
Richard J. Haray
Antitrust law, principally embodied in the Sherman Act, encouraged the development of a competitive market by prohibiting the concerted actions of horizontal competitors seeking monopolistic control. Concomitantly, labor laws, principally embodied in the

1 The Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)). Section one provides in pertinent part:

   Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . ., is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .


The broad and inclusive language of the Act has been interpreted as Congress’ attempt at exercising the full range of its power under the Commerce Clause. See United States v. South-Eastern Underwriters Ass’n, 322 U.S. 533, 558 (1944). “The [Sherman Act] has been very ingeniously and properly drawn to cover every case which comes within what is called the commercial power of Congress.” 21 CONG. REC. 3147 (1890) (statement of Sen. George, member of Senate Judiciary Committee responsible for redrafting the Act before its unanimous passage). See also 21 CONG. REC. 8314 (1890) (statement of Rep. Stewart) (“The provisions of this trust bill are as broad, sweeping, and explicit as the English language can make them to express the power of Congress over this subject. . . .”) See generally T. Vakerics, ANTITRUST BASICS § 1.02(1) (1986) (overview of sections one and two of the Sherman Act); 1 J. Von Kalinowski, ANTITRUST LAWS AND TRADE REGULATION § 2.02(4) (1986) (discussing legislative enactment and scope of Sherman Act).

The Sherman Act’s broad language has also been expansively interpreted by the Supreme Court to allow it to meet the demands of an everchanging industrial marketplace. See Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933) (Hughes, C.J.). See also 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman) (noting the proposed Act was also intended to arm the federal courts with the power to assist state courts “in checking, curbing, and controlling the most dangerous [unlawful] combinations”).

2 See United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 385-86 (1956); Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911). Historically, federal antitrust statutes were a codification of the common law policy which condemned as illegal all acts or contracts that unduly restricted competition in the market. See Apex Hosiery Co. v. Leader, 310 U.S. 469, 479-80 (1940); 1 J. Von Kalinowski, supra note 1, § 1.01(2)(a). It should be noted, however, that the Sherman Act, through subsequent judicial interpretations, enjoys a greater breadth of scope than that of the common law prohibitions. See id. However, it is clear that current judicial construction, which involves an adaptation of the law to changing industrial conditions, still mirrors the common law approach. See id. § 1.01(2)(b). In addition, courts still find it necessary to refer to the common law when defining the terms or
National Labor Relations Act ("NLRA"), were enacted to foster collective bargaining agreements and thus maintains a decidedly anticompetitive focus. Exemptions have been carved out of the phrases of the federal statutes. See id. § 1.01(2)(c). "Congress has incorporated into the Anti-Trust [sic] Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case." United States v. Associated Press, 52 F. Supp. 362, 370 (S.D.N.Y. 1943), aff'd, 326 U.S. 1 (1945).

The motivating factor for passage of antitrust legislation was the growing congressional concern that a few corporations were amassing significant economic power which would be used to the detriment of the general public. See Standard Oil Co., 221 U.S. at 50. This legislation also reflected a basic extension of congressional economic philosophy that a free market was the most efficient way to allocate resources; which, in turn, would produce better goods and services at lower prices. See National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 695 (1978); Standard Oil Co. v. FTC, 340 U.S. 231, 248-49 (1951). See also P. Areeda & D. Turner, Antitrust Law § 103 (1978) (objectives of antitrust law); T. Vakerics, supra note 1, § 1.01 (general overview of antitrust legislation).

The Sherman Act distinguishes between unilateral conduct and concerted action. See Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984). Unilateral conduct is governed by section two which provides in pertinent part: "[e]very 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 . . . shall be deemed guilty of a felony." 15 U.S.C. § 2 (1982). Unlike section two, a section one violation does not require proof that concerted activity threatens monopolization, with the result that concerted actions under section one are scrutinized more than unilateral conduct under section two. See Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984). Consequently, restraints on trade without a combination or conspiracy are outside the purview of section one. However, such conduct would constitute a section two violation. Id. at 767 n.13.


4 See 29 U.S.C. §§ 151, 157 (1982). Under the NLRA, it is the declared "policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce" and when they have occurred to lessen or eradicate these problems "by encouraging the practice and procedure of collective bargaining." Id. § 151. Employees were given the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining." Id. § 157. "The practice and philosophy of collective bargaining looks with suspicion on . . . individual advantages." J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944). The essential character of labor unions is anticompetitive. See J. Weisbart & C. Lowell, The Law of Sports 549 (1979). See also McCormick & McKinnon, Professional Football's Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws, 33 Emory L.J. 375, 383-84 (1984) (union's nature and purpose is against compe-
antitrust statutes for labor unions in an attempted accommodation of these Congressional policies. This inherent conflict nevertheless


To further the goal of industrial peace, the NLRA requires both the employer and the union representatives to engage in collective bargaining concerning wages, hours, and working conditions. See 29 U.S.C. § 158(d) (1982). Additionally, both parties are required to meet at reasonable times and “confer in good faith.” Id. However, such an obligation does not require the parties reach an agreement or capitulate to the other’s demands. See id. Compare NLRB v. Highland Park Mfg. Co., 110 F.2d 632, 637 (4th Cir. 1940) (good faith bargaining does not require a settlement) with NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152-53 (1956) (employer’s failure to produce necessary data to justify bargaining position held breach of good faith).

For a discussion on the fundamental principles of national labor policy, see generally P. STAUDOHAR, THE SPORTS INDUSTRY AND COLLECTIVE BARGAINING (1986) (three basic rights form heart of labor policy); Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 YALE L.J. 1, 6 (1971) (two fundamental principles—bargaining agent’s exclusive power and freedom of contract between employer and union); Marks, supra note 3, at 708 (national labor policy embodies four fundamental principles).


The NLRA policy, while encouraging collective bargaining between employers and union representatives, would normally be subject to antitrust scrutiny because it necessitates joint union and non-union activity. See Marks, supra note 3, at 726-27; Note, Application of Antitrust Laws to Professional Sports’ Eligibility and Draft Rules, 46 Mo. L. Rev. 797, 808 (1981). In order to protect collective bargaining agreements, the Supreme Court evolved a nonstatutory labor exemption. See Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965). The critical analysis in determining whether or not a union-employer activity is immune from antitrust laws involves a balancing of the restraint’s impact on the market against the interests of the union. Id. at 690 n.5. In Jewel Tea, Justice White upheld a marketing hours restriction as advancing the vital interests of the union. Id. at 692. In UMW v. Pennington, 381 U.S. 657 (1965), however, Justice White used the same balancing test to strike down an agreement that ran counter to the union’s interest even though it concerned a mandatory subject of collective bargaining. Id. at 666-68. The Court in Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975), used this balancing approach to deny antitrust immunity to an agreement which eliminated competition in the marketplace without advancing any union interests. See id. at 625-26. For a short summary of the scope of the nonstatutory labor exemption, see Note, Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap, 62 IND. L.J. 95, 104 (1986) [hereinafter Note, Salary Cap].
has crystallized in the unique battleground of professional sports. The applicability of federal antitrust law in the sports arena is well established, yet the courts have been left to define the scope of those laws within the context of the collective bargaining process. Recently, in Wood v. National Basketball Association, the United States Court of Appeals for the Second Circuit held that an athlete's challenge to a collective bargaining agreement based on anti-

---


The most notable exception to this general rule is professional baseball. See Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922) (baseball not commerce and thus immune from antitrust scrutiny). Baseball's anomalous exemption was reaffirmed fifty years later. See Flood v. Kuhn, 407 U.S. 258 (1972). Justice Blackmun recognized that baseball involved interstate commerce but, bowing to stare decisis, refused to lift the exemption. Id. at 282-84. See generally J. Weiss & C. Lowell, supra note 4, at 480-89 (detailed discussion of baseball exemption).

8 See Allen Bradley Co., 325 U.S. 797 (1945). Justice Black summarized the Court's role as follows:

The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.

Id. at 806 (emphasis added). See also Roberts & Powers, Defining the Relationship Between Antitrust Law and Labor Law: Professional Sports and the Current Legal Background, 19 Wis. & Mary L. Rev. 395, 395 (1978); McCormick & McKinnon, supra note 4, at 386. This has not been an easy judicial task nor one that has been immune from criticism. See Note, Salary Cap, supra note 5, at 96. See also Roberts, Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry, 32 UCLA L. Rev. 219, 222 n.4 (1984) (past judicial decisions have left sports leagues unguided and confused).

9 809 F.2d 954 (2d Cir. 1987).
trust violations so undermined fundamental national labor policies as to be facially invalid.\textsuperscript{10}

In \textit{Wood}, the plaintiff, O. Leon Wood, was selected in the first round of the 1984 college draft by the Philadelphia 76ers basketball team ("76ers").\textsuperscript{11} Under the terms of the modified collective bargaining agreement between the National Basketball Association ("NBA"), its member-teams, and the National Basketball Players Association ("NBPA"), Wood was offered only a one-year contract at a predetermined minimum salary.\textsuperscript{12} This was the maximum the 76ers could offer Wood under the team "salary cap" provision in the collective bargaining agreement.\textsuperscript{13} Wood refused the proffered contract and brought suit claiming that the college draft and the salary cap were section one violations of the Sherman Act.\textsuperscript{14} Wood sought a preliminary injunction restraining enforcement of the NBA-NBPA agreement and requested that teams other than the 76ers be compelled to compete for his services outside the terms of

\textsuperscript{10} Id. at 959.

\textsuperscript{11} Id. at 958. Plaintiff was a talented college basketball player from California State University at Fullerton and a gold-medal winner on the 1984 United States Olympic basketball team. \textit{Id.} at 956.

The draft refers to the system where the member-teams select eligible athletes and obtain exclusive negotiating rights. \textit{See} NBA-NBPA \textit{COLLECTIVE BARGAINING AGREEMENT}, art. XXII, § 1(a)(1) (1980) [hereinafter NBA AGREEMENT]. The team with the worst won-lost record selects first, with the remaining teams selecting in inverse order of their won-lost records. \textit{See} L. SOBEL, \textit{PROFESSIONAL SPORTS AND THE LAW} 248 (1977). The selecting team retains the draft rights for one year; if the player is not signed after that period, he is eligible to be drafted again. \textit{See} NBA AGREEMENT, supra, art. XXII, § 1(a)(2)(b). Moreover, if the player is not re-drafted or sits out the second year, he then becomes eligible to sign with any member-team. \textit{See id.}

\textsuperscript{12} \textit{Wood}, 809 F.2d at 958. The plaintiff's actions are in part an outgrowth of an earlier antitrust suit brought by players against the NBA which resulted in a Settlement Agreement on April 29, 1976, which modified the player draft and instituted a system for veteran free agency. \textit{Id.} at 957-58. In 1980, the NBA and NBPA incorporated this settlement into a collective bargaining agreement which was later modified in 1983 by a Memorandum of Understanding ("Memorandum"). \textit{Id.} at 957-58. This Memorandum continued the pre-existing draft provisions and also included a floor on minimum individual salaries and a minimum and maximum on aggregate team salaries known as the salary cap provisions. \textit{Id.} at 957. Wood was selected by the 76ers who had reached the maximum team salary and therefore could only be offered a one-year, $75,000 contract. \textit{Id.} at 958.

\textsuperscript{13} \textit{See id. \textit{See also supra}} note 12.

\textsuperscript{14} \textit{See Wood}, 809 F.2d at 958. The court points out that the contract was a mere formality intended by the 76ers to preserve their exclusive negotiating rights to Wood while they attempted to rearrange their personnel to allow an offer of substantially more money. \textit{Id.} Wood declined to accept this proposition, contending that if he signed, he could expose himself to a possibly career ending injury. \textit{See} Wood v. National Basketball Ass'n, 602 F. Supp. 525, 527 (S.D.N.Y. 1984).
the agreement. The United States District Court for the Southern District of New York denied Wood’s motion, holding that the salary cap and the college draft were protected by national labor policy and were thereby exempt from the Sherman Act. Subsequently, the parties made an evidentiary submission to the district court for a decision on the merits, and judgment was granted for the defendants. On appeal, the Second Circuit affirmed and determined that an analysis of possible antitrust violations was an unnecessary exercise where a claim seeks to subvert federal labor policies.

Writing for the court, Judge Winter stated that the appellant’s antitrust claim must fail because it conflicts with two fundamental principles of labor law—a union’s right to eliminate competition amongst themselves by selecting a bargaining agent and the freedom of contract between parties to a collective agreement. The court found that identical anticompetitive agreements

---

15 See Wood, 809 F.2d at 958.
16 Wood v. National Basketball Ass’n, 602 F. Supp. 525, 528-29 (S.D.N.Y. 1984). The court adopted the three-part test of Mackey v. National Football League, 543 F.2d 606, 614-15 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977), in determining whether the player draft and salary cap were antitrust violations. See Wood, 602 F. Supp. at 528. The court found that the draft and salary cap only affected the NBA and NBPA, were mandatory subjects of bargaining under section 8(d) of the NLRA and were the product of bona fide negotiations, thereby entitling them to antitrust exemption. Id. The court also held that the NBA Agreement was binding on all those who were currently in the bargaining unit and all others entering into it before its expiration. Id. at 529.
17 See Wood, 809 F.2d at 958. The evidentiary submission included the papers filed with the preliminary motion and a stipulation of additional facts. Id.
18 Id. at 959-60.
19 It is noteworthy that Judge Winter was co-author of an article written on the issues in this case. See id. at 958 n.1. Judge Winter’s predilection towards national labor policy was clearly evident when he stated that “national labor policy, rather than antitrust law, is the principal and pre-eminent legal force shaping employment relationships in professional sports.” Jacobs & Winter, supra note 4, at 6.
20 See Wood, 809 F.2d at 959. The National Labor Relations Act provides that “[r]epresentatives ... selected ... by the majority of the employees in a unit ... shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . .” 29 U.S.C. § 159(a) (1982). The court pointed out that national labor policy encourages collective rather than individual bargaining strength. See Wood, 809 F.2d at 959. Once a representative is chosen, an individual is forbidden from separately negotiating with the employer even if individual negotiations would lead to enhanced compensation. See id.
21 Id. at 961. The court asserted that freedom of contract between the parties to a collective agreement is an important foundation of labor policy for two reasons: the negotiating parties know best what provisions fit their particular needs; and it furthers the pursuit of labor peace by leaving untouched the number of available compromises the parties may avail themselves to in solving their differences. See id.
existed in the industrial marketplace, and allowing an attack on such agreements would lead to a collapse of federal labor policy unless unwarranted judicial exceptions were made. Judge Winter conceded Wood's economic disadvantage under these restraints, but noted that even if they were illegal and discriminatory, Wood's only cognizable remedy would be for breach of the duty of fair representation against the NBPA.

Although the Wood court has sought to protect national labor policy from antitrust attack, it is submitted that the court's sole reliance on labor principles was both unnecessary and unprecedented. Moreover, the Wood court's rejection of any antitrust analysis leaves untouched prohibitive restraints on the players' services market. This Comment will examine the weaknesses in using a unilateral labor approach and will propose that antitrust analysis furnishes the proper focus in professional sports by accommodating both labor and antitrust goals.

LABOR POLICY REIGNS SUPREME

In order to effectuate national labor policy, it has become necessary to shield certain union activities from free competition. It is within a court's province to delineate the extent to which collective bargaining agreements are subject to antitrust scrutiny. Traditionally, this has involved a two-step approach—a finding as to

\[\text{\scriptsize Note:}\]

\[\text{\scriptsize See id. at 960-61. Wood claimed that his unique athletic skills entitled him to bargain individually, but the court pointed out that industrial agreements routinely set wages for employees with varying capabilities. See id. at 960. The court analogized the exclusivity of the college draft to the union hiring hall where employees are referred to a particular employer and either work where directed or do not work. See id. The court also noted that in typical industrial settings new employees and employees outside the bargaining unit regularly find themselves disadvantaged with regard to salaries, layoffs, and promotions, as seniority clauses benefit incumbent employees. See id.}\]

\[\text{\scriptsize Id. at 962. Conceding this disadvantage, the court held that "Wood has offered us no reason whatsoever to fashion a rule based on antitrust grounds prohibiting agreements between employers and players that use seniority as a criterion for certain employment decisions." Id. (emphasis omitted). See also infra note 31.}\]

\[\text{\scriptsize See, e.g., Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975) (boycotts and secondary picketing exempt); UMW v. Pennington, 381 U.S. 657, 662 (1965) (Clayton and Norris-LaGuardia Acts provide exemptions to Sherman Act for labor unions); Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965) (union-employer agreements on wages, hours, working conditions exempt). See also Roberts & Powers, supra note 8, at 417 (Congress and courts provided shields for labor activities).}\]

\[\text{\scriptsize See Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 806 (1945); Note, Salary Cap, supra note 5, at 96; supra note 8.}\]
whether a union activity is entitled to an exemption from antitrust standards, and, if not, a determination as to the possibility of an antitrust violation. The Second Circuit in Wood intentionally omitted this analysis by denying the applicability of antitrust law when a union member challenges a collective bargaining agreement. Judge Winter summarily dismissed the alleged antitrust violations thereby taking an unprecedented judicial leap favoring labor law preeminence. Moreover, the court suggested that a union member may obtain relief from an egregious antitrust violation based on a breach of duty of fair representation against the bargaining representative. This, however, is an essentially hollow remedy that serves as an inadequate substitute for a viable antitrust analysis.

The union's right to select an exclusive bargaining agent coupled with the freedom to contract are the two fundamental labor

---

26 See supra note 5 (discussing development of both statutory and non-statutory labor exemptions).
27 See infra notes 57-62 and accompanying text (discussion of per se and rule of reason violations).
30 See Wood, 809 F.2d at 962.
31 Breach of duty of fair representation only occurs when the bargaining agent acts in an arbitrary or detrimental manner against a union member. See Vaca v. Sipes, 386 U.S. 171, 190 (1967). Union representatives have been given wide discretion in negotiations and have been allowed to reach agreements clearly discriminatory towards some employees. See Humphrey v. Moore, 375 U.S. 335, 349-50 (1964). Courts are willing to allow these "harms" absent hostile or arbitrary bargaining actions. See id. It is unlikely that Wood would be able to sustain his burden of proof as to unfair representation by the NBPA. See J. Weisbart & C. Lowell, supra note 4, at 547; Jacobs & Winter, supra note 4, at 18-21. For additional case law and commentary on the duty of fair representation, see J. Weisbart & C. Lowell, supra note 4, at 545 n.404.
principles upon which the *Wood* court based its rationale.\(^{22}\) As to the former, Judge Winter concluded that recognizing Wood's claim would undermine the union representative's effectiveness and reduce the salary potential for other players in the league.\(^{23}\) The Second Circuit, however, ignored contractual reality by failing to acknowledge that the right to individually negotiate salaries was expressly reserved to the players in the collective bargaining agreement.\(^{24}\) Additionally, the court offers no support to justify its suggestion that other players would necessarily receive less compensation if Wood were free to negotiate in an unrestrained market.\(^{25}\)

Freedom of contract contravenes judicial interference in an area where the negotiating parties seek solutions to fit their particular needs, and also fosters labor peace by increasing the number of negotiable solutions.\(^{26}\) The practical effect of this philosophy holds that provisions in a collective bargaining agreement must necessarily be shielded from antitrust standards; yet this position has never been adopted and has, in fact, been rejected by the Supreme Court.\(^{27}\) By refusing to look past the NBA-NBPA agree-

---

22 See *Wood*, 809 F.2d at 959-61; Stoll & Goldfein, supra note 28, at 2, col. 4. See also supra notes 21-22.

23 See *Wood*, 809 F.2d at 961.

24 See NBA Agreement, supra note 11, art. I, § 3 (right to negotiate individual salaries). Accepting the fact that new employees are disadvantaged by the draft and the salary cap, the Second Circuit rationalized this inequity as an example of restraints found in the industrial marketplace caused by seniority provisions. *Wood*, 809 F.2d at 962.

25 See *id.* at 961. If other players were to receive less compensation if Wood were to negotiate freely, a viable and equitable alternative would be for the owners to share league revenues equally. This in turn would enable each team to comparatively bid for players' services, secure league financial stability and allow players like Wood to receive their market value without leaving less for other players. *See generally Professional Sports: Has Antitrust Killed the Goose that Laid the Golden Egg?*, 45 ANTITRUST L.J. 290, 299 (1976) [hereinafter *Professional Sports*] (statement of I. Millstein) (antitrust laws apply to all competitors who must learn to survive without judicial largesse).


ment, the court assumed that the union reached this agreement without internal conflicts of interest and that reasonable and more efficient alternatives were not readily available. While a court's function does not extend to rewriting collective bargaining agreements, it is suggested that a failure to strike down provisions which violate antitrust laws, in the name of labor peace or for fear of the collapse of national labor policy, is more harmful than forcing parties to rework stricken provisions.

The Wood court attempted to buttress blanket immunity for the player draft and salary cap by analogizing these restraints to hiring halls and seniority clauses which are commonly protected in the industrial marketplace. The justification for allowing those restraints derives from the need "to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers . . . ." It is self-evident that no such justification exists in the operation of a professional sports league; conversely, the player draft and salary

Absolute non-intervention into collective bargaining has also been rejected by Congress. See L. Sobel, supra note 11, at 327. For example, the Fair Labor Standards Act establishes minimum wages and maximum hours and the Occupational Safety and Health Act specifies working conditions; neither can be avoided by a collective agreement. See id.

See Weiler, supra note 36, at 376-77. In most unions, including the NBPA, senior employees prefer increased fringe benefits or pension provisions over wages. See id. In an analogous setting, journeymen entertainers and star performers agree collectively only on a base level of compensation while leaving additional benefits to be negotiated separately. See id. at 376-77.

See infra note 67.


See Wood v. National Basketball Ass'n, 809 F.2d 954, 960 (2d Cir. 1987). See also J. Weisbart & C. Lowell, supra note 4, at 554 (applying hiring hall analogy to professional sports); Jacobs & Winter, supra note 4, at 17 (same).

cap create obstacles for prospective employees.\textsuperscript{43} Judicial support for hiring hall exemptions has normally been confined to those positions in industry with frequent employment turnover, seasonal labor supply requirements or employee unfamiliarity with particular job functions, situations clearly inapposite to the employment of a professional basketball player.\textsuperscript{44} It is submitted that the court missed the distinguishing feature between sports and industry, namely, that individual players are free to negotiate salaries based on their athletic skills within the terms of the collective bargaining agreement while their industrial counterparts may not. Therefore, the restraints impact uniquely on ballplayers.

The fundamental weakness in the Wood decision lies in its failure to accommodate a basic doctrine of economic policy—market freedom under the Sherman Act.\textsuperscript{45} This policy demands at the minimum equal consideration with national labor policy.\textsuperscript{46} Arbitrary condemnation of collective bargaining agreements is both contrary to congressional policy and damaging to labor harmony.\textsuperscript{47} However, a majority of courts have recognized that exempting labor practices or shielding them from antitrust attack must be cautiously granted.\textsuperscript{48} Moreover, no prior court has automatically allowed labor policy to override antitrust policy or suggested that encouraging competition for players' services is not an

\textsuperscript{43} See Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 891-92 (S.D.N.Y. 1975), aff'd, 556 F.2d 682 (2d Cir. 1977); J. Weisbart & C. Lowell, supra note 4, at 504; L. Sobel, supra note 11, at 259; Note, Salary Cap, supra note 5, at 115.

\textsuperscript{44} See Local 357, Int'l Bhd. Teamsters v. NLRB, 365 U.S. 667, 672 (1961); NLRB v. Houston Chapter, Associated Gen. Contractors of America, Inc., 349 F.2d 449, 452 (5th Cir. 1965); Note, Salary Cap, supra note 5, at 115.

\textsuperscript{45} See United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972). The Sherman Act has been likened to the "Magna Carta of free enterprise" and as important to economic freedom as the "Bill of Rights is to the protection of our fundamental personal freedoms." Id. at 610. See also Note, The National Basketball Association Salary Cap: An Antitrust Violation?, 59 S. Cal. L. Rev. 157, 170 (1985) (noting importance of Sherman Act)

\textsuperscript{46} See Note, supra note 45, at 170; Professional Sports, supra note 35, at 309 (statement of I. Millstein) (antitrust laws paramount to labor laws). But see J. Weisbart & C. Lowell, supra note 4, at 557-58 (labor policy disallows individual challenges to collective agreements); Jacobs & Winter, supra note 4, at 6 (labor law is pre-eminent legal force in professional sports).

\textsuperscript{47} See 29 U.S.C. §§ 151, 158(d) (1982). See also supra notes 3-4 and accompanying text.

antitrust concern when a collective bargaining agreement exists. Since labor policy cannot justify substantial restraints in the market, it is submitted that a proper judicial analysis concerning player restraints contained in collective bargaining agreements must reconcile the conflict between labor and antitrust principles without a wholesale subversion of either precept.

ACCOMMODATING LABOR AND ANTITRUST: THE RULE OF REASON APPROACH

The traditional approach in analyzing whether a collective bargaining agreement’s provisions will be shielded from antitrust scrutiny initially requires a determination that the provision fits into a labor exemption. Various formulas utilized in the professional sports arena have attempted to incorporate industrial labor exemptions with varying results. Functionally, these exemptions were intended to protect unions in their collective bargaining activities in order to further legitimate employee interests. In the

49 See supra note 29 and accompanying text.
51 See supra notes 26-27 and accompanying text.
52 See Mackey, 543 F.2d at 614-15. The Mackey court used a three-prong test: (1) the restraint only affects parties to the agreement; (2) the agreement must be a mandatory subject for collective bargaining; and (3) the agreement must be bona fide arm’s length negotiation. Id. If all three parts are satisfied, then the nonstatutory exemption applies. Id. Both sides in the Wood case assumed this was the test the Second Circuit would use in its decision. See Brief for Plaintiff-Appellant at 21-28, Wood v. National Basketball Ass’n, 809 F.2d 954 (2d Cir. 1987) (No. 86-7173); Brief of Defendant-Appellee National Basketball Ass’n at 15-30, Wood V. National Basketball Ass’n, 809 F.2d 954 (2d Cir. 1987) (No. 86-7173). Other formulations have included a variation on the Mackey test that has relaxed some of its requirements. See McCourt v. California Sports, Inc., 600 F.2d 1193, 1203 (6th Cir. 1979). In contrast, courts have also adopted a more restrictive test than that in Mackey. See Kapp v. National Football League, 390 F. Supp. 73, 86 (N.D. Cal. 1974), aff’d, 586 F.2d 644 (9th Cir. 1978), cert. denied, 441 U.S. 907 (1979). A severely restricted test for the nonstatutory labor exemption was previously adopted by Judge Carter, district court judge in the Wood case. See Robertson, 389 F. Supp. at 888-89.
53 Compare Mackey, 543 F.2d at 622 (“Rozelle Rule” violative of antitrust laws) with McCourt, 600 F.2d at 1203 (reserve system entitled to nonstatutory exemption). See also Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 COLUM. L. REV. 282, 325 (1975) (criticism of Supreme Court antitrust analysis).
54 See, e.g., Mackey, 543 F.2d at 617 (statutory exemption enacted to benefit unions by
sports industry, however, they are being used by employers seeking a derivative immunity from antitrust liability. Paradoxically, a union is prohibited from trying to shield restraints from antitrust liability when the restraints run counter to a union's interests; yet their employers may be permitted to do just that under collective bargaining. It is submitted, therefore, that the initial exemption determination is functionally inoperative in the sports industry because it exempts provisions without any antitrust consideration and should be abandoned in favor of an antitrust approach which recognizes that the employer and not the union seeks immunity from antitrust liability.

There are certain trade practices that so blatantly restrain competition that they result in a per se violation of antitrust laws. The trend, however, is against per se applicability in the unique sphere of professional sports. The member-teams in the

exempting some activities from antitrust scrutiny). See also Note, The National Hockey League Reserve System: A Restraint of Trade, 56 J. Urb. Law 467, 494 (1979) (unions being sued sought to invoke nonstatutory labor exemption); Note, supra note 29, at 175 (non-sport cases concerned with labor's anticompetitive activities).

See Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 499-500 (E.D. Pa. 1972); Mackey 543 F.2d at 612 n.10 ("To preserve the integrity of the negotiating process, employers who bargain in good faith must be entitled to claim the antitrust exemption."). See also Roberts & Powers, supra note 8, at 434 (underpinning of exemption is national labor policy favoring collective bargaining entitling employers to same immunities); Jacobs & Winter, supra note 4, at 26 (nonstatutory cases discussed exemption of unions and employers in collective bargaining). But see Note, supra note 45, at 163 (employers not entitled to use exemption since it was created to benefit union interests and NBPA derives no benefit from salary cap).

See Flood v. Kuhn, 407 U.S. 258, 294-96 (1972) (Marshall, J., dissenting); Lowes v. Pennington, 400 F.2d 806, 814 (6th Cir.), cert. denied, 393 U.S. 983 (1968); Kapp v. National Football League, 390 F. Supp. 73, 86 (N.D. Cal. 1974), aff'd, 586 F.2d 644 (9th Cir. 1978), cert. denied, 441 U.S. 907 (1979). See also L. SOBEL, supra note 11, at 328 (union or employer may not reach an agreement violating other laws even if it concerns mandatory bargaining subjects); Jacobs & Winter, supra note 4, at 10 (bargaining representative must represent union's interests in settlement negotiations).


See, e.g., NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 86 (1984) (rule of reason approach determined college broadcasting rights); Mackey, 543 F.2d at 619 (pro-
league must cooperate in order to produce their product yet remain fiercely competitive on the playing field. This demands a balanced approach focusing on the restraint’s effect on competitive conditions. The rule of reason approach analyzes the justification for the restraint and considers whether less restrictive means might better achieve those ends. It is submitted that this analysis affords a better accommodation of labor and antitrust policies as it allows member-team cooperation while protecting against unreasonable restraints in the players’ services market. Moreover, the rule of reason would subject only those restraints which unreasonably restrain competition to antitrust scrutiny thereby allaying any fears of a national labor policy collapse.

The Wood court acknowledged that the player draft and salary cap put new players at an economic disadvantage. Under a rule of reason analysis, the NBA could try and justify these restraints by claiming that they insure on field competition and

---

See supra note 6 and accompanying text. Congress has statutorily recognized that professional sports is not the only industry where unrestrained competition is undesirable. See 6 J. Von Kalinowski, supra note 1, § 50.01 (agriculture, insurance, labor).

See Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918). Justice Brandeis formulated the rule of reason as follows:

The true test of legality is whether the restraint imposed . . . merely regulates and perhaps thereby promotes competition or whether it . . . may suppress or even destroy competition. To determine that . . . the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.

Id. at 238.


White Motor Co., 372 U.S. at 271 (1963) (Brennan, J., concurring). See also Note, Salary Cap, supra note 5, at 122 (restraints should not be more restrictive than necessary).

See supra note 23. Adding to this economic burden is the brevity of an athlete’s playing career and the fact that loss of even one year’s salary potential can be detrimental. See Linseman v. World Hockey Ass’n, 439 F. Supp. 1315, 1319 (D. Conn. 1977). See also P. Staudohar, supra note 4, at 147 (average NBA career about four years).
thereby enhance customer satisfaction. In addition, the draft and salary cap may be deemed essential to achieving financial stability. New players, on the other hand, could counterbalance these justifications with proof that these restraints do not enhance intraleague competition and only provide financial stability at the players' expense. In addition, viable, less restrictive alternatives on a player's mobility and earning capacity would necessarily and equitably entail greater employer contributions in an area of legitimate employer concern. The collective bargaining process would still be the appropriate channel used in resolving these issues once the courts no longer allow this process to shield illegal provisions. It is asserted that under this approach, the Wood court could have found the player draft and salary cap illegal restraints. Further, Judge Winter's approach recognized team-member needs at the expense of prohibitive player restraints in the name of national labor policy.

CONCLUSION

The Second Circuit's failure to incorporate antitrust principles as the basis for its decision in Wood was an unprecedented departure that validated market restraints in professional sports without a consideration of their deleterious effects. The Wood court did not acknowledge the many distinguishing characteristics between

65 See Brief for Defendant-Appellee National Basketball Ass'n at 7-9, Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987) (No. 86-7173); Note, supra note 45, at 157; Note, Salary Cap, supra note 5, at 106.
67 See UMW v. Pennington, 381 U.S. 657, 665 (1965). "[T]here are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws." Id. See also Local 24 Teamsters Union v. Olivers, 358 U.S. 283, 296 (1959) (federal law sets limits on what collective bargaining agreements may provide).
the sports and industrial marketplaces. A properly focused anti-trust analysis, using the rule of reason approach, would be the most effective and equitable tool to reconcile labor and antitrust concerns. Protecting the integrity of collective bargaining agreements, fostering national labor policy and freeing the player's market from unreasonable restraints are all within the realm of the court's responsibility.

Richard J. Haray