A SPORTS LAW DIALOGUE ABOUT THE NFL LABOR DISPUTE AND THE PENDING *BRADY v. NATIONAL FOOTBALL LEAGUE* CASE

The following is an edited "e-conversation" between several friends who teach, write, and practice with regard to sports law issues involved in the pending litigation. The conversation includes Roger I. Abrams (Professor of Law at Northeastern University and a prominent neutral arbitrator (including baseball salary arbitration), Gabriel Feldman (Professor of Law at Tulane University), Clark Griffith (former MLB Executive, Minor League Baseball Commissioner, and Adjunct Professor at Hamline College of Law), Gary Roberts (Dean and Professor at Indiana University School of Law – Indianapolis), and Steve Ross (Professor of Law at The Pennsylvania State University).

From: Roberts, Gary R [mailto:robertsg@iupui.edu]

[Responding to Steve Ross' analysis: http://www.youtube.com/watch?v=9Jg3PWYEYTc]

The only thing I would really quarrel with on your decertification analysis is that the law isn't clear whether the players can choose a union this week, no union and antitrust litigation this week, and then a union again next week. Are they really choosing not to have a union when everyone on the planet knows they will recertify the minute they get a deal to their liking? Has the NFLPA as a union really gone away or is it still a union in disguise that is simply refusing to bargain in good faith? Stay tuned. We'll soon know the answer.

From: Ross, Stephen [sfr10@dsl.psu.edu]

Under labor law parties to multi-employer bargaining cannot end such bargaining once it begins, even if it appears that the parties are completely at an impasse. Several questions based on this principle:

1. Is there anything in labor law precedents, perhaps drawing by analogy on the rules relating to multi-employer bargaining, that would suggest that workers should not be allowed to decertify as a union just because they are unhappy with collective bargaining, once they have started the collective bargaining cycle? Under this theory, once workers agree to negotiate in good faith under the NLRA, they have made their choice and cannot opt for free labor markets.

2. At what point after multi-employer bargaining completely fails can one of the parties announce its desire to return to single employer bargaining? There has got to be some end game to multi-employer bargaining. I assume, for example, that if an industry had been shut down for ten years by strikes and/or lockouts with an impasse declared 9 1/2 years ago, the NLRB would permit single employer bargaining, no? Is this a useful analogy here?

3. I must confess I am skeptical of an affirmative answer to question 1 from my antitrust perspective, which is that the Sherman Act reflects a generalized preference for free markets. Although my own views on the labor exemption were reversed by the Supreme Court 8-1

(which is 11% better than Gary's views on single entity!), I see the point that Harry Edwards made in his DC Circuit opinion on Brown that workers get to choose between free markets or collective bargaining. But it seems to me that -- assuming that prior to decertification they have been negotiating in good faith under the NLRA -- this means that workers always get a choice. But I could be wrong.

ROGER ABRAMS' ANSWERS:

1. THERE IS LITTLE, IF ANY, PRECEDENT ON INSTANT DECERTIFICATION AS A BARGAINING PLOY. IT SEEMS CLEAR THAT UNIONS CAN GO OUT OF BUSINESS, BUT I HAVE NEVER SEEN ANY OTHER UNION USE THE TACTIC AS THE NFLPA HAS NOW DONE TWICE. THUS, THE NFL'S CHARGE BEFORE THE LABOR BOARD WILL TEST THE UNION'S TACTIC AS "BAD FAITH BARGAINING." (THE BOARD WILL FIND THE UNION BARGAINED IN GOOD FAITH, BUT I HAVE NO IDEA WHAT IT WILL DO WITH THE DECERTIFCATION STRATEGY. AS YOU KNOW, THIS IS ALL CAUSED BY THE ILL-CONSIDERED DC CIRCUIT AND SUPREME COURT DECISIONS ON WHEN THE ANTITRUST EXEMPTION EXPIRES [*Brown v. Pro-Football, Inc., 50 F. 3d 1041 (D.C. Cir. 1995) (Edwards, J), aff'd,* 518 U.S. 231 (1996) (Breyer, J). . HARRY EDWARDS IS A CLOSE FRIEND, BUT HE WAS CLEARLY WRONG.)
PREDICTION: JUDGE DOTY ISSUES AN INJUNCTION AGAINST THE LOCKOUT AS A GROUP BOYCOTT. PARTIES REACH A DEAL GIVING THE NFL'S OWNER A COUPLE OF BUCKS MORE THAN LAST TIME.

2. I HAVE NO IDEA ABOUT BREAKING UP THE MULTI-EMPLOYER BARGAINING, AND IT WON'T HAPPEN IN THE NFL SINCE SEPARATE DEALS WON'T WORK.

From: Clark Griffith [mailto:ccgpa@ccgpa.com]

I was wondering what the NFLPA is really after. If they are successful with the injunction, that vestige of labor law disappears, and they have a non union work force and the NFL will be asked to operate a 32 member association and avoid AT claims. How is this done? Clearly, the Multi-employer bargaining unit is finished as is the management council with regard to player employment issues. The CBA, that bundle of restraints on the labor market, is also gone. (Do the mandatory subjects of bargaining stay in place?) How does it operate?
It can operate NFL Properties, the NFL Network, etc., but how does it put a competitive game on the field? Who negotiates with the players? How do the players negotiate without stumbling into concerted behavior, triggering labor law coverage? It seems to me that the result is chaos. Is this what the players are after? Judge Nelson seems to buy the legitimacy of the disclaimer, so she will proceed as if there is no union. I was told that Smith said that the NFL would be fundamentally changed by this negotiation. Wow..
The judge suggested that the parties use the court to fashion a settlement. This would allow negotiation to go forward with her or a magistrate without having the form of the negotiation used in a trial.
Therefore, a group of defendants could negotiate settlement with a group of plaintiffs. I did not hear her say that the FMCS should be used at this time.

From: Roberts, Gary R [mailto:robertsg@iupui.edu]

Clark, you are asking questions that nobody has answers for and that go to the heart of this litigation. Essentially, the union-in-disguise's position is that it is free at any time to flip the switch and instantly turn a legal inherently multi-employer collective bargaining relationship into an antitrust violation. This league of teams, whose members cannot function independently of one another unless they are going to be just a collection of barnstorming clubs, cannot stop doing business without it being an illegal section 1 conspiracy (funny how the union-in-disguise can stop doing business but the league cannot), but if the league then operates as ordered the players can then argue that every league rule and policy is an illegal section 1 conspiracy. Kessler will say that all the league has to do is operate in a legal manner, but that basically means in the manner the union-in-disguise approves of, because otherwise it will bring an antitrust claim. In short, the players' position is that at any time the NFLPA can flip the switch and turn everything the league does with regard to its players into an antitrust violation unless the NFLPA agrees to it. One does not have to be a toady for the owners to realize that if this is the law, the players will be handed unbelievable bargaining leverage and will be able essentially to write their own collective bargaining agreement -- er, settlement agreement -- that will then become a collective bargaining agreement when the switch is flipped again. (This illustrates why this is just a preposterous legal position that merely underscores why the league should be recognized as a single entity. But I won't fight that fight again anytime soon.)

Many observers predict that Judge Nelson will follow her district court predecessors Earl Larson and David Doty in ruling for the players. But I am betting that the 8th Circuit will reverse her if she enjoins the league from shutting down its business operations, which is a truly incredible remedy -- telling a joint venture that it is legally required to operate its business but that everything it then does is also subject to section 1 challenge, while telling the employees' union that it can change its legal status on a daily basis. It's mind boggling to me.

I emphasize that on the underlying issue (i.e., what share of the revenue pie should go to the players and what share to the owners), I am agnostic. It may well be that the owners are a bunch of greedy bastards and the players exploited, short-careered, victims. But I honestly do not understand why the legal system doesn't require these employees to pursue their interests through collective bargaining the same way every other union in the country has to on behalf of their workers who are one helluva lot worse off than these professional athletes.

From: Ross, Stephen [mailto:sfr10@dsl.psu.edu]

Clark, as a matter of theory, your very question suggests the practical weakness in the NFLPA's case. The Sherman Act mandates free competition in labor markets. [But see, for the contrary view, Gary Roberts, Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints, 70 Geo. L. J. 19 (1986).]. The NLRA allows workers to engage in what otherwise would be a restraint of trade by collectively organizing; the non-statutory

labor exemption allows employers to participate in this process to make it work. The law gives workers the choice, and as a matter of public policy the corpus juris is agnostic about whether workers prefer a free labor market (enforced by the Sherman Act) or a collectively-bargained labor market.

Gary believes, for myriad and thoughtful reasons, that we should NOT be agnostic about whether sports league labor markets should be unrestrained and policed by the Sherman Act or regulated by collective bargaining. He clearly favors the latter, primarily because he believes -- as did a majority of the House of Representatives in 1957 -- that sports league labor market rules should NOT be subject to challenge under the rule of reason.

Roger Abrams likewise believes, for a variety of reasons, that society is better served by sports league labor market rules being determined collectively.

In most other markets, I suspect that Gary returns to his moderate agnosticism. If grocery store workers want to organize and engage in multi-employer bargaining with supermarket chains, that's great, and if not, then there is no way Gary would think that Safeway and Jewel should be able to agree on labor market terms, much less lock out workers.

This is why I would suggest that those like Gary who advocate the continuation of the labor exemption here are really just launching guerilla warfare on the application of section 1 to sports league labor markets, not really arguing about worker choice.

Now, Clark, as to your specific question as to how this plays out, there are two models. One is the model that exists for European soccer leagues: there is no labor exemption, so any labor market rules have to comply with competition law. Perhaps the NFLPA is so fed up with collective negotiation that they think this is the best approach. Alternatively, there is collective negotiation simply in another setting, which is that labor market rules are not determined by De Smith and Roger Goodell in NLRA-sanctioned collective bargaining, but by Jeff Kessler and Roger Goodell in a settlement approved by the court under FRCP 23(b)(1).

Personally, I remain agnostic on all these options.

From: Gary Roberts:

Steve, you have accurately stated my view: I do not think the Sherman Act is the appropriate vehicle for identifying how the sports player market should be structured because in intra-league player market is not a true market. It is an artificial market among inherently wholly integrated joint venturers, so we cannot start with the presumption that exists in other true markets that collaboration is presumptively anti-competitive unless the parties can show overriding pro-competitive benefits. In sports, there is a market at all only because of the way the venture partners have agreed to structure their inherently joint business. They could structure the business as a single corporation/LLC in which case there would not be a section 1 issue at all, because any internal labor market would be acknowledged to be purely artificial,

but that "true single entity" model is a far less efficient way to structure and operate a sports league. So to apply normal section 1 rule of reason principles to the intraleague market will more likely than not produce what I think would be silly results. Some restraints are necessary and inevitable. Because *American Needle* erroneously refused to recognize the league as a single entity, what those intra-league restraints should be determined solely through the collective bargaining process defined by the NLRA, not through collective bargaining that can be interrupted at any time with a litigation tactic that effectively puts at antitrust risk everything the league does unless the union-in-disguise agrees to it. That creates way too much bargaining leverage for the players and will inevitably produce a set of terms & conditions of employment that is optimal for the players but not consumers.

From: Ross, Stephen [sfr10@dsl.psu.edu]

Gary, I have regard for your long-standing argument that a jury verdict in antitrust litigation is a poor way to determine whether a sports league rule is consonant with public policy. I do not fully understand, though, why you think ex ante this is systematically unfair to owners.

Properly applied (as it was in the jury instructions in McNeil), the antitrust laws mandate that labor market restraints should not suppress player salaries below that which would occur in a free market, unless the owners can demonstrate that the restraints are reasonably necessary to maximize fan appeal through a better product (usually framed as facilitating competitive balance). I do not understand why the ability of players to insist that, unless they get a better deal, owners have to meet the standard I set forth above is in any way "unfair" to owners.

From: Abrams, Roger [mailto:r.abrams@neu.edu]

You all aptly describe the predicament the parties have fallen into in pro football -- kind of like a naked bootleg with three defensive backs bearing down on the QB. The labor law perspective starts with the premise that there is an independent value in encouraging collective bargaining -- see Congress, 1935. The parties tried that, but the starting point was (apparently) a management demand for an extra $1 billion in its pile of goodies. It does not matter whether this was needed, warranted, selfish or otherwise – consistent with good faith collective bargaining you can ask for the moon. The PA seems to have gone through all the motions of collective bargaining, and that is why I doubt the NLRB will ever find that it bargained in bad faith. It seems likely that Kessler's plan all along was to try to use antitrust as the dealmaker. If it works, it will have proven very clever, and Jeff is certainly a bright guy.

We may not like a court (or Congress for that matter) inserting itself into a labor dispute, but the PA has nicely set this up so that, on its face, this is no longer a union-management labor dispute. Much of labor law depends on labels, and calling yourself a trade association is perfectly fine, as long as you act as one. That is why I was so amused yesterday about the headlines which read: "Both parties seek mediation," as if they were seeking the same thing. The NFL wants the union to resurrect itself now by meeting with [chief federal labor mediator] George Cohen. The PA wants the court to oversee the mediation so that it can always run back

to St. Paul during the course of whatever agreement results from the process. These are very different things.

I suspect that the Court will, in fact, grant the injunction and not wait for the Labor Board's input on decertification. I trust no one thinks that the group boycott of a large group of non-union players passes muster under the Rule of Reason. It is true, as Gray suggests, that this result would rebalance the power between the parties and the players may end up with a better deal than they would have. I can't tell whether this is good or bad. I do know that Brown gave management a tremendous benefit it did not "pay for" in bargaining with the union. This may be the "make-up" call.

The only thing I was really worried about in this strange, albeit interesting, process, is what happens when the trade association wins. A court-supervised settlement process may be the only way the trade association can convert itself back into a union. That's what happened before, but we did not take much notice.

From: Gabe Feldman

I don't know that the "mediations" the parties are calling for are all that different at this point. Perhaps recognizing that Judge Nelson wasn't buying their sham argument (or any of their arguments), the NFL changed their request-- they now appear willing to talk to the players while assuring that those talks won't be used as evidence that the union still exists and that the decertification was a sham. Granted, they still want those talks to happen in front of George Cohen, but they no longer seem to be insisting that the union resurrects itself before those talks happen. The players, on the other hand, want Judge Nelson to oversee the mediation (with assurances that those talks won't be used against them), but I don't see that as meaning that the players will insist that Judge Nelson maintains Doty-like jurisdiction over any agreement that eventually stems from that process.

So, if the owners are willing to talk to the players without them re-forming their union and without arguing that the talks indicate that the union still exists, I don't see them as being that far apart.

Of course, the risk for the players is that if they do sit back down and talk with the owners, and don't reach a deal, and this winds its way up to the 8th Circuit (assurances from the NFL or not), the 8th Circuit could use these post-decert talks as evidence to conclude that the decertification was a sham. That risk exists whether they talk with Cohen or with Judge Nelson (after all, everyone knows that the goal of both talks would be to reach a new CBA), though I recognize the behavior looks more union-like if they're back with Cohen...

From: Ross, Stephen [sfr10@dsl.psu.edu]

I concur with Brother Abrams more-expert analysis of the NLRA with one quibble: WORKERS (not management, the NLRB, the then-failed NRA, or society) ought to be able to freely choose whether to compete as individuals in a free market or to collectively bargain with management.

Once we posit that workers have this choice, then it follows (short of the specific sort of special rule the NLRB developed for multi-employer bargaining) that workers ought to be able to choose, whenever a collective bargaining agreement is not in place, whether they are better off without a union or with a union; having selected the former, at any time they are free to select the latter; having selected a union, at any time they are free to return to free market principles.

It is hard to think about these issues outside of sports, because (as Roger has observed in conversation in his lovely Boston condo) it is so hard to organize a union and successfully negotiate a first contract that there are very few industries where workers are relatively indifferent to unionization or not and unionization is even feasible. But if this sort of dispute did occur, say, in the supermarket industry, does anyone seriously think that if the UFCW disbanded rival supermarkets could lock out workers? Again, I think this demonstrates that Gary and his fellow travelers are simply trying to reverse American Needle and 1940s decisions that apply the Sherman Act to labor markets at all.

This naturally gives workers an asymmetric advantage over management, although history shows that the advantage is swamped by the vast economic power advantages that capital has to labor.

From Gary Roberts:

Steve, I won't deny that I think American Needle was wrongly decided and that sometime down the road the world will have to face the reality that treating sports leagues like a bunch of independent competitors makes no sense. But that is not really the core of my problem with the current NFL situation. I acknowledge that any group of workers has the right either to be represented by a union or not. But every person on the planet from the time they were small children have heard and understood the adage that you can't change rules in the middle of the game. I have no sympathy for the bargaining demands or position of the owners, but it is just fundamentally unfair and unreasonable for a group of workers to elect to be represented by a union, but then when they cannot get everything they want through the labor law bargaining process, they shift in mid stream and claim they now elect not to be represented by a union. That is just wrong! And from a policy standpoint it makes no sense to allow one side in a legally protected collective bargaining relationship to simply send a letter in the middle of the bargaining process and instantly transform a legal multi-employer bargaining tactic into an antitrust violation.

The Norris-LaGuardia Act was passed in 1933 in order to stop one side in a labor-management relationship (then management) from using antitrust law in a way that was never intended in

order to give that side unfair or disproportionate bargaining leverage. In this case, the shoe is simply on the other foot. The union (or whatever you want to call it) believes that it can simply flip a switch, then enjoin the inherent joint venture partners from shutting down their business, and then continue to sue for treble damages for whatever rules the joint venture then operates under as ordered. That is an absurd scenario that essentially produces a legal regime where the league is acting illegally when it does anything unless the union agrees to it. The unfair and disproportionate bargaining leverage that gives the players should be apparent to anyone. The same policy concerns that motivated the passage of Norris-LaGuardia almost 80 years ago are present again, only from the other side. I confess that I struggle to understand how anyone can think it is fair or appropriate to allow either side in a bargaining relationship (or any relationship for that matter) to change the rules in the middle of the process, particularly when the resulting scenario would be so unbalanced.

From: Clark Griffith [mailto:ccgpa@ccgpa.com]

Can we agree that a CBA under the NLRA is the best solution and that this mess will end up that way? However, a comment by De Smith, [Brady class plaintiffs' lawyer James] Quinn's statement in court and a conversation I had with a NFLPA lawyer cause me to believe that the PA is after something vastly different. De Smith was heard at a DC party saying that the NFL would be" fundamentally changed by the time he was finished with it," Quinn said that the NLRA protections don't work and that they were going to try AT protections, and the lawyer, in answer to my question as to how the league would operate under AT rules, told me that it would have to develop a plan that complied with AT restrictions. I asked who would approve this plan, court via declaratory judgment or the union? The answer was that "it would have to work it out with the union." We, therefore, are faced by a dilemma that the NFL may have to try to operate without AT protection.

Just how would this take place? Obviously, no multi-employer bargaining could take place, but could there be a management council or even a commissioner? Could the teams even talk to each other let alone set any rule relating to the employment of players? Steve thinks these issues could be solved in a Rule 23 proceeding, but that still puts the union in control of the outcome. I believe that if the NFL is faced with this problem, it simply stops operating rather than risk treble damages. I do know that PA lawyers hate the level playing field, lockout/strike equality of the NLRA, where the outcome of a dispute is a bargaining order. Kessler loves the prospect of running the NFL on his terms. We all have the ingrained sense that only a CBA under the NLRA will work and this is true, but this is, in my opinion, a new strategy according to Quinn's and Smith's comments. I think my dear friend Susan Nelson will see the right to disclaim as fixed, the lockout as an illegal act as a group boycott or concerted refusal to deal. (She asked Boies if his billionaire clients could lockout the players forever?) She probably thinks today that enjoining the lockout is legally defensible and will result in a benefit, i.e. a move towards a settlement. That enjoining a lockout is illegal under labor law is not something she thinks restricts her options in this case. She will also see this as a skirmish over the lockout and not realize that this is the opening of the battle of Stalingrad. The NFL needs to take her on head on in court sponsored mediation to educate her as to the enormous risk in this case. They

will not get the union in front of the FMCS at this time. Stay tuned folks, this may be the way sports "labor" disputes are played out for the next few years.

From: Steve Ross

I do not agree that the CBA is necessarily the best solution.

First, recall that there are two markets where labor restraints could have an anticompetitive effect: the labor market (by lowering salaries or rendering salaries unresponsive to demand) and the product market (by resulting in a less appealing product for fans, where the cost savings from labor are greater than the revenue decline from fans). The plaintiffs need not show a product market effect in order to prevail under the rule of reason, although Mackey establishes and Bd of Regents validates that the defendants can defend by showing that a restraint is necessary to achieve product market efficiencies.

Second, although never tested, it seems that when the non-statutory labor exemption applies, it covers labor restraints that have significant anti-consumer effects (see e.g. Jewel Tea) and presumably would apply in the face of a consumer class action as well as litigation brought by players. In my view, this is the correct approach, because consumers (and society as a whole, as reflected in the NLRA) value industrial peace and continued service more than they value any particular labor restraint that might produce a less attractive product.

For this reason, I am willing to tolerate anti-consumer labor restraints when they are contained in collective bargaining agreements, and accept (although I don't really think it's correct) Breyer's argument in Brown that anti-consumer labor restraints that arise as part of the general process of collective bargaining need to be exempted as well to facilitate the NLRA's goals.

If however, workers no longer prefer to collectively bargain, I see no reason that consumers should tolerate rules that make the sport less attractive.

I appreciate that Clark's vision of the NFL having to operate without AT protection is puzzling at least and horrifying at worst; I note that European leagues all do this (they don't have a labor exemption for a variety of reasons, in part because unions in Europe are not exclusive representatives of the unit). I think it reflects the industry mindset for Clark to suggest that the NFL will rather shut down a $10 Billion industry rather than operate subject to treble damages, as virtually every single other business does! Contrary to Breyer's misleading discussion in Brown, multi-employer bargaining would not be per se illegal. Just as with joint ventures and standard setting in the U.S., firms with skilled antitrust counsel present (and Jeff Pash and Gregg Levy certainly qualify) routinely discuss all sorts of issues; many ideas that would actually be illegal are tabled and then rejected.

I don't understand Clark's comment that a Rule 23 proceeding "puts the union in control of the outcome." It is true that the NFL would be barred from violating the antitrust laws unless they

could secure a compromise settlement with Kessler, but I don't see this as significantly different from the way the labor exemption is supposed to operate anyway.

This is the heart of my disagreement with Gary as well. Gary is focused on how unfair it is for the union to 'change the rules in the middle of the game,' and has previously written about how he is agnostic on the substance of the actual rules the NFL implements but how unfair it is to give the union too much power. In terms of the specific complaints he raises in his last email, I have previously conceded -- given my lack of expertise in labor law -- that it would be superficially reasonable for the NLRB to hold that it is an unfair labor practice for a union to decertify once a round of bargaining starts, just as it is an unfair labor practice to break off multi-employer bargaining once a cycle starts. However, Roger informs me that the NLRB is unlikely to so find. So, if this is not "unfair" in NLRA terms, I see no reason why the EXCEPTION to the NORMAL rule that ALL INDUSTRIES ARE SUBJECT TO THE ANTITRUST LAWS ought to be extended here.

As we're all law professors, perhaps a ridiculous analogy will fill the bill. When both of my daughters lived at home, there were fights about borrowing each other's clothes, make-up, etc. As long as they agreed among themselves, I didn't really care what they did. But when the fighting reached the point where parental intervention was required, the rule was that everything was the sole property of each kid and couldn't be shared. Now suppose in one particular month Sara really wanted to borrow Lizzie's clothes more than the reverse: this gives Lizzie an unfair "club" because now she can extract all sorts of deals or concessions out of Sara, so that they work it out on the 3rd floor and I don't know about it. Is this horribly unfair to Lizzie?

I start from the proposition that NFL labor rules should conform to the Sherman Act, and the labor exemption is precisely that -- a special exemption that serves some important public function unrelated to competition policy. Clark's comments echo Gary's in adopting a fundamental presumption that the Sherman Act can't possibly apply to sports league labor restraints; the implication is that if the Supreme Court was foolish enough in Radovich to refuse to apply Federal Baseball to the NFL, and foolish enough in American Needle to refuse to find sports leagues as a single entity, then the labor exemption should do the good work that the Court failed to do.

From: Gary Roberts

Maybe, Steve, it all comes down at the core again to our basic disagreement that you think the federal courts are capable of intelligently applying section 1 to the internal rules of sports leagues. I don't. You say that "the NFL would be barred from violating the antitrust laws unless they could secure a compromise settlement with Kessler." In my mind, that is not the way to phrase it. I would say the NFL is barred from doing anything without getting the union's permission because if antitrust governs, then everything the league does, short of being structured as wholly independent barnstorming teams, requires uniform agreement among the 32 teams and thus is at risk of being found illegal and subject to treble damages by some

federal judge or jury. There is no rational predictable set of standards for applying the rule of reason to the inherently uniform rules of a joint venture with respect to its joint business. You simply cannot tell me any set of principles for when joint venture partners are required to act independently and when they are allowed to act cooperatively with respect to their jointly owned and operated venture. You apparently think there are. I am as convinced as I can be that there are not, and so turning these labor disputes (or any dispute about the proper rule for a league to have in any context) over to a federal antitrust court is simply giving judges a blank check on which to issue whatever ruling produces the results consistent with their own preferred, often biased, outcome. (To me, this is the fundamental lesson of Texaco v. Dagher in 2006, although I realize that that case simply held that per se rules don't apply to joint venture agreements about the price of a jointly produced product, but the reasoning made it clear that such joint pricing policies are not going to violate the rule of reason either.) I think Clark agrees with me, which is why he says that the proceeding "puts the union in control of the outcome."

The total unpredictability of after-the-fact antitrust rulings and the lack of any rational standards for applying the rule of reason to internal joint venture governance puts the league at such risk that it cannot afford to operate at all because anything it does will be claimed by the union (or plaintiff), and likely found by sympathetic federal judges in Minnesota, to be illegal -- and yet now while the league cannot risk operating at all, the court is going to tell it that even a decision not to operate is illegal too. Whatever it does is illegal according to the union, unless the union consents to it. In my mind the whole thing is just absurd. But if one thinks, as you do, that the rule of reason is an understandable, rational, and predictable set of legal principles that can guide the league's decision-making and will be applied sensibly by the federal courts, then you are right -- the league should simply operate without violating section 1. I just don't believe the rule of reason is in the context of an inherent wholly integrated joint venture like a sports league either understandable, rational, or predictable, or that the courts that apply it have any clue what the hell they're doing except reaching a result they like. And therein, I suspect, lies our fundamental disagreement.

I think Steve is absolutely wrong on another point as well. He says below -- "I think it reflects the industry mindset for Clark to suggest that the NFL will rather shut down a $10 Billion industry rather than operate subject to treble damages, as virtually every single other business does!" The fact is that there is no other business that has to have its internal operating rules subject to ad hoc rule of reason review. None! That's why no other labor union in America except those in sports can decertify and bring an antitrust case. I accept that in effect I am rearguing American Needle, but that case was so obviously wrongly decided when applied in this context. The only unions in America who can use this antitrust ploy are sports unions (who happen to represent the highest paid unionized (or not) employees in the world) because they have the fortuity of having their employer be a bunch of "independent" sports teams that have to act jointly when it comes to running their inherently joint business. So it's not true that "virtually every other single business" has to be subject to treble damages for everything it does. In fact no other business has to operate under this sword of Damocles.

From: Gabe Feldman

Steve has already captured much of what I was planning to say (though I confess I had not thought of his excellent makeup-sharing analogy) and that I have already begun to write as part of a law review article, but let me add a few notes in response to Gary and Clark. I will try not to repeat too much of what Steve has already written, though our views seem to be almost completely aligned on this one.

I agree with Steve that Gary's struggle with this situation seems to stem (at least in part) from the fact that he believes that Section 1 of the Sherman Act should not apply to professional sports leagues.

With American Needle (and Radovich) putting that argument to bed, the remaining argument is that Section 1 analysis of pro league restraints "makes no sense," etc., and that allowing the union to "simply flip a switch" in the middle of bargaining to enjoin the league from locking them out forces the league to act illegally unless the union agrees to it. I see at least two problems with Gary's argument. First, the argument seems to go away-- or at least lose much of its force-- if there were a Section 1 analysis of pro league restraints that did "make sense"-- that is, if it allowed leagues to implement reasonable, procompetitive rules that the owners could, with some level of confidence, conclude ex-ante would survive Section 1 scrutiny. I concede that world may not exist right now (though Justice Stevens did give the leagues some very helpful rule of reason language at the end of American Needle), but, to me, it highlights Gary's primary discomfort with the players' decertification strategy. If there were no players union, or, if the players permanently, unequivocally, in good faith decertified and swore on all that is holy that they would never ever return as a union, the league would have to figure out a way to create rules that would survive Section 1 scrutiny. Because Gary believes that world, in and of itself, is unfair, there is no way to avoid the conclusion that any sequence of events that brings us to that world is unfair (whether it is rejecting American Needle or limiting the scope of the labor exemption).

I'm not sure I understand how allowing the players to return to the default world-- where owners must agree on reasonable restraints-- is so terribly unfair. Perhaps it's because the default world itself is unfair, but that leads us back to the point that Gary's main trouble is with the mere application of Section 1 to league activity. But, assuming the league could enact a set of rules--including reasonable restrictions on free agency, a draft, etc.-- without violating Section 1, why is the league in such an unfair position if it is forced to negotiate a deal while being constrained by Section 1? I just don't accept the argument that every rule the league will put in place will violate Section 1 and that the league will be at the mercy of the players. It's not as if the league is powerless at that point. In the "real" world, it's at that point where management has complete power.

The league may be hesitant to implement a salary cap or strict free agency rules, but they're free to implement other rules that could force the players to agree to concessions and even to re-form their union. For example, the league can eliminate the minimum player salary and the

salary floor. There's no real threat of antitrust liability for eliminating price fixing agreements, and the disappearance of the minimum and floor would impact a large number of the players and give the owners some real leverage. (And, if the league rules are really that anticompetitive, shouldn't we be narrowly construing any exemption to the antitrust laws that might apply to those rules?

Again, I understand part of Gary's response-- there is no way to sensibly apply Section 1 to these rules. But, that doesn't mean we don't apply the antitrust laws at all, and the concern seems to go away if there were a way for the league to predictably and successfully defend its "reasonable" rules.)

The second problem I have with Gary's argument is the notion that this "switch of the flip" occurred in the middle of bargaining and thus leads to the inherently unfair situation where the players can jump in and out of antitrust and labor law as they see fit. I concede that something seems unfair about the players being able to change legal regimes like they change their hats (though it will be easier for the players to change their hats now that the NFL has opened up their apparel licensing to multiple licensees post-American Needle). But (putting aside that it also seems unfair that the labor force has no real alternative opportunities for employment), this wasn't exactly "in the middle of bargaining." Judge Nelson pressed [NFL' s trial counsel, ace litigator David] Boies on this very point. We all agree (I think) that at some point in time the players can actually decertify, lift the labor exemption, and gain access to the antitrust laws. Roger suggests (I think) that the NLRB would recognize that the decertification itself can happen at any time, but the question remains whether that decertification is sufficient to lift the exemption, and/or how much time has to elapse before the decertification does lift the exemption. If the owners locked out the players for 3 years post-decertification and the union remained decertified, would that be sufficient time to lift the exemption? 2 years? 1 year? 6 months? Where's the line? And, if there is a line, we're just disagreeing about degree, not kind. The league characterizes the timing of this decertification as the "middle of bargaining," but the players (and perhaps Judge Nelson) characterized the timing as the "end of bargaining." Two extensions had come and gone, the CBA was hours from expiration, and the owners were waiting to lockout. Whether that's the middle or the end of bargaining, if we agree that the union can choose antitrust over labor law, we're down to asking whether a decertified union has to allow a certain amount of time to expire to bring an antitrust suit? I get the sense that the league would be no more comfortable allowing the decertified union to sue under antitrust law 6 months after the CBA expired than they would 1 day after the CBA expired.

One last thought-- the delay right now clearly helps the owners in one respect. The longer the lockout lasts, the more economic strain the players start to feel. But, the longer the lockout lasts, the further we get from the moment of decertification. If the 8th Circuit hears this case 3 months after decertification and life has gone on for the players without any labor law protection, does the decertification-antitrust suit become more valid?

From: Gary Roberts

Gabe, your characterization of my issue in your second paragraph below is absolutely correct. I support the single entity theory as well as the labor exemption precisely because I believe there is no sensible way to apply rule of reason principles to internal sports league policies. If you can get the courts to develop some rational predictable way to apply section 1 to internal sports league rules, I will surrender. But since they have not (and I believe you concede that a fair rational world like this does not exist now), the point I just made a few minutes ago in my email reply to Steve's missive remains.

From: Roger Abrams

First, as to Gary's suggestion that this is a sports-only ploy: there is no reason why this could not be repeated by unions such as Actors Equity with the Broadway theaters. (Although I suspect employees in the entertainment industry would never decertify because it is so hard to hold that union together with so many non-union job opportunities available.) The construction industry unions -- carpenters, laborers, etc. -- could also use the strategy, but there are many available non-union workers who would fill those jobs in a second. None of this is much different from the NFL. See 1987 Scab Football.

Next, as to antitrust (where I am, admittedly, at a distinct disadvantage), Congress did pass the Sherman and Clayton Acts, I think, and so any limits on the NFL's ability to run its shop in a non-union setting flow from law that is 120 years old, not from anything the PA did by committing suicide. Industries like the NFL can operate legally, I am told. Any arrangements among the teams that are essential to the operation of a league -- leaving out revenue sharing, price-fixing on player salaries, etc. -- will pass AT muster.

I am not particularly happy that the PA brought the bargaining dispute to court when it did not have to -- unlike the MLBPA in 1995, through the Labor Board to the federal court. On the other hand, the NFL should stop whining and make a better offer.

From: Ross, Stephen

Gary Roberts is simply a more thoughtful and intellectually rigorous successor to those who made the precise arguments that the Sherman Act provided no rational, predictable, and sensible outcomes in:

United States v Socony Vacuum (1940) (complexities of oil industry, including essential nature of product, lack of storage supplies, and need for capital for high-risk drilling, meant that antitrust principles should not apply)

Radovich v National Football League (1957) (same principles of inappropriateness to apply antitrust to sport that led to rule in *Federal Baseball*, reaffirmed in *Toolson*, should apply to bar antitrust scrutiny of the NFL)

The House of Representatives in 1957 (H Judiciary's bill to subject sports to special provisions roughly akin to current rule of reason replaced by floor substitute to virtually immunize all activity)

The U.S. Senate in 1965 (Senate's bill to immunize virtually all activity)

American Needle v NFL (2010) (inherent interdependence of sports clubs precludes rule of reason inquiry).

The legal (as opposed to policy) difficulty with Gary's argument is that it has been rejected at every possible turn by the courts and our bi-cameral legislature. An argument that appears to concede (though implicit, through silence) that a union decertification and injunction against collective management activity is perfectly appropriate in labor markets where the Sherman Act can apply a predictable set of rules governing the rule of reason (say, grocery stores), but that the labor exemption should continue here because the rule of reason cannot (in Gary's opinion) be sensibly applied, is simply guerilla warfare masked as a legal argument.

I can't resist two other quibbles:

First, Gary gives away the answer when he objects that "there is no other business that has to have “its” internal operating rules subject to ad hoc rule of reason review." Of course, I (and it would seem 9 Supreme Court justices) would instead characterize the challenge practices as agreements among 32 club owners, not an internal operating rule of a league. So this argument, like it would seem all of Gary's points, keeps coming back to his fundamental disagreement with the overarching antitrust principle from *Socony Vacuum*, articulated again in *Professional Engineers* when the Court wrote that the Sherman Act presumes competition is a good thing and an argument that competition itself is unreasonable requires the sort of Congressional exemption that sports leagues have not been able to obtain.

Second, Dagher is clearly distinguishable. The fundamental lesson of Dagher is that pricing policies by fully integrated ventures are not subject to section 1. In Dagher, the parties deliberately set up the venture to share ALL revenue on a fixed formula basis. Shell and Texaco took the same percentage regardless of how much Shell- or Texaco-branded gasoline was sold. If more gas could be sold by labeling Shell as superior and higher-priced gasoline and Texaco as cheaper bargain gasoline, both Shell and Texaco would have profited. If those sitting on the other side of the table from De Smith and Jeff Kessler were solely concerned with maximizing the profitability of the NFL (i.e. determining "its" internal operating rules to maximize efficiency), then the NFL would actually have a winning argument after Needle. But they aren't, and they don't.

From Gary Roberts:

At least Justice Blackmun and his colleagues agreed with me in *Flood v. Kuhn.* Thank God there is one shred of sanity in this area. If my position is guerilla warfare, I follow proudly in the tradition of the Minutemen after Concord & Lexington and the French underground in WWII.

BTW - I actually do think the Court was wrong in Socony Vacuum and American Needle, just as it was in Schwinn, Utah Pie, Fortner I, Klor's, Topco, Dr. Miles, etc., etc. (as well as Dred Scott, Plessy v. Ferguson, Korematsu, and many others). The simple-minded, popular, bright-line approach is not always the right one. The Radovich case is not relevant b/c the conduct at issue there was interleague, not simply intra-NFL rules. And anyone who relies on the inaction of either branch of Congress for any rational principle is obviously grasping at straws.

Finally, I suspect that those sitting on the opposite side of the table from De Smith and Jeff Kessler are concerned with maximizing league-wide profits and efficiency (which is most of the time) far more frequently than De Smith and Jeff Kessler are concerned with enhancing consumer welfare (which is never).