

From: Mitten, Matt [matt.mitten@marquette.edu]

My thoughts: At bottom, this is a labor dispute that only can be resolved by an agreement that both sides can live with. Neither the NLRB nor a court applying antitrust law can require the parties to make a deal or to agree to any particular terms of their employment relationship (e.g., how the economic pie will be divided and for how long). Under current law, the players can choose the labor arena by unionizing and collectively bargaining, or an antitrust court by not unionizing and seeking to invalidate particular terms and conditions of employment unilaterally imposed by the clubs as unreasonable restraints of trade. As a policy matter, I'm troubled by the players' strategy of "decertifying" their union in the middle of collective bargaining negotiations and picking up the antitrust sword simply to gain bargaining leverage. This strikes me as contrary to labor law's objective of peacefully resolving labor disputes in traditionally unionized industries through collective bargaining and the parties' usage of their respective economic weapons. I think a court ultimately must decide whether decertification under these circumstances results in the inapplicability of the non-statutory labor exemption. As a judge, I would find Gabe's analysis, combined with the long history of multi-employer collective bargaining in the NFL, to be appealing. I'd be tempted to find a way to get the parties back to the bargaining table as soon as possible, rather than applying antitrust law and its exclusively prohibitory remedies to a labor dispute that ultimately must be resolved pursuant to an agreement among the parties. But I'd want to carefully think about the implications of ruling that the non-statutory labor exemption applies and bars the players' antitrust suit (particularly if the NLRB finds that the NFLPA had bargained in good faith and its decertification is legitimate) and whether there's a principled ground for doing so.

From: "Ross, Stephen" <sfr10@dsl.psu.edu>

Ultimately, Matt's cogent analysis articulates the case better than I did: that the decert-in-the-middle-of-the-bargaining-cycle strategy is contrary to federal labor policy. I am agnostic on this point, except regarding doctrine: if it is contrary to federal labor policy, it ought to be considered an unfair labor practice by the NLRB. And if the NLRB doesn't think this practice is contrary to federal labor policy, I don't think it's the business of federal courts, who disagree with the Board on labor policy, to interfere by refusing to apply otherwise applicable labor law. I don't agree with the Goldberg view of the labor exemption (which got only 3 votes in *Jewel Tea*, but for which his clerk, Breyer, got 8 in *Brown*), but the idea that federal courts would use the antitrust law to enforce labor policy that the labor board doesn't agree with is really counter-historical.

There are a number of non-union industries where structural relief to provide competition is undesirable, and so the industry is regulated pursuant to agreement among the parties pursuant to antitrust settlements: motion picture distribution, jointly licensed music, and (if currently litigating plaintiffs have their way) credit card interchange fees. Indeed, the Federal Rules of Civil Procedure Rule 23(b)(1) clearly contemplates that disputes "can be resolved by an agreement that both sides can live with" by certifying a class, allowing the parties to strategically jockey through litigation, and then allowing the parties to negotiate a settlement.

I am open to persuasion, but I can't really think of a reason why I, or society, should prefer a settlement between Roger Goodell and De Smith in collective bargaining instead of a settlement between Roger Goodell and Jeff Kessler as attorney for the class. (Indeed, there is something to be said for the latter, which allows a judge to give closer scrutiny to whether the settlement is fair than the relatively weak Duty of Fair Representation under labor law.)

So much for doctrine...

If Matt really is concerned about getting a settlement quickly, as opposed to theoretical objections or substantive concerns, then the clear position to cheer for is Kessler's, since an injunction barring a lockout is far more likely to gain a quick settlement now.

From: Mitten, Matt [<mailto:matt.mitten@marquette.edu>]

What do you think of this proposed standard for balancing the competing concerns of antitrust and labor law: decertification of the players union prior to impasse constitutes an unfair labor practice and precludes the nonstatutory labor exemption from being extinguished. (Has the NFL made this argument?)

From Roger Abrams

Matt, I applaud your effort to develop a brighter line to deal with this conundrum, but the Labor Board's thinking about decertification, of course, was not developed with antitrust in mind and focuses only on the right of employees covered by the Act to decline to be further represented for purposes of collective bargaining by an exclusive bargaining agent. This can occur anytime after a contract expires (if I remember my Labor Law -- which I have not taught since 1985!). Requiring employees to wait until an impasse imposes a significant burden on this right. And as to when an impasse actually occurs, ask the MLB how they screwed that up on Christmas 1994. An employer can keep a union from pulling the switch simply by following the example of the MLBPA.

I am not terribly worried about the unfairness my friend Gary expresses for the NFL. Most of them bought into a unionized workplace and that entails burdens seen and unforeseen. Although I have been appointed to hear about 2200 labor disputes as a labor arbitrator, I still can't figure out what is a "fair" or "unfair" outcome. As expressed earlier, I don't like Kessler's strategy, but that is not because it is too powerful. It is simply disingenuous and dangerous to unions without the apparent staying and resurrecting power of the NFLPA, the latter being a particularly timely metaphor in light of the forthcoming Easter season.

In any case, I think we may see a deal emerge out of the St. Paul mediation. The parties were not that far apart, and now the implied threat of an injunction adds momentum.

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

Because I think Brown was wrongly decided, I personally think this is bad policy, but concede that it would be consistent with Brown if the NLRB actually found that decertifying pre-impasse was contrary to the purposes of the NLRA.

One of the key questions is whether, in general or in the specific context of sports, the NLRB shares Gary and Clark's substantive preference that labor markets should be organized by collective bargaining as opposed to free competition subject only to reasonable restraints permitted by the Sherman Act. If so, this obviously would support Matt's idea.

There are quite a number of industries where AFL-CIO or UNITE organizers would claim that workers are better off with collective bargaining, while employers would argue that the entire industry, and as a consequence workers, are better off with competition that will require employers to offer competitive wages and working conditions. I presume that, with regard to most of these industries, the NLRB's position is complete agnosticism as to whether workers should choose to organize or not.

The question is whether there is something different about sports (Gary thinks so, but I'm not sure the NLRB agrees), or something different about exercising your choice in the midst of collective bargaining.

From: Roger Abrams

Maybe this will help. As a matter of preferred national policy under the NLRA, parties should attempt in good faith to reach agreements at the negotiating table. Sometimes that works -- actually most of the time with second, third, fourth, etc. CBAs. Unions can strike, management can lockout -- and still CBAs are eventually reached. Genuine decertification should remain an option that can be exercised by the employees. Whether that results in individual bargaining, replacement by another union, or Kesslerized antitrust actions should be irrelevant. Sure, the Labor Board can give us guidance on that, but the Judge has case in front of her now.

While rules that apply only to sports should be avoided (or that only apply to some sports, see Federal Baseball), this may be one of those rare situations where a union can pull off the Kessler twist. It is a hard case, as we have all seen through this exchange of emails.

One more thought. The conundrum is caused by Congress' failure to explain how the antitrust laws should be applied in this situation. Since Congress has nothing to do now (except repeal the New Deal and its progeny), perhaps it could tell what it intended?