to become fully effective only upon Kapp's signing of a Standard Player Contract. See 390 F. Supp. at 77.

games of the 1970 season for New England, for which he was paid \$154,000. In January, 1971, the Patriots, pursuant to sections 15.1¹⁴ and 15.4¹⁵ of the NFL Constitution and By-Laws, sent Kapp a Standard Player Contract¹⁶ which he refused to sign since he was

14. All contracts between clubs and players shall be executed in triplicate and be in the form adopted by the member clubs of the League; such contract shall be known as the "Standard Players Contract". Subject to the provisions of Section 9.1 (C)(8) hereof, a club may delete portions of or otherwise amend the Standard Players Contract subject to the right of the Commissioner to disapprove the same, as provided by Section 15.4 hereof.

NFL CONST. & BY-LAWS § 15.1 (1974).

15. The Commissioner shall have the power to disapprove any contract between a player and a club executed in violation of or contrary to the Constitution and By-Laws of the League, or if either contracting party is or has been guilty of conduct detrimental to the League or to professional football. Any such disapproval of a player contract must be exercised by the Commissioner within ten (10) days after such contract is filed with the Commissioner.

Id. § 15.4.

16. The Standard Player Contract is pertinent to this note because of two paragraphs included in it: Paragraph 4, which binds the player to the NFL and club constitutions, by-laws, rules, and regulations,

The Player agrees at all times to comply with and be bound by: the Constitution and By-Laws, Rules and Regulations of the League, of the Club, and the decisions of the Commissioner of the League (hereinafter called "Commissioner"), which shall be final, conclusive and unappealable. The enumerated Constitution, By-Laws, Rules and Regulations are intended to include the present Constitution, By-Laws, Rules and Regulations as well as all amendments thereto, all of which are by reference incorporated herein. If the Player fails to comply with said Constitution, By-Laws, Rules and Regulations, the Club shall have the right to terminate this contract as provided in Paragraph 6 hereof or to take such other action as may be specified in said Constitution, By-Laws, Rules and Regulations, or as may be directed by the Commissioner. The Player agrees to submit himself to the discipline of the League and of the Club, for any violation of said Constitution, By-Laws, Rules and Regulations, subject, however, to the right to a hearing by the Commissioner. All matters in dispute between the Player and the Club shall be referred to the Commissioner and his decision shall be accepted as final, complete, conclusive, binding and unappealable, by the Player and by the Club. The Player, if involved or affected in any manner whatsoever by a decision of the Commissioner, whether the decision results from a dispute between the Player and the Club or otherwise, hereby releases and discharges the Commissioner, the League, each Club in the League, each Director, Officer, Stockholder, Owner or Partner of any Club in the League, each employee, agent, official or representative of the League or of any Club in the League, jointly and severally, individually and in their official capacities, of and from any and all claims, demands, damages, suits, actions and causes of action whatsoever, in law or in equity, arising out of or in connection with any decision of the

under the assumption that he already had a valid contract. On May 28, 1971, NFL Commissioner Rozelle reminded the Patriots that according to sections 17.5B¹⁷ and 15.6¹⁸ of the NFL Constitution and By-Laws, no player may play for a member club unless he has on file with the commissioner an executed Standard Player Contract.

In July, 1971, the other NFL clubs complained of Kapp's being allowed to practice even though he had not signed a Standard Player Contract. As a result, Rozelle reiterated that Kapp must sign a Standard Player Contract as a condition precedent to being eligible to participate in NFL activity. Kapp reacted by leaving football and turning to America's second favorite pastime—litigation.

III. ANTITRUST ANALYSIS

A. Scope and Nature of the Problem

Kapp's attack on the restrictive rules of professional sport, alleg-

Commissioner, except to the extent of awards made by the Commissioner to the Player. The Player hereby acknowledges that he has read the present said Constitution, By-Laws, Rules and Regulations, and that he understands their meaning.

and Paragraph 10, which contains the so-called "option clause."

The Club may, by sending notice in writing to the Player, on or before the first day of May following the football season referred to in ¶ 1 hereof, 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 in ¶ 3 hereof and shall be payable in installments during the football season in such further term as provided in ¶ 3; and (2) after such renewal this contract shall not include a further option to the Club to renew the contract. The phrase "rate of compensation" as above used shall not include bonus payments or payments of any nature whatsoever and shall be limited to the precise sum set forth in ¶ 3 hereof.

17. No player may practice with a club unless such player is signed to a contract with that club for the current or succeeding season or seasons. All contracts including contracts of players on the Future List must be filed with the Commissioner in accordance with the provisions of Section 15.3 hereof.

NFL CONST. & BY-LAWS at § 17.5(B).

18. No club shall permit a player in any practice session or game, subject to the tryout provisions of Sections 12.4(A) & (B), with its team unless:

(a) A Standard Player Contract has been executed between the player and a club or the Player Contract has been properly assigned to the club, and

(b) Such contract or assignment is on file in the League Office or the League Office has been notified by telegram or TWX of the execution of a contract or assignment.

Id. at § 15.6.

ing that they violate sections 1¹⁹ and 2²⁰ of the Sherman Act, was not novel.²¹ Basically, he claimed that the "draft rule,"²² the "tam-

19. 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: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1973).

20. 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, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Id. § 2.

21. See, e.g., *Flood v. Kuhn*, 407 U.S. 258 (1972); *Radovich v. National Football League*, 352 U.S. 445 (1957); *United States v. International Boxing Club of N.Y.*, 348 U.S. 236 (1955); *Deesen v. Professional Golfers' Ass'n of America*, 358 F.2d 165 (9th Cir. 1966); *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966); *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260 (N.D. Ga. 1973); *Boston Professional Hockey Ass'n, Inc. v. Cheevers*, 348 F. Supp. 261 (D. Mass. 1972); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971); *Robertson v. National Basketball Ass'n*, TRADE REG. REP. (1970 Trade Cas.) ¶ 73,282 (S.D.N.Y. 1970); *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961); *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953).
22. See note 5 *supra*.

pering rule,"²³ the "option clause,"²⁴ the "Rozelle rule,"²⁵ and the "Standard Player Contract rule"²⁶ are foisted upon players through a combination of the NFL member clubs, whereby they boycott any and all players who refuse to agree to these restrictive rules. It was Kapp's contention that as a result of such a group boycott the Sherman Act was violated. Since the decision in *Kapp* was rendered on a motion for summary judgment alleging that the group boycott was a violation of the Sherman Act, the threshold question was whether professional football is subject to the antitrust laws. This question was easily answered by reference to *Radovich v. National Football League*,²⁷ a case which is the basic ingredient in an antitrust challenge of professional football's rules of restraint.

In *Radovich*, the petitioner, a former all-pro guard for the NFL Detroit Lions, broke his player contract with the Lions so that he could play for the Los Angeles Dons of the All-American Conference. His justification for doing so was that the Lions had refused to transfer him to the Los Angeles NFL team so that he could be with his sick father in California. Two years after leaving the Lions, Radovich was offered the position of player-coach of the San Francisco Clippers of the Pacific Coast League. The NFL, however, informed the Clippers that Radovich was black-listed from professional football in the United States and that any team that gave him a job would suffer severe penalties. As if by some quirk of Thomas Hardian coincidence, the Clippers never gave Radovich the position they had offered him. In answering the question of whether football, like baseball,²⁸ was immune from antitrust liability, the Court said: "[T]he volume of interstate business involved in organized professional football places it within the provisions of the [Sherman Act]."²⁹

Having answered the easy question (i.e., that football is subject to the antitrust laws), the court in *Kapp* next faced the more difficult issue—Are the restrictive rules complained of by Kapp illegal per se under the Sherman Act, or are they subject to the analysis of the rule of reason?

A literal reading of section 1 of the Sherman Act³⁰ leaves little question that any and all contracts, combinations, and conspiracies

23. See note 7 *supra*.

24. See note 16 *supra*.

25. See note 11 *supra*.

26. See notes 14, 15, 17 & 18 *supra*.

27. 352 U.S. 445 (1957) [hereinafter cited in the text as *Radovich*].

28. See *Flood v. Kuhn*, 407 U.S. 258 (1972).

29. 352 U.S. at 452.

30. See note 19 *supra*.

in restraint of trade are in violation thereof. A flat rule application has not, however, been followed. The Supreme Court in a landmark antitrust decision stated:

[The Sherman Act] evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not *unduly* restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods . . . which would constitute an interference—that is an *undue restraint*.³¹

This enunciation coupled with the following:

[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.³²

amount to a standard for determining whether a particular practice is an illegal restraint of trade, a standard commonly referred to as the “rule of reason.” The rule of reason knows no real bounds, rather it requires a case-by-case analysis of the economics peculiar to the particular industry involved, and a determination of whether the restraint is narrow enough in its application so that it does not unduly restrict competition.

The “per se” rules were conceived to eliminate the painstaking and time-consuming task of applying the rule of reason,³³ and are the natural offspring of a time-poor parent like the Supreme Court. Per se rule applicability in its most pristine sense means that the type of activity alleged to have occurred, if proven, is conclusively presumed to be an unreasonable restraint of trade. This conclusion, therefore, follows without any consideration of the purposes for the restraint in the context of a particular industry’s economics.³⁴

31. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60 (1911) (emphasis added).

32. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

33. The so-called per se rules exist in many areas of antitrust litigation. They are applied to those types of restraint which are so anti-competitive by nature that no purpose can justify them. The result of the application of these per se rules is, of course, that the practices to which they are applied are unquestioned violations of the antitrust laws. The following practices have been declared per se violations of the Sherman Act: territorial allocations of markets in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967); tying arrangements in *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958); group boycotts in *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941); and price fixing in *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940).

34. There are basically two rationales for this short-circuiting of antitrust

The court in *Kapp* concluded that the determination of whether the Sherman Act was violated by the NFL's restrictive rules should be made by rule of reason analysis. However, the court's articulated reasons for concluding this were unsatisfactory³⁵ because they failed to deal with the similarity between the facts of the case before it and the facts of those cases in which the Supreme Court had applied the per se rule. Instead, the court in *Kapp* treated the application of per se reasoning as elective and concluded that since it would reach the same result applying either test it did not make a difference as to which test were used. In fact, it makes a world of difference which rule applies. If the restrictions are per se violative no alteration except eradication can make the restriction legal. If the rule of reason applies, loosening of the rules between law suits may save the rule in some form.

B. Classic Boycott Per Se Analysis

Group boycotts, the situation allegedly present in *Kapp*, are generally considered to be per se unreasonable restraints of trade, and, therefore, violative of section 1 of the Sherman Act.³⁶ A brief look at the "classic" per se group boycott cases makes it clear, however, that the per se rule is inapplicable to the NFL situation. As will be seen, the latter situation is not one in which a group of competitors organizes to exclude another from competition, but rather one where a group at one level of competition agrees to rules of self-regulation which affect the entrance of others into another level of competition.

analysis known as per se rules; one is positive the other negative.

On the positive end of the spectrum is an idealistic Justice Black who stated:

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958). On the negative side is a realistic Justice Marshall who in *United States v. Topco Associates*, 405 U.S. 596, 609-10 n.10 (1972), said the Court would just as soon not "ramble through the wilds of economic theory in order to maintain a flexible approach."

35. The court said in this regard:

[W]e conclude that in this particular field of sports league activities the purposes of the antitrust laws can be just as well served (if not better served) by the basic antitrust reasonableness test as by the absolute per se test sometimes applied by the courts in other fields.

390 F. Supp. at 82 (emphasis added).

36. See, e.g., *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941).

In *Fashion Originators' Guild of America, Inc. v. FTC*,³⁷ the petitioner, an association of original dress design manufacturers who sold their designs throughout the United States, established a practice to eliminate from competition those who copied and sold their designs. The original action involved an order by the FTC demanding that FOGA cease and desist in its "unfair method of competition" known as black-listing. The Supreme Court case was brought by FOGA to appeal the circuit court's decree to affirm the FTC order.

Since the guild members' originals were neither protected nor protectable by copyright or design patent, the "style pirates" had no legal difficulties in copying the creations of the guild members. The pirates had no cost of creation to recover and could undersell the members of the guild. As a result of what seemed to be justifiable outrage toward an unfair method of competition, the guild members sought redress of their grievances.

Their efforts resulted in a system whereby all the guild members refused to sell to any retailer who was blacklisted as a result of having bought and sold "copies." The system was enforced by imposing heavy fines on all members of the guild who were caught selling to such retailers. Periodic audits of the guild members' books were made to discover sales to blacklisted retailers.

On appeal to the Supreme Court, the guild members admitted that a boycott existed and that its purpose was to eliminate the pirates as competitors. They argued, however, that the boycott was reasonable because of the effect that the pirates had on the original fashions business.³⁸ The Supreme Court chose not to consider the reasonableness of the guild's goals stating: "[T]he 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."³⁹

FOGA was closely followed by *Associated Press v. United States*.⁴⁰ In *AP*, the Government challenged both the method by which membership in the association was granted and how the association dealt with the news it collected. The group boycott in this case resulted from the member papers' refusal to sell news to non-members prior to publication. The Court found the boycott to be a violation of the Sherman Act despite the association's contention

37. 312 U.S. 457 (1941) [hereinafter cited in the text as *FOGA*].

38. See 312 U.S. at 458-60. These pages contain FOGA's arguments in summary form as to the reasonableness of their boycott.

39. *Id.* at 468.

40. 326 U.S. 1 (1945) [hereinafter cited in the text as *AP*].

that the members' dissemination of news to non-members was not indispensable to the continued existence of non-members' papers (i.e., the Court found the boycott to be a per se Sherman Act violation and, thus, did not consider petitioner's arguments of reasonableness).

In another case, *Klor's Inc. v. Broadway-Hale Stores, Inc.*⁴¹ the Supreme Court made it clear for the first time that group boycotts are illegal per se under the Sherman Act regardless of whether only one small competitor is run out of the market or whether there is (as in *FOGA* and *AP*) a public injury because of the sizeable share of the product market held by the boycotting party. In *Klor's*, Broadway-Hale (one of Klor's direct competitors in the retail sale of appliances in the San Francisco market area) entered into an agreement with major appliance manufacturers whereby Klor's could only buy their products at discriminatory prices, if at all. As a result of these agreements, Broadway-Hale was totally eliminated as a direct competitor. Broadway-Hale argued that the boycott was not unreasonable in that its scope was limited to private and not public injury. The Supreme Court, however, replied to that in the following way:

We think Klor's allegations clearly show one type of trade restraint and public harm the Sherman Act forbids

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

Plainly the allegations of this complaint disclose such a boycott It clearly has by its "nature" and "character" a "monopolistic tendency." As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy.⁴²

C. Middle Ground: Professional Football Lands on the "Free Parking" of Antitrust

FOGA, *AP*, and *Klor's* differ in one major respect from the NFL situation—the boycott declared in each of them had as its purpose or necessary end the injury to or elimination of competition. The restrictive rules of the NFL have as their purpose not the elimination, but the maintenance of competition between the League's teams. As stated earlier,⁴³ professional football exists as a league sport and the league exists only if intra-team competition is bal-

41. 359 U.S. 207 (1959) [hereinafter cited in the text as *Klor's*].

42. *Id.* at 210-13.

43. See note 2 *supra*.

anced; therefore, the restraints imposed by the NFL rules, even though they are for an economic purpose, are not for an anticompetitive purpose. The "classic" per se analysis is inappropriate and inapplicable to the restrictive rules of the NFL.⁴⁴

Two more recent Supreme Court cases add credence and validity to the foregoing analysis of the inapplicability of per se rules to non-commercial situations in general and to professional football in particular. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*⁴⁵ involved a factual situation in which sellers of gas burners needed to meet the standards of the American Gas Association before any gas distributor would supply gas for the burner. Plaintiff, having failed to get the necessary American Gas Association approval, was unable to market its burners because people found little use for a gas burner for which they could not get gas. The Supreme Court held that the boycott by all the gas distributors would be a per se violation of section 1 of the Sherman Act if, and only if, the district court on remand could find that the plaintiff's direct competitors had assisted in formulating the standards by which plaintiff's burners were rejected as being inadequate. The Court stated in essence that a per se application could not be used unless it were shown that foreclosing a market to one possible entrant was done by a combination of or (as in this case) a conspiracy with a possible direct competitor of the potential entrant.⁴⁶

The second of the validating cases, and probably the more important one, is *Silver v. New York Stock Exchange*.⁴⁷ In *Silver*, the plaintiff, in an effort to achieve "instantaneous communications with firms in the mainstream of the securities business,"⁴⁸ sought direct private telephone connections with members of the New York Stock Exchange ("Exchange"). Such connections were and are extremely important to non-Exchange members such as was Silver.

44. Note is taken of Professor Coons' excellent article with respect to the general concept of commercial and non-commercial group boycotts and the inapplicability of the per se rules to the latter. Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705 (1962). The application and extension of this concept to professional sports is discussed in *Player Control Mechanisms*, *supra* note 1.

45. 364 U.S. 656 (1961) [hereinafter cited in the text as *Radiant Burners*].

46. See also *Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n*, 261 F. Supp. 154 (D. Ore. 1966), for a factual situation similar to that in *Radiant Burners* but with a broader basis for the decision. In that case, a plywood trade association was allowed to adopt standards which foreclosed the plaintiff from the market even though some of the members of the trade association were plaintiff's direct competitors.

47. 373 U.S. 341 (1963) [hereinafter cited in the text as *Silver*].

48. *Id.* at 343.

Exchange rules adopted pursuant to the Securities Exchange Act of 1934 called for approval by the Exchange of any member's grant of private telephone connections to any non-member. The Exchange granted "temporary approval" of Silver's connections, but in a matter of months and without prior notice, it decided to disapprove the connections. Silver alleged that this refusal was a conspiratorial group boycott by the Exchange and its member firms in competition with him and that such a group boycott was a per se violation of the Sherman Act.

Citing *Klor's*,⁴⁹ the Supreme Court declared that such a group boycott would normally be per se violative of the Sherman Act; however, it then went on to state the following: "Hence, absent any justification derived from the policy of another statute or otherwise, the Exchange acted in violation of the Sherman Act."⁵⁰ In *Silver*, because of the existence of the statutory scheme of the federal securities laws, the imposition of a restraint by the Exchange was not a per se violation of the Sherman Act. The Court concluded (and elaborated in a footnote by Justice Goldberg⁵¹) that before a self-regulated industry can impose rules which could deprive an individual of his livelihood, notice and hearing are requisite. Thus, in *Silver*, since there was neither notice nor hearing, the Court found the rule to be a per se violation of the Sherman Act.

The applicability of the *Silver* analysis to professional sports is demonstrated by *Denver Rockets v. All-Pro Management, Inc.*⁵² *Haywood* involved the National Basketball Association's ("NBA")

49. See note 41 *supra*.

50. 373 U.S. 341, 363 (1963).

51. See 373 U.S. at 364 n.16, wherein Justice Goldberg posited the following:

It may be assumed that the Securities and Exchange Commission would have had the power, under § 19(b) of the Exchange Act, 15 U.S.C. § 78s(b), pp. 352-353, 357 & note 7, *supra*, to direct the Exchange to adopt a general rule providing a hearing and attendant procedures to nonmembers. However, any rule that might be adopted by the Commission would, to be consonant with the antitrust laws, have to provide as a minimum the procedural safeguards which those laws make imperative in cases like this. Absent Commission adoption of a rule requiring fair procedure, and in light of both the utility of such a rule as an antitrust matter and its compatibility with securities-regulation principles, see p. 361, *supra*, no incompatibility with the Commission's power inheres in announcement by an antitrust court of the rule. Compare *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714, 723-724.

52. 325 F. Supp. 1049 (C.D. Cal. 1971) [hereinafter cited in the text as *Haywood*]. See also Comment, *Antitrust Law: Procedural Safeguard Requirements in Concerted Refusals to Deal: An Application to Professional Sports*, 10 SAN DIEGO L. REV. 413 (1973).

four-year college rule.⁵³ This rule prohibited NBA member teams from drafting any player until his high school graduating class would have been graduated from college regardless of whether the athlete in question ever spent a day in a college classroom.

Spencer Haywood challenged this rule. In 1970, he had signed a player contract with the Denver Rockets of the American Basketball Association for a large amount of money. It soon became obvious, however, that Denver would not be able to compensate Haywood in full.⁵⁴ Late that same year, he signed a contract to play for the Seattle franchise of the NBA. However, NBA Commis-

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53. The NBA four-year college rule is found in sections 2.05 and 6.03 of the NBA By-Laws:

A person who has not completed high school or who has completed high school but has not entered college, shall not be eligible to be drafted or to be a Player until four years after he has been graduated or four years after his original high school class has been graduated, as the case may be, nor may the future services of any such person be negotiated or contracted for, or otherwise reserved. Similarly, a person who has entered college but is no longer enrolled, shall not be eligible to be drafted or to be a Player until the time when he would have first become eligible had he remained enrolled in college. Any negotiations or agreements with any such person during such periods shall be null and void and shall confer no rights whatsoever; nor shall a Member violating the provisions of this paragraph be permitted to acquire the rights to the services of such person at any time thereafter."

NAT'L BASKETBALL ASSOC. BY-LAWS § 2.05.

The following classes of persons shall be eligible for the annual draft:

- a) Students in four year colleges whose classes are to be graduated during the June following the holding of the draft;
- b) Students in four year colleges whose original classes have already been graduated, and who do not choose to exercise remaining collegiate basketball eligibility;
- c) Students in four year colleges whose original classes have already been graduated if such students have no remaining collegiate basketball eligibility;
- d) Persons who become eligible pursuant to the provisions of Section 2.05 of the By-laws."

Id. § 6.03.

54. As explained in Bock & OLAN, BASKETBALL STARS OF 1974, 23 (1973), Rockets' owner Bill Ringsly sought to head off Haywood's defection to the NBA by offering him \$1.9 million over six years. The contract's small print, however, revealed that of the total sum only about 20 per cent would ever be paid in salary over the term of the agreement. The remainder was to accrue from a long term annuity in which Denver invested \$100,000. Further, Haywood's lawyer, Al Ross, projected that the total value of the annuity would be less than the publicized amount of the contract—about \$1 million less. Finally, none of the income from the annuity was guaranteed and none of it was payable if Haywood was traded or if Denver or the ABA folded.

sioner Walter Kennedy foreclosed Haywood's entry into the NBA by invoking the four-year college rule since Haywood's high school class had yet to be graduated from college. Haywood then brought suit contending that this rule was the basis for a group boycott which was illegal per se under the Sherman Act. The district court defined the four-year college rule not in terms of a restraint by direct competitors on another competitor, but as a restriction imposed by "one level of a trade pattern" on a person "at another level."⁵⁵ In other words, the district court took notice that in professional basketball (as in professional football) the boycotts involve group refusal to deal with players who do not fit or follow the restrictive rules and are not commercial boycotts imposed by competitors to destroy competition.⁵⁶ Having recognized the problem, the district court turned to *Silver* for guidance.

The *Haywood* court analyzed *Silver* as an exception to the boycott per se doctrine.⁵⁷ It determined that *Silver* in distillate form presented a three-pronged test:⁵⁸ (1) the industry involved must be one which is directed by statute to regulate itself, or one whose structure necessitates self-regulation; (2) the goal of the group imposing the rule must be one that can be achieved in no other way than the imposition of reasonable restraint; (3) the rule, if it has the effect of foreclosing entry to the industry, must give the person being foreclosed notice and hearing. If the rule which results in a group boycott meets these three tests, the rule of reason rather than the per se rule will be applied to determine if there is an anti-trust violation. In *Haywood*, the failure of the NBA to offer or provide for notice or hearing prior to excluding a player under the four-year college rule was fatal.

The *Silver-Haywood* approach is a desirable and highly acceptable middle ground for analyzing the Kapp-NFL situation and for determining the validity of professional league sports rules in general. Under the *Haywood* formulation of the *Silver* rule, Kapp can

55. 325 F. Supp. at 1061.

56. *Id.* at 1064. This type of non-commercial boycott is readily distinguishable from *FOGA*, *AP*, and *Klor's*, the cases in which the Supreme Court has deemed the per se boycott rule appropriate. An investigation of the inapplicability of traditional boycott per se application to non-commercial situations can be found in Coons, *supra* note 44.

57. The author questions whether *Silver* is in a strict sense an exception to the classic boycott per se rule. It is suggested that the *Silver* rule is a special test applicable to self-regulated industries where standards and rules are established by an association of industry members to maintain the economic integrity of the industry, but that it is only applicable in those situations in which competitors are not those responsible for establishing the rules which restrict entry.

58. 325 F. Supp. at 1064-65.

be analyzed in the following manner. First, the industry structure of professional football, like that of basketball, is one which necessitates self-regulation.⁵⁹ Second, the goal of the restrictive rules is the perpetuation of balanced competition and thereby the continuation of the league. Since most would agree that without the restraints the rich teams would buy all the good players and destroy competition, not only is the goal of league survival reasonable, but the method (by way of restraint) seems necessary.⁶⁰ Finally, in Kapp's case the facts indicate that he was given notice that he would not be eligible to play in the NFL if he did not sign a Standard Player Contract.⁶¹ Whether he was given a chance to be heard on the issue is unmentioned, unknown, and unprovided for in any of the NFL documents involved. Considering the circumstances, it is doubtful that any hearing was provided Kapp. Without knowing this positively, however, it was improper for the court to dismiss summarily whether the various rules involved in the case could reach the level where their validity, in the antitrust sense, could be measured by the rule of reason. Since *Kapp* may fit the *Silver-Haywood* mould, a discussion of the reasonableness of the questioned rules is in order.

D. Rewriting the Rules to Result in Reasonableness under the Rule of Reason

To comprehend fully the restrictive scope of the NFL rules out of which the Kapp complaint grew, it is necessary to view their in-

59. Those commentators who have written on the subject of self-regulated industries and the application of the antitrust laws to them would necessarily define self-regulated industries so as to include professional sport. See, e.g., Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247 (1970).

60. Articles expressing the opinion that restraints are necessary because without them the poor teams would die of talent attrition include Comment, *supra* note 1, Comment, *The Sherman Act: Football's Player Controls—Are They Reasonable?*, 6 CALIF. W.L. REV. 133 (1969) [hereinafter cited as *Football's Player Controls*]; Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418 (1967) [hereinafter cited as *The Super Bowl and the Sherman Act*].

The author takes issue with the assumption that the wealthy teams would buy all the league talent. Either that assumption or the assumption that the rules exist to maintain league balance is erroneous. If it is true that balanced competition is necessary to the continuation of the league, and if it is true that the wealthy teams would buy all the league talent if they are unrestrained, it can only be concluded that the wealthy owners desire to hang themselves by their money belts because not only the poor teams, but all league teams, die with the demise of the league by way of competitive imbalance.

61. 390 F. Supp. at 77.

terrelationship. The primary complaint involved the group boycott by the NFL member clubs of any player who refused to sign a Standard Player Contract. This boycott is enforced by sections 15.1 and 15.4⁶² of the NFL Constitution and By-Laws. The mandatory signing of the Standard Player Contract has two basic goals. First, it binds the signer to the existing constitution, by-laws, rules and regulations of the NFL and the member club as well as to any future amendments.⁶³ Second, it binds the player to the option clause which allows the member team which has contracted with the player to retain his services for one year beyond the contract term at a rate of compensation not less than 90 per cent of the player's last salary.⁶⁴

There is further interrelation in that by binding himself to the NFL Constitution and By-Laws, the player acquiesces to the Rozelle Rule which is contained in them.⁶⁵ The Rozelle Rule in turn melds with the option clause because it further extends the length of time the player will stay with a club and inhibits movement because it requires the acquiring team to compensate the team losing the player in either money or men.

Taken as a whole, this system which forces a player to sign a Standard Player Contract if he wants to play completely eliminates all player choice on where he will play. His only choice is whether he will play. Beside this restraint in movement, the player has almost no say in what compensation he will receive.⁶⁶ This results because although the player can contract with another club after he has played out his option, he may do so only after the team with which he contracts compensates the losing team. Thus, even though another team may be willing to pay the player an amount in excess of anything his original team has offered him, the new team may not be able to pay that salary plus compensation to acquire the player's rights under the Rozelle Rule.

The draft rule⁶⁷ and the tampering rule⁶⁸ present the same problems in the context of restraints on professional rookies. Indeed, the restraints are even more extreme in this context. Under the draft system, college athletes are chosen by the member teams with the team having the worst won-loss record from the previous year

62. See notes 14 & 15 *supra*.

63. See note 16 *supra*.

64. *Id.*

65. See note 11 *supra*.

66. This statement is meant to cover only the intra-NFL situation, because at least in the case of super-stars, the "other" leagues are in bidding competition with the NFL.

67. See notes 5 & 6 *supra*.

68. See note 7 *supra*.

being accorded first choice in each of the draft's seventeen rounds. Upon his selection by a team, the player can negotiate only with that team since the tampering rule causes any team that negotiates with a player on another team's selection list to lose a selection of its own and become subject to heavy penalties. Thus, a player chosen in the draft by a club has no choice but to sign with that club or not play NFL football.

Of course, when and if the player does sign a contract with the selecting club, he is then subject to all the rules previously discussed. Even if the player does not sign with the NFL selecting club, if he wishes to contract with an NFL club in the future, that club will have to compensate the selecting club if it has retained the player on its reserve roster.⁶⁹

This discussion of the NFL rules and the restraint created by their interrelationship demonstrates that the rules are unreasonable even in the context of their goal—to maintain a high level of intra-league competition. The court in *Kapp* concluded the same thing as to all the rules except the option clause,⁷⁰ and, therefore, partially granted petitioner's motion for summary judgment.

The author would briefly like to suggest the following changes in the presently unreasonable rules so as to make the rules reasonable and to restrict player selection and movement in a manner that would maintain a high level of intra-league competition.⁷¹

As to the draft rule, two changes are appropriate. First, the draft should last for only a limited number of rounds, five instead of the present seventeen. By making this change, all the "cream" of graduating football players would get even league distribution, and at the same time a large number of free agents (players not bound to any team) could be approached by as many teams as have need for the free agents' services. Using this approach, the clubs could fill weak spots in their rosters and negotiate salary on the basis of need, while the free agent could decide where he would play on the basis of compensation, likelihood of first year playing exposure, and location.

69. See notes 5 & 6 *supra*.

70. The court said with regard to the option clause that:

[s]ince NFL rules leave the matters of duration and salary to free negotiation between players and clubs, this lone prescribed option provision [the option clause] cannot be said to so extend the original term and salary as to render it patently unreasonable; its legality cannot, therefore, be determined on summary judgment.

390 F. Supp. at 82.

71. Certain of these suggestions found their formative stages upon reading *Football's Player Controls* and *The Super Bowl and the Sherman Act*, *supra* note 60.

The second change concerns those who are in fact drafted. If they cannot come to terms with the selecting club, they should be thrown back into the ranks of the eligible after a period of six months. At this time, a "second draft" would take place.⁷² If, after the "second draft," a player were still unable to come to terms with his selecting club, he should become a free agent after a period of two months following the date of the second draft. The tampering rule should stay in effect during those periods in which the selected player is technically negotiating with his selecting club. This system subjects both the player and club to pressures which create an incentive to reach an agreement (*i.e.*, the player will miss part of the season and the club will lose a person with high potential), yet the player still has choice in where he will play.

As to the option clause, it should become a bargained for term of the player's contract and not just boiler-plate. In this way, each team could decide from the outset of the negotiations if a player has adequate talent or potential to justify payment of extra money to him for an extra year, and the player could decide if the amount of money offered were worth the potential restriction on movement represented by the option clause. It should be pointed out, of course, that in addition to the decision of whether to pay or accept more money, an important consideration in bargaining for an option clause is the leverage it creates in new contract negotiation. If the team to which a player is under contract can exercise an option and employ him at 90 per cent of his former salary, would not the player be tempted to accept a new contract at a higher salary (or even the same) rather than play for less?

As a final change in the NFL rules, the Rozelle Rule must be altered, yet its purpose (*i.e.*, to discourage wholesale team-hopping) is so necessary that creating a rule that is less restrictive but just as useful is a task of mammoth proportion. First, the player should be able to bargain for a paragraph in his contract that gives him the right to buy his freedom after the last year of the contract (or after the option year if the contract has an option clause) at a price to be negotiated by the parties prior to contracting. In no case should the price be more than the total compensation paid for the last year's services. Such a paragraph, if bargained for, would alleviate the necessity for any intervention by the Commissioner of the NFL. Further, the cap on the price of freedom will fluctuate according to the player's ability; therefore, the losing team gets more for what it loses.

72. Professional baseball has used a similar system for years. See PROFESSIONAL BASEBALL RULES, Rule 4(d) (1969).

Another solution, of course, is necessary for those who do not bargain for a "freedom buy-out" clause as outlined above. The following system or a variant of it should work. The Standard Player Contract should provide for a mandatory new contract negotiation period to last for six weeks beginning after the last game of the last contract, or the option, year. If the player and team are unable to reach a mutually acceptable agreement in that time, the player should become a free agent capable of contracting with any member club but not for more than one year at a time and not for an amount less than the final offer of the losing club. If another club does not opt to hire the player for a more substantial sum, the player can, of course, return to his original club where he will receive the best terms offered him during negotiations.

If another club chooses to employ the player, the losing club will get the right to select a new player in a special draft round to coincide with the regular "first draft" already outlined. The special draft round will take place between the third and fourth rounds of the "first draft" and losing teams will choose in order of the salaries paid to the player or players they lost, with high salary getting first choice. As in the freedom buy-out clause situation, this system allows player movement and maintenance of competitive balance, while providing the player and team an incentive to negotiate and reach an acceptable agreement.

IV. LABOR LAW ANALYSIS

A. Background

The antitrust analysis of the *Kapp* case may have been superseded by a labor law approach to the problem. In *Kapp*, the NFL raised as a defense to Kapp's complaint that since all the rules which he complained of were made part of a collective bargaining agreement, they were exempt from the antitrust laws regardless of whether or not they violated the laws.⁷³

The court held that the facts did not present such a defense.⁷⁴ The reason for so holding was that although sections 15.1 and 15.4⁷⁵ of the NFL Constitution and By-Laws which required players to sign the Standard Player Contract were accepted by the player's association and were included in the Collective Bargaining Contract dated June 17, 1971, the illegal group boycott took place on May

73. 390 F. Supp. at 84.

74. The court went on to add that there may be limits on the extent to which labor and management can agree within the forbidden regions of the antitrust laws. *Id.* at 86.

75. See notes 14 & 15 *supra*.

28, 1971. Thus, the aegis of labor law had yet to be lifted when the league boycotted Kapp.⁷⁶ As to Kapp, and indeed all players not under a collective bargaining agreement (as is currently the case for all NFL players), this holding is of some solace. However, the bigger question remains—can an individual member of a professional sports team challenge the league rules as violations of the antitrust laws when the rules are a bargained for part of the collective bargaining agreement?⁷⁷

B. Where Antitrust Law Fits in the Labor Law Scheme of Things

The concept of exclusive representation in collective bargaining is one of the backbones of American labor policy.⁷⁸ It means that the employees in the bargaining unit lose their right to bargain with their employer individually whether they are members of the certified bargaining agent (union) or not. In the NFL, the players (the bargaining unit) are represented by the National Football League Player's Association ("NFLPA"), the certified bargaining agent. Thus, the NFLPA, and only that group, can bargain with the NFL club owners in the areas of mandatory bargaining (i.e., wages, hours, and terms and conditions of employment) under section 9(a) of the National Labor Relations Act.⁷⁹ In the trade-off

76. The league contended that the terms of the Collective Bargaining Contract were retroactive to February 1, 1970. The court held, however, that since Kapp was never told he must sign a Standard Player Contract because of the existence of a collective bargaining agreement, the league could not say that the retroactivity of the contract justified Kapp's ouster.

77. This note does not attempt to cover the ramifications of the situation in which the challenged rules are not in actuality bargained for, but are "thrust upon" the players [a term used by Justice Marshall in his opinion in *Flood v. Kuhn*, 407 U.S. 258, 295 (1971) (Marshall, J., dissenting)]. For a case involving such an issue in professional sports, see *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

78. See 29 U.S.C. § 159(a) (1964):

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

79. *Id.*

for collective strength, therefore, the players give up their right to bargain individually except to the extent they are given that right under the collective bargaining agreement. The resolution of whether an individual member of a collective bargaining unit can challenge the results of certified collective bargaining is impliedly answered in the negative by this quote from *J.I. Case v. NLRB*:⁸⁰

The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result. We cannot except individual contracts generally from the operation of collective ones because some may be more individually advantageous.

J.I. Case involved a situation in which the petitioner refused to bargain with the union, giving as his reason that pre-existing contracts between himself and individual employees would necessarily be breached if a collective bargaining agreement were negotiated. The Court, in light of this particular fact situation, was asked to determine whether a collective bargaining agreement superceded the individual contracts. Using the language previously quoted, it held that a collective bargaining agreement did in fact have priority over individual contracts. The implication as to professional football is that since the February 1, 1970 collective bargaining between the NFLPA and the member clubs specifically included a provision that all players shall sign a Standard Player Contract,⁸¹ all the rules which were discussed in section III of this note as being violative of the Sherman Act are, therefore, subjects of a collective bar-

80. 321 U.S. 332, 339 (1944). It should be noted that the decision in *J.I. Case* forms the basis of the opinion expressed in one article that labor law and not antitrust law will determine the continued existence of restrictive rules in professional sports. Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971).

81. Article III § 1 of the COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION AND THE MEMBER CLUBS OF THE NATIONAL FOOTBALL LEAGUE (February 1, 1970) states that:

All players in the NFL shall sign the Standard Player Contract which shall be known as the "NFL Standard Player Contract." The Standard Player Contract shall govern the relationship between the clubs and the players, except that this Agreement shall govern if any terms of the Standard Player Contract conflict with the terms of this Agreement. No amendments to the Standard Player Contract affecting the terms and conditions of employment of NFL players shall be effected without the approval of the NFLPA, subject, however, to the right of the player and his club to agree upon changes in his contract consistent with this Agreement.

gaining agreement. As a result, it may be implied from *J.I. Case*⁸² that players (members of the bargaining unit) have no standing to sue if they find the terms of the contract unacceptable.

The question looms large, however, as to whether the antitrust laws are of such paramount importance to the economic stability of the nation that members of a bargaining unit can challenge terms of their union's collective bargaining agreement as being violative of those laws. Except for the answer derived by implication from *J.I. Case*, the question is unanswered. The Supreme Court, in its decisions concerning the interplay of antitrust and labor law, has never intimated that an individual member of the bargaining unit has standing to make such challenges.

Allen-Bradley Co. v. Local 3 Electrical Workers,⁸³ and *United Mine Workers v. Pennington*⁸⁴ are almost unanimously cited in favor of the proposition that a member of the collective bargaining unit can challenge the terms of the collective bargaining agreement as being violative of the antitrust laws, and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*⁸⁵ is cited to the contrary.⁸⁶ However, as will be shown, none of these cases support either of the positions.

Allen-Bradley involved a union that had managed to organize a majority of New York's electrical workers. Both employees of electrical manufacturers and contractors were represented by the union. The collective bargaining agreement provided that manufacturers would sell only to contractors with whom the union had contracts and that the contractors would buy only from those manufacturers with union contracts. Those manufacturers who did not have contracts with the unions and were, therefore, foreclosed from competing in the New York electrical supply market, sued the union for violating the Sherman Act. The Supreme Court held that such agreements were not insulated from the antitrust laws simply because a union was involved: "a business monopoly is no less such [a monopoly] because a union participates, and such participation is a violation of the [Sherman] Act."⁸⁷

82. See, e.g., Jacobs & Winter, *supra* note 81; Note, *Flood in the Land of Antitrust: Another Look at Professional Athletics, the Antitrust Laws and the Labor Law Exemption*, 7 IND. L. REV. 541 (1974).

83. 325 U.S. 797 (1945 [hereinafter cited in the text as *Allen-Bradley*]).

84. 381 U.S. 657 (1965) [hereinafter cited in the text as *Pennington*].

85. 381 U.S. 676 (1965) [hereinafter cited in the text as *Jewel Tea*].

86. For some scholarly review of the problems of *Allen-Bradley*, *Pennington*, and *Jewel Tea*, see Di Cola, *Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering*, 33 U. PITT. L. REV. 705 (1972); Note, *Labor-Antitrust: Collective Bargaining and the Competitive Economy*, 20 STAN. L. REV. 684 (1968).

87. 325 U.S. at 811.

In *Pennington*, the Supreme Court again held that union activity could be found violative of the antitrust laws. The case was concerned with a collective bargaining agreement entered into between the United Mine Workers and the larger mine companies whereby market overproduction was to end by eliminating the smaller mine companies. The elimination of the small company competition was to be achieved by making the smaller companies meet the high scale of pay agreed to by the union and the large companies. Since the smaller companies could not pay such high wages, they would be ruined. They challenged the original agreement as violative of the Sherman Act,⁸⁸ and the Supreme Court held on appeal that "one group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes party to the conspiracy."⁸⁹

Finally, in *Jewel Tea*, a case decided the same day as *Pennington*, the plaintiff meat cutters union had entered into a collective bargaining agreement with several employers of meat cutters. Included in the terms was a provision that market operating hours would be from 9:00 a.m. to 6:00 p.m. Monday through Saturday. The agreement further provided that no customer could enter the market except during those hours. *Jewel Tea* was one of the signer-employers, though a reluctant one. After signing the contract, it sued the union alleging that the agreement violated the Sherman Act by restricting the use of their facilities in an unreasonable manner since the *Jewel Tea* stores were set up to operate without a butcher and, therefore, could be open for business in excess of the stipulated periods. The Supreme Court held that the provision in question was within the mandatory subjects of bargaining under the National Labor Relations Act, *i.e.* hours. Therefore, the agreement was protected by national labor policy which exempts labor and the results of collective bargaining from the antitrust laws.⁹⁰

88. The United Mine Workers brought the primary suit for the collection of royalty payments due from one small company. The payments were to go to the miners' retirement fund.

89. 381 U.S. at 665-66.

90. See 15 U.S.C. § 17 (1973):

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

The cases are clearly not supportive of the proposition that *employees* can or cannot bring suits alleging that a term or terms of the collective bargaining agreement under which they are bound is violative of the antitrust laws. *Allen-Bradley* and *Pennington* were suits by companies who were foreclosed from their respective markets because of union conspiracy with their competitors, and *Jewel Tea* was a suit by an employer who bargained with a union and did not like his bargain. There being no better authority, *J.I. Case* at least suggests the solution to this knotty issue: NFL players who are subject to the terms of a collective bargaining agreement which has been reached by freely negotiated give-and-take cannot bring suits questioning the validity of the terms of the agreement. This is because the bargained for agreement is reached by the collective power of the unit, and to allow a dissatisfied segment of the whole to question the result reached through the collectivity of power would impair the equality of employer-employee bargaining power which national labor policy seeks to establish and protect.

V. CONCLUSION

The following suggestions to both the NFL and the players incorporate the ideas expressed in this article.

A. Suggestions for the NFL

1. The rules and regulations of the NFL should provide in each instance a procedure for notice and hearing to any person aggrieved by them. This is especially important for those rules which by their nature preclude players or potential players from employment in the NFL. Such a rule would include the one requiring players to sign standard player contracts.

2. The Rozelle Rule, the option clause, and the draft rule should be substantially rewritten so as to be less restrictive on a player's power of choice. This is essential because even if the professional football industry should fall into the self-regulated industry rules of *Silver* and *Haywood*, and even though the efforts made in (1) *supra* were to insure that this does occur, the fact remains that even after professional football qualifies for *Silver* rule treatment its rules will be scrutinized under the rule of reason.

3. There should be an attempt to reach agreement with the NFLPA as soon as possible. This is advantageous to the league as it will insulate them from player antitrust litigation under the theory of *J.I. Case*.

B. Suggestion for the Players

There is only one suggestion for the players—do not enter into a collective bargaining agreement until: the NFL offers to eliminate or alter substantially the rules held violative of the Sherman Act in *Kapp*; or the courts have conclusively decided whether the rules complained of in *Kapp* are indeed violative of the antitrust laws. If the players enter into a new collective bargaining agreement prior to either of these events occurring they will lose all chance to free themselves of the unreasonably restrictive rules of professional football.

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