FEATURE

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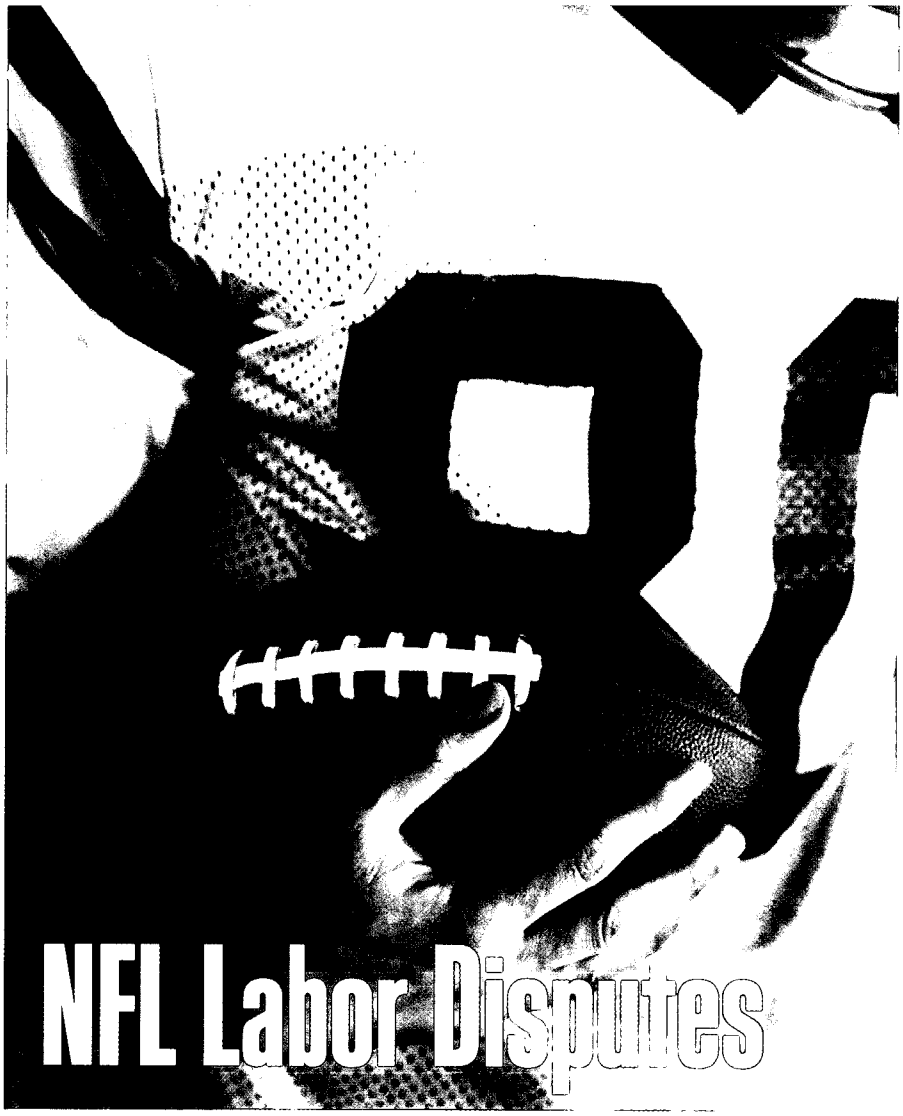

A Short History of NFL Labor Disputes

For years, courts have grappled to reconcile antitrust and labor law issues as the league and players battle to win points.

Professional football is America's most popular sport. The Super Bowl has set the record three years in a row for the most-watched television show in history.[1] Given the sport's popularity, the labor dispute between the National Football League and the NFL Players Association ("NFLPA") — growing out of the expiration of the NFL collective bargaining agreement in March 2011 — captured the attention of millions of Americans.

While it may not have seemed that way to fans, the dispute moved at a rapid pace. Within minutes on the afternoon of March 11, 2011, the parties literally went from the bargaining table in Washington, D.C., to the courthouse in Minnesota, from labor peace to labor strife.

By midnight, the NFLPA had purported to disclaim interest in bargaining, players had filed a class-action antitrust complaint, *Brady v. NFL*, and sought a preliminary injunction, and the NFL owners had locked out the players.

Brady was an antitrust challenge to a labor law tool — a lockout. Throughout the NFL's history, the intersection of federal antitrust and labor law has been a focal point of litigation and dispute. *Brady* is the most recent chapter.

NFL players have often sought to invoke the antitrust laws to challenge terms and conditions of their employment. Because the NFL is an association of individually-owned teams, rules or agreements among the clubs are potentially subject to antitrust challenge (and treble damages), and antitrust claims offer potential bargaining leverage for players.

There is, however, an inherent tension between the labor and antitrust

laws. As Justice Breyer observed, "I was brought up at my mother's knee to believe that antitrust and labor law do not mix."[2] Antitrust law potentially subjects concerted action to treble-damages; labor law encourages concerted action.

Given this paradox, courts have grappled with whether and to what extent antitrust laws can be used to challenge terms and conditions of employment. The NFL has been the *situs* of many of these cases.

Mackey and the "Rozelle Rule"

In *Mackey v. NFL*[3], John Mackey, president of the NFLPA, brought an antitrust challenge[4] to the "Rozelle Rule," which "required any club that signed a veteran free agent to compensate the player's former team."[5] If the two teams were unable to agree, the Commissioner had discretion to determine appropriate compensation; he could award players, draft picks, or both[6] to the franchise whose veteran player was signed by another club.

Mackey was the first in a long series of NFL labor dispute cases brought in federal court in Minnesota. It also was the first major decision to address whether the non-statutory labor exemption to antitrust challenges applies to player-related rules.

This exemption recognizes the inherent tension between antitrust and labor law when it comes to concerted action. Courts have resolved this tension through application of the "statutory" and "non-statutory" exemptions from the antitrust laws.

The "statutory" exemption derives from Sections 6 and 20 of the Clayton Act[7] and the Norris-LaGuardia Act.[8] The non-statutory exemption has its roots in the long history of multi-employer bargaining, wherein employers in a given industry bargain for and agree on common terms and conditions of employment with their employees.

If the antitrust laws were to apply to agreements among the employers, multi-employer bargaining simply could not work. To accommodate the congressional preference for collective bargaining, the Supreme Court has recognized that "certain union-employer agreements must be accorded a limited non-statutory exemption from antitrust sanctions."[9]

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The need for a non-statutory exemption is apparent. The difficulty lies in accommodating the competing interests of the labor and antitrust laws. *Mackey* presented one such challenge.

Following a 55-day trial, the District Court held that the Rozelle Rule constituted a concerted refusal to deal and a group boycott, and was therefore a *per se* violation of the Sherman Act.[10] The League appealed, arguing that the "labor exemption" to the antitrust laws "immunizes the NFL's enforcement of the Rozelle Rule from antitrust liability."[11]

On appeal, the Eighth Circuit posited the following test for applicability of the non-statutory labor exemption: "First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining."[12]

Applying this test, the panel found that the Rozelle Rule did not qualify for the exemption because the Rule had not been the product of bona fide arm's-length bargaining.

Next, the Eighth Circuit reversed the District Court's finding that the rule was a *per se* violation of the antitrust laws. The court concluded that the "unique nature of the business of professional football" did not lend itself to mechanical application of the *per se* rule.

The Eighth Circuit then proceeded to the rule of reason analysis. In support of its argument that the Rozelle Rule was not an unreasonable restraint, the League had asserted the following justifications: (1) competitive balance; (2) protecting the teams' investment in player developments costs; and (3) maintaining the quality of the product. The panel agreed with the District Court's finding that the Rozelle Rule was too restrictive to survive rule of reason analysis.

As to the competitive balance argument, the Eighth Circuit held that the Rule was over inclusive: "[o]nly the movement of the better players was urged as being detrimental to football[,] [y]et the Rozelle Rule applies to every NFL player regardless of his status or ability."[13]

Likewise, the Eighth Circuit concluded that the need to recoup player development costs did not justify the Rule because this "expense is an ordinary cost of doing business and is not peculiar to professional football."[14]

Finally, the Eighth Circuit rejected the argument that the Rozelle Rule facilitated continuity among the NFL teams by limiting player movement. The Court observed that player movement was already a significant part of the business due to trades, retirements and player drafts.[15]

Following *Mackey*, the parties executed a five-year CBA in 1977. This CBA replaced the Rozelle Rule with a "right of first refusal/compensation" free agent system.

Player Strikes of 1982 and 1987

The 1977 CBA expired after the 1981 season. Two weeks into the 1982 season, the players went on strike, demanding 55 percent of the teams' league-wide reve-

nues. On December 5, 1982, the parties executed the 1982 CBA. Although the owners did not agree to the players' demands for a fixed percentage of revenue, the agreement did guarantee the players $1.28 billion over the five-year period.[16]

While the 1982 CBA increased players' financial compensation, player movement via free agency remained limited. Entering the 1987 negotiations, the players' primary objective was a free agency system with increased player movement.

As before, the NFLPA initiated a strike after the second week of the season. After missing one week, the NFL resumed play with "replacement" players, most of whom were players released during the 1987 pre-season.[18]

Powell v. NFL

On October 15, 1987, after two weeks of replacement games and with more regular players crossing the picket lines, the NFLPA ended its strike and filed an antitrust lawsuit, *Powell v. NFL*, in Federal Court in Minnesota challenging the right-of-first-refusal system.[19] Plaintiff Marvin Powell was the president of the NFLPA.

Powell raised issues not decided in *Mackey*. In *Mackey*, the court had wrestled with whether the non-statutory exemption applied to a particular challenged restraint in an operative CBA. In *Powell*, the issue was whether the non-statutory labor exemption continued to apply to a restraint, the right of first refusal, that had been part of an expired CBA. *Powell* was assigned to Judge David Doty, who would remain a central figure in NFL labor disputes for years to come.

Judge Doty resolved this issue by adopting the following standard: A "labor exemption relating to a mandatory bargaining subject survive[s] expiration of the collective bargaining agreement until the parties reach impasse *as to that issue* ... ."[20] Judge Doty defined "impasse" as "whether, following intense, good faith negotiations, the parties have exhausted the prospects of concluding an agreement."[21]

Judge Doty held that the right of first refusal/compensation system and the "standard player contract" were protected by the non-statutory labor exemption during the life of the 1982 CBA. Thus, the labor exemption would continue to protect these practices until the parties reached impasse as to those issues.

After two weeks of replacement games and with more regular players crossing the picket lines, the NFLPA ended its strike and filed an antitrust lawsuit.

As for the free agency system, it was unclear to the Court whether the parties had reached impasse. Judge Doty concluded that it would be premature to make the determination prior to the National Labor Relations Board's ("NLRB") "good faith" determination because the NFL had "filed a charge with the NLRB alleging that plaintiffs have not bargained in good faith [and] a finding of good faith must be made as a precondition to determining impasse[.]"[22]

The League appealed. While the appeal was pending, the League implemented a modified free agency system, "Plan B," under which each team could protect 37 players through the right of first refusal/compensation system.[23]

The Eighth Circuit reversed Judge Doty and held that "the non-statutory labor exemption protects agreements conceived in an ongoing collective bargaining relationship from challenges under the antitrust laws."[24] Because the right of first refusal, Plan B, and the draft were part of agreements conceived in an ongoing collective bargaining relationship, the ruling shielded these provisions from antitrust scrutiny.

Decertification/Disclaimer and *McNeil*

Two days after the Eighth Circuit's *Powell* decision, the NFLPA Executive Committee voted to "decertify" the union, abandoning the NFLPA's status as the collective bargaining representative of the NFL players.[25] (This was not actually "decertification" — which requires notice and election supervised by the NLRB — but rather a "disclaimer" by which a union renounces its representation of the members of the bargaining unit.)

Believing that this purported "disclaimer" freed the players from the *Powell* holding, the NFLPA sponsored an antitrust lawsuit by several players, the *McNeil* case, challenging Plan B under the antitrust laws.[26]

Pointing out that, among other things, the NFLPA was still funding the litigation and that its leadership and operations continued unchanged following its "reformation" as a professional association, the NFL argued that the "decertification" was a sham. Judge Doty rejected this defense on summary judgment, notwithstanding considerable testimony from player leaders that the sole purpose of the disclaimer was to pursue antitrust litigation to accomplish their bargaining objectives regarding free agency.[27]

The jury in *McNeil* found that Plan B violated the antitrust laws because it was more restrictive than necessary to achieve competitive balance.[28] But the jury awarded total damages of only $543,000, a small fraction of the amount sought.[29]

White Settlement and 1993 CBA

Within one week of the *McNeil* verdict, the players filed a follow-on lawsuit, *Jackson v. NFL*, seeking an injunction barring continued implementation of Plan B. Some months later, the NFLPA arranged for the filing of a separate class-action antitrust suit, the *Reggie White* case, challenging Plan B, the draft and other NFL rules.

In May 1993, the parties finally resolved the *McNeil*, *Jackson* and *White* lawsuits through the "*White* Stipulation and Settlement Agreement" ("SSA"). The SSA reflected a new system familiar

to fans today — liberalized free agency, a salary cap, franchise and transition players, and a seven-round draft. Commensurate with the *White* settlement, the parties also agreed to a new CBA that paralleled the SSA's terms.

Under the SSA and CBA, player costs were guaranteed as a percentage of gross revenues. Judge Doty continued to exercise jurisdiction over the terms and conditions of player employment by virtue of the *White* settlement.

Brown v. Pro Football

The SSA resolved all but one antitrust case between the NFL and its players. In *Brown v. Pro Football, Inc.*,[30] a class of 235 "developmental squad" players brought an antitrust suit against an agreement among the NFL clubs to pay them a uniform $1,000 weekly salary. The League argued that this agreement, unilaterally implemented after an admitted impasse in bargaining with the NFLPA, was protected by the non-statutory labor exemption.

When the Supreme Court granted certiorari, it seemed that it might finally resolve the issues of when the non-statutory labor exemption applies, and when it expires.

In *Brown*, the Supreme Court held that "the post impasse imposition of a proposed employment term concerning a mandatory subject of bargaining" is shielded from the antitrust laws by the non-statutory labor exemption.[31] Under this standard, the League's agreement was protected by the non-statutory labor exemption. The Court explained that the "conduct took place during and immediately after a collective-bargaining negotiation ... [and] [i]t involved a matter that the parties were required to negotiate collectively."[32]

The Court noted, however, that "an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process."[33]

Thus, *Brown* answered one question but raised others.

CBA Extensions 1996-2006

In 1996, 1999 and 2002, the parties negotiated amendments and extensions to the *White* settlement and the CBA. With the CBA due to expire after the 2007 League Year, in negotiations leading up to the 2006 season the NFLPA demanded that the revenue base for calculating the salary cap change from "DGR" ("Defined Gross Revenues," a subset of League revenues) to the League's total revenues.

> The agreement reflected a new system familiar to fans today — liberalized free agency, a salary cap, franchise and transition players, and a seven-round draft.

In March 2006, the NFLPA presented the League with a Term Sheet as its "final offer." The Term Sheet called for replacement of the "DGR" system with a "Total Revenue" or "TR" measure. The League accepted the Term Sheet, and the parties eventually translated its terms into the current CBA.[34]

The Term Sheet also provided for early termination by either the players or the clubs. The League resolution approving the Term Sheet provided that the League would terminate the agreement after the 2010 League Year unless 3/4 of the membership affirmatively voted not to do so. The League gave the Union notice of early termination in May 2008. Accordingly, the CBA was set to expire after the 2010 League Year (which would be uncapped), except for provisions relating to the draft, which remained in effect for 2011.

Brady v. NFL

The SSA and CBA were due to expire at 11:59 p.m. on March 11, 2011.[35] By then, the parties had been engaged for months in ongoing collective bargaining negotiations under the auspices of the Federal Mediation and Conciliation Service ("FMCS"). But on March 11, everything changed in an eight-hour span: The Union announced that it had disclaimed its status as bargaining representative of the players at 4 p.m.; negotiations at FMCS came to a halt at 5 p.m.; the players filed *Brady v. NFL*[36] and a motion for a preliminary injunction against a lockout in Federal Court in Minneapolis at 6 p.m.; at about the same time, the owners amended an unfair labor practice charge with the NLRB to assert that the purported disclaimer by the NFLPA was in bad faith; and at midnight, the owners "locked out" the players.

The *Brady* plaintiffs, nine current players and one prospective early draft pick, alleged that the lockout was an illegal group boycott and therefore a *per se* violation of the Sherman Act.[37] Although there were other claims, the players' principal objective was an injunction against the lockout.

In opposing the motion for a preliminary injunction, the League countered with two jurisdictional arguments, in addition to arguing that its lockout of the players was protected by the labor exemption. First, the League argued that "the Norris-LaGuardia Act precludes any injunctive relief," and second, "that this Court should defer this matter, or at least a portion of it, to the National Labor Relations Board under the doctrine of primary jurisdiction[.]"[38]

Under the doctrine of primary jurisdiction, "a court having jurisdiction to hear an action that involves a particular issue on which an agency has particular expertise may 'refer' that issue to the agency for its views or resolution."[39] The NFL argued that the District Court should stay this action to await the NLRB's ruling on the NFL's unfair labor practice charge that accused the players of engaging in a sham disclaimer.

Judge Susan Richard Nelson[40] rejected the League's primary jurisdiction argument, relying principally on Judge Doty's unreviewed summary judgment decision in *McNeil*.[41] Judge Nelson explained that "[a] union may end its duty

to bargain by disclaiming interest in representing the employees as long as it does so in good faith," and, notwithstanding numerous public statements from NFLPA leadership that the decertification was done solely to increase leverage for the players' bargaining objectives, Judge Nelson concluded that "[h]ere, as in 1990, the good faith requirement is met."[42]

The NFL also argued that the Norris-LaGuardia Act barred the Court from entering an injunction against the lockout. Section 4 of that Act provides: "No court ... shall have jurisdiction to issue any [injunctive relief] 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 acts ...."[43] Among these protected acts is "[c]easing or refusing to perform any work or to remain in any relation of employment."[44]

Judge Nelson rejected this argument, explaining that the Act "does not apply here at all, now that the Union has effectively renounced its status as the Players' negotiating agent."[45]

Having resolved the League's objections to its jurisdiction, the Court addressed the merits of the plaintiffs' request for injunctive relief.

Relying on *Brown*, the League argued that the plaintiffs could not show a likelihood of success on the merits because: "(1) the non-statutory labor exemption protects lockouts by multi-employer bargaining units; (2) the exemption continues to apply until the challenged conduct is sufficiently distant in time and in circumstances from the collective bargaining process" and that this lockout could not possibly be sufficiently distant in time and in circumstances from the collective bargaining process (which, at least in the League's view, was still ongoing).[46]

Judge Nelson disagreed, stating that *Brown* "concerned an impasse occurring within the context of a collective bargaining relationship that likely could continue[,]" whereas in the current situation "the parties have left the collective bargaining framework entirely."[47] On April 25, 2011, the District Court entered a preliminary injunction against the lockout.

The Labor dispute did not suddenly disappear just because the Players elected to pursue the dispute through antitrust litigation rather than collective bargaining.

On appeal, the Eighth Circuit reversed in a 2-1 decision. The majority disagreed with Judge Nelson's construction of the term "labor dispute," explaining that the "text of the Norris-LaGuardia Act and the cases interpreting the term 'labor dispute' do not require the present existence of a union to establish a labor dispute."[48] The Eighth Circuit found that Judge Nelson had "depart[ed] from the text" of the Act[49] by interpreting the phrase "'one or more employees or associations of employees' [as] not encompass[ing] the Players in this dispute, because 'one or more employees' means 'individual *unionized* employee or employees.'"[50] The Eighth Circuit found "no warrant for adding a requirement of unionization to the text."[51]

Next, the panel majority analyzed the impact of the Union's disclaimer. The majority observed that, "for approximately two years through March 11, 2011[,] the parties were involved in a classic 'labor dispute' by the Players' own definition."[52] "Then, on a single day, just hours before the CBA's expiration, the union discontinued collective bargaining and disclaimed its status ...."[53] The majority concluded that "[w]hatever the effect of the union's disclaimer on the League's immunity from antitrust liability, the labor dispute did not suddenly disappear just because the Players elected to pursue the dispute through antitrust litigation rather than collective bargaining."[54]

The majority concluded that the Norris-LaGuardia Act prevented the District Court from enjoining the lockout. Its analysis focused on Section 4(a) of the Act, which provides: "No court ... shall have jurisdiction to issue any [injunctive relief] 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 acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment ...."[55]

The players had argued that this Section did not apply to injunctions against employers. The majority rejected this interpretation, reasoning that a "one-way interpretation of § 4(a) — prohibiting injunctions against strikes but not against lockouts — would be in tension with the purposes of the Norris-LaGuardia Act to allow free play of economic forces and to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer."[56]

Because the panel held that the Norris-LaGuardia Act prevented the District Court from enjoining the lockout, it did not address and expressed no view on whether the lockout could be subject to antitrust damages liability or whether the District Court also should have deferred to the NLRB's primary jurisdiction regarding the validity of the Union's disclaimer.[57]

Meanwhile, the parties had continued to negotiate, settling the *Brady* litigation on July 25 and entering into a 10-year CBA on August 4, 2011

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Brady is the latest chapter in the history of NFL labor disputes, but if history is a guide, it may not be the last, and the issues addressed may rise again, whether in the NFL or other professional sports. ◇

The end notes accompanying this article are posted on the Delaware Bar Foundation's website, www.delawarebarfoundation.org.