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FREE AGENCY AND THE NATIONAL FOOTBALL LEAGUE

*Bruce H. Singman**

I. INTRODUCTION

The most recent collective bargaining agreement between the National Football League Players Association (“NFLPA”) and the National Football League Management Council (“NFLMC”) expired on August 31, 1987 and negotiations for a new collective bargaining agreement, which had commenced in the Spring of 1987, have been stalled by litigation.¹ The NFLPA established several objectives for bargaining purposes. These objectives, described in *Game Plan '87—A Commitment to NFL Players, Past, Present, Future* (“*Game Plan '87*”) were published by the NFLPA as its blueprint of bargaining priorities.²

The most newsworthy objective and the focus of the aforementioned legal action of the NFLPA is the pursuit of a “true free agency” system which would allow complete freedom of movement by players from one team to another.³ Such a true free agency system could have a major impact upon the economics of the entertainment industry in general and professional football in particular. The purpose of this article is to explain the reasons why National Football League (“NFL”) football players are not presently “free agents” with freedom of choice in the selection of an employer; the reasons why free agency is important to NFL football players; and how the current stalemate over free agency could be solved.

In 1968, the National Labor Relations Board (“NLRB”) recognized

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1. *Powell v. National Football League*, No. 4-87-917 (D. Minn. filed Oct. 15, 1987). *Powell* was commenced by the NFLPA against the National Football League on October 15, 1987, upon the return of the NFL players from a “work stoppage” (strike) action commenced on September 22, 1987. Through this action, the NFLPA is seeking to eliminate the draft of college football players by the NFL and all restrictions on the freedom of movement by players from team to team. Telephone interview with Michael J. Duberstein, Research Director for the NFLPA (Feb. 5, 1988).

2. NATIONAL FOOTBALL LEAGUE PLAYERS ASSOC., *GAME PLAN '87—A COMMITMENT TO NFL PLAYERS, PAST, PRESENT, FUTURE* (1986) (hereinafter *GAME PLAN '87*).

3. *Id.* at 39.

the NFLPA as a labor organization⁴ and as the exclusive bargaining representative of all NFL players.⁵ Subsequently, NFL teams and the NFLPA have engaged in collective bargaining over various issues relating to employment of the players. As a result of collective bargaining, the NFLMC and the NFLPA have entered into four formal collective bargaining agreements. The first agreement was in effect from July 15, 1968 to February 1, 1970 and the second agreement was in effect from February 1, 1970 to January 30, 1974. The third agreement took three long years to iron out, but was signed on March 1, 1977 and extended to July 15, 1982. The fourth and final agreement was in effect from December 11, 1982 to August 31, 1987.

II. THE *MACKEY* CASE

Upon expiration of the second agreement on January 30, 1974, the NFLMC and the NFLPA commenced negotiations for a new, third agreement. During the course of these negotiations, the case of *Mackey v. National Football League*⁶ ("*Mackey*") was decided. The *Mackey* case involved an appeal by the NFL, twenty-six of its member teams and NFL Commissioner Alvin "Pete" Rozelle from a district court judgment holding that the "Rozelle Rule" ("the Rule") violated section 1 of the Sherman Antitrust Act.⁷ The Rozelle Rule provided that an NFL team

4. Within the meaning of 29 U.S.C. § 152(5) which states:

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers governing grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5) (1983).

5. Within the meaning of 29 U.S.C. § 159(a) which states:

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

29 U.S.C. § 159(a) (1983).

The significance of the NLRB recognizing the NFLPA as a labor organization and as the exclusive bargaining agent for the players, was that the NFL owners would no longer unilaterally control NFL operations, which they had been doing since the league's inception in 1920.

6. 543 F.2d 606 (8th Cir. 1976).

7. 15 U.S.C. § 1 (1983). Section 1 of the Sherman Antitrust Act states in part:

Every contract, combination in the form or trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is

which signed a player, upon the expiration of the player's contract with another team, had to compensate the player's former team. In addition, if the teams were unable to agree on compensation acceptable to both of them, the Commissioner was empowered to award compensation to the former team consisting of one or more players and/or draft choices as the Commissioner deemed fair and equitable.⁸

The action underlying the *Mackey* appeal⁹ was commenced by then present and former NFL players against the NFL. The players, seeking injunctive relief and treble damages, alleged that the enforcement of the Rozelle Rule constituted an illegal conspiracy in restraint of trade, denying professional football players the right to freely contract for their services.¹⁰ At the conclusion of the trial, the District Court for the District of Minnesota granted the injunctive relief and entered judgment in the players' favor on the issue of liability. Trial on the issue of damages was deferred until after an appeal of the liability issue was final.¹¹

The district court held for the players because "enforcement of the Rozelle Rule constituted a concerted refusal to deal and a group boycott, and was therefore a per se violation of the Sherman Act."¹² The court found that the evidence offered in support of the NFL's contention that the Rozelle Rule was necessary to the successful operation of the NFL was insufficient to justify the Rule's restrictive effects. Furthermore, the court concluded that the Rule was invalid, even under the Rule of Reason standard.¹³ Additionally, the district court rejected the defendants'

declared to be illegal Every person who shall make any contract or engage in any combination or conspiracy declared . . . to be illegal shall be deemed guilty of a misdemeanor

Id.

8. *Mackey v. National Football League*, 543 F.2d 606, 609 n.1 (8th Cir. 1976).

9. *Mackey v. National Football League*, 407 F. Supp. 1000 (D. Minn. 1975).

10. *Id.* at 1002.

11. *Id.* at 1011.

12. *Id.* at 1007.

13. The Rule of Reason standard is used to analyze exemptions to the Sherman Act. "The focus of an inquiry under the Rule of Reason is whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary." *Mackey*, 543 F.2d at 620.

In applying the Rule of Reason Standard in the *Mackey* case, the district court determined that the Rozelle Rule was:

(i) unreasonably broad in its application in that testimony revealed that the NFL was concerned with the effects of unrestricted movement between clubs of the best players in the NFL, but the Rule was not limited to superstars or even the better players, as it included every player regardless of his status or ability;

(ii) unreasonable in that there are no procedural safeguards whatsoever with respect to its employment in that there was no "opportunity to be heard," no process by which a free agent player could become aware that other clubs are interested in his services and were negotiating

argument that the Rule was not subject to attack under the Sherman Act because it had been the subject of a collective bargaining agreement between NFL team owners and the NFLPA.¹⁴

The issues raised by the defendants on appeal were: whether the "labor exemption" to antitrust law immunizes the NFL's enforcement of the Rozelle Rule from antitrust liability; and, if not, whether the Rozelle Rule, and the manner in which it had been enforced, violated antitrust law.¹⁵

The Eighth Circuit Court of Appeals held that although non-labor parties may potentially avail themselves of the non-statutory labor exemption to antitrust laws when they are parties to collective bargaining agreements that pertain to mandatory subjects of bargaining, the labor exemption from antitrust laws cannot be invoked in instances when agreements are not the product of bona fide arm's-length negotiations.¹⁶ Such negotiations are required as a basis for the exemption because of the national policy favoring collective bargaining. Thus, the exemption exists as an inducement to collectively bargain. The court held further that the defendants' enforcement of the Rozelle Rule was not exempt from the coverage of the antitrust laws because it had not been the subject of such negotiations. Furthermore, the Rozelle Rule, as implemented, contravened the Rule of Reason and constituted an unreasonable restraint of trade, in violation of the Sherman Act.¹⁷

with his old club for his services under a new contract, no safeguard that the player's old club was being reasonable and was even stating a compensation demand;

(iii) unreasonable in that it is unlimited in duration, as the Rule applies to a player for the duration of his career; and

(iv) unreasonable when viewed in conjunction with the other anticompetitive practices of the NFL: the draft, the Standard Player Contract, the Option, the Tampering Rule. *Mackey*, 407 F. Supp. at 1007-08.

14. *Id.* at 1010.

15. *Mackey*, 543 F.2d at 609-10. The labor exemption to the Sherman Antitrust Act "was created to insulate legitimate collective activity by employees, which is inherently anticompetitive but is favored by federal labor policy, from the proscriptions of the antitrust laws." *Id.* at 611. The statutory exemption extends to legitimate labor activities unilaterally undertaken by a union in furtherance of its own interests. The exemption was not intended to include agreements between unions and non-labor groups. The United States Supreme Court, however, has held that in order to properly accommodate the congressional policy favoring free competition in business markets with congressional policy favoring collective bargaining, certain union-cutter agreements have been accorded an exemption. *Id.* at 611-12. *See generally* *Meat Cutters v. Jewel Tea*, 381 U.S. 676 (1965).

16. *Mackey*, 543 F.2d at 616.

17. *Id.* at 623.

III. CONSEQUENCES OF THE *MACKEY* DECISION

Until the *Mackey* case, the NFL had operated under a reserve system in which each player who signed a standard player contract with an NFL team was bound to play only for that term of the contract plus one additional year at the option of the team. Therefore, each player was bound to play for his team for at least two years. A player was able to become a "free agent" at the expiration of the option year by playing during the season of the option year without signing a new contract.¹⁸

Upon conclusion of the *Mackey* case, the NFLPA was in an ideal position to be able to negotiate for substantial benefits in a new collective bargaining agreement. In the Spring of 1977, the NFLPA, under the leadership of Executive Director Ed Garvey, could have attempted to attain a free agency system which would have allowed for player movement from team to team, free of the restrictive effects of the Rozelle Rule, which was enjoined at that time. It was not to be.

In exchange for certain concessions, including a "dues check-off provision,"¹⁹ requiring NFL teams to withhold NFLPA dues payments from players' payroll checks, Ed Garvey and NFLPA management personnel negotiated a new five-year agreement which reinstated the "player draft."²⁰ It also provided a *highly restrictive* free agency system, requiring NFL teams to give up high round draft choices in order to acquire players from other teams when such players' contracts expired.²¹ This highly restrictive system, labeled the "Right of First Refusal/Compensation System," also is part of the 1982 agreement.²²

The "Right of First Refusal/Compensation System" provides, in essence, as follows: When a player's contract expires (on February 1), he

18. National Football League Standard Player Contract, par. 17 (1977). The player is then subject to a 10% reduction in salary during the option year. *Id.*

19. A dues-check-off provision was necessary to the NFLPA, for the purpose of assuring the financial stability of the NFLPA. Because the NFLPA was willing to agree to the highly restrictive "Right of First Refusal/Compensation System," the NFLMC was willing to accommodate on the issue of a dues-check-off provision.

20. The "player draft" is an annual draft of college players, held on or about May 1. In each draft 336 selections are made. A club which drafts a player has the exclusive right to negotiate for or sign a contract with such player from the date of the college draft ("initial draft") to the date of the next draft ("subsequent draft"). If a club doesn't sign the drafted player between the dates of the initial draft and the subsequent draft, the club loses the exclusive right to negotiate for a contract with the player. NFLPA-NFLMC Collective Bargaining Agreement, Art. XIII (1982). The previous collective bargaining agreement had expired on January 30, 1974 and the *Mackey* case had placed the draft's legality in doubt. *Mackey*, 543 F.2d at 621. *Powell v. National Football League*, No. 4-87-917 (D. Minn. filed Oct. 15, 1987), has again focused attention on the legality of the player draft.

21. NFLPA-NFLMC Collective Bargaining Agreement, Art. XV, at 27-31 (1977).

22. NFLPA-NFLMC Collective Bargaining Agreement, Art. XV, at 20-25 (1982).

has the right to solicit offers from other teams; upon the player's receipt of a qualifying offer ("First Refusal Offer Sheet") from another team ("New Club"), the player's current ("Old Club"), has a right of first refusal to match the New Club's offer through submission of a "First Refusal Exercise Notice" (on or before April 15); and if the Old Club does not exercise its right of first refusal within seven days of receipt of an Offer Sheet, the New Club must compensate the Old Club by assigning draft choices to the Old Club, the number and rounds of which are determined by the amount of salary to be paid to the player by the New Club.²³

The NFLPA agreed to this restrictive system again in 1982, even though only one player had moved from one team to another since 1977,²⁴ and despite the fact that the players, after *Mackey*, had the leverage to negotiate for a less restrictive system. The NFLPA, in bypassing the opportunity to affect a modification of the free agency system, opted instead to seek a "percentage of the gross-standard wage scale system."²⁵ Such a system would have provided for the allocation of fifty-five per cent of the NFL teams' gross operating revenues into a pool for payment to players of a specified amount of salary according to their positions and number of years of service.²⁶ In defending this position, Garvey maintained that free agency would not work because it had not worked in the recent past.²⁷ However, the free agency system that Garvey agreed to in 1977 was a system based upon excessive compensation to be given by one team to another upon the signing of a free agent and, therefore, was not a true free agency system.

IV. FREE AGENCY

A true free agency system would allow players complete freedom to choose the team for which they wished to play, upon commencement of their professional football careers and upon expiration of contracts entered into during their careers. Such a system would allow each player

23. *Id.*

24. In 1977, defensive back Norm Thompson moved from the St. Louis Cardinals to the then Baltimore Colts. Thompson was the only player to use the free agent market, until March 19, 1988, when Chicago Bear linebacker Wilbur Marshall signed with the Washington Redskins. Marshall received six million dollars over five years from the Redskins, who had to compensate the Bears with the required two first round draft choices. *USA Today*, Mar. 17, 1988, at 3C, col. 5.

25. Stanton, *Stanton Says*, *Football News*, Sept. 8, 1981, at 6, col. 1.

26. *Id.*

27. Memorandum from Bruce H. Singman to NFL players (Jan. 28, 1982), *reprinted in Football News*, Mar. 30, 1982, at 12-13, col. 1 [hereinafter Memorandum].

commencing his career to select the team of his choice, after all interested teams competitively bid for such player's services. The system would not include rights of first refusal in any team or allow compensation to be given by one team to another if a player moves upon the expiration of his contract. Such a system would not necessarily result in rampant movement of players from team to team, but rather, would give the players the bargaining leverage necessary to achieve equitable compensation through contract negotiations and, in appropriate instances, guaranteed player contracts binding upon the teams as well as the players.

At present, standard player contracts are unilaterally binding upon the players. This is because paragraph 11 of the NFL Player Contract entitled "Skill, Performance and Conduct" provides as follows:

Player understands that he is competing with other players for a position on Club's roster within the applicable player limits. If at any time, in the *sole* judgment of Club, Player's skill or performance has been unsatisfactory as compared with that of other players competing for positions on Club's roster, or if Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then *Club may terminate this contract.*²⁸

When a true free agency system was instituted in Major League Baseball in 1976,²⁹ Commissioner Bowie Kuhn and several team owners complained publicly that "free agency" would destroy baseball's competitive balance, making the rich richer and the poor poorer.³⁰ They expressed concern that those teams willing to spend more money acquiring star players would dominate the league.³¹

Such notions should have been dispelled by the realization that on a baseball team, only one player can be a "starter" at each position, and only a limited number of pitchers on a baseball team can be "starters," at any specific time. A historical review of the developments in Major

28. NFL Standard Player Contract, Par. 11 (1977) (emphasis added), *reprinted in* NFLPA-NFLMC Collective Bargaining Agreement, Appendix M, at 55 (1982).

29. Major league baseball's free agency system works as follows: Any player with six (6) years of major league service is eligible for free agency and compensation is due from the player's Old Club on the basis of a complex statistical ranking system in which players are rated as Type A, B and C. Additionally, a player with three (3) to six (6) years service who is not signed for the next season or any player with six (6) years service ineligible for free agency is eligible to have his salary determined by an impartial arbitrator through a process which provides for the submission by each party of a specific salary figure to such arbitrator who then selects either of the salary figures. *USA Today*, Sept. 28, 1987, at 11C, col. 2.

30. *The Sporting News*, Feb. 1, 1988, at 32, col. 1.

31. *Id.*

League Baseball since the institution of free agency reveals that the rich have not become richer, but rather, that parity among teams has been established. For example, since the institution of free agency in Major League Baseball in 1976, sixteen different teams have won the twenty division titles over the last five years; other than the Kansas City Royals' successive division championships in 1984 and 1985, no team has won consecutive division titles since the New York Yankees won in 1980 and 1981; two of the 1987 division titlists had not been in the playoffs in over fifteen years;³² and ten different teams have won the last ten World Series.³³

Complaints filed by the Major League Baseball Players Association, alleging collusion by the owners in refusing to bid on available free agents, resulted in arbitration decisions holding that the owners tacitly agreed not to sign free agents. Certain players affected by the decisions are now free agents, free from the constraints of newly executed contracts.³⁴

V. WOULD FREE AGENCY WORK IN FOOTBALL?

If, as in professional basketball and baseball, there were a free agency system in football which did not involve excessive compensation in the nature of high round draft choices, it would succeed, because teams would be more inclined to make offers for quality free agent players. The district court in *Mackey* concluded that:

[T]he Rozelle Rule significantly deters clubs from negotiating with and signing free agents; that it acts as a substantial deterrent to players playing out their options and becoming free agents; that it significantly decreases players' bargaining power in contract negotiations; that players are thus denied the right to sell their services in a free and open market; that as a result, the salaries paid by each club are lower than if competitive bidding were allowed to prevail; and that absent the Rozelle Rule, there would be increased movement in interstate commerce of players from one club to another.³⁵

The court of appeals, in finding substantial evidence in the record to support the findings of the district court, noted that two economists had testified that the elimination of the Rozelle Rule would lead to a substan-

32. The Minnesota Twins, who had not won a division since 1970, and the San Francisco Giants, who had not won a division since 1971.

33. The Los Angeles Times, Mar. 8, 1988, Part III, at 1, col. 2.

34. The Sporting News, Feb. 29, 1988, at 35, col. 1 and 38, col. 2.

35. *Mackey v. National Football League*, 543 F.2d 606, 620 (8th Cir. 1976).

tial increase in player salaries. Carroll Rosenbloom, owner of the Los Angeles Rams at that time, also had indicated that the Rams would have signed quite a few star players from other teams who had played out their options, were it not for the existence of the Rozelle Rule.³⁶

The defendants, in asserting a number of justifications in support of their contention that the restraints affected by the Rozelle Rule were not unreasonable, argued that without the Rozelle Rule, star players would flock to cities having natural advantages such as larger economic bases, winning teams, warmer climates and greater media opportunities. As a consequence, competitive balance throughout the NFL would be destroyed and such a result would be extremely detrimental to the successful operation of the League.³⁷ The defendants also argued that the elimination of the Rozelle Rule would lead to increased player movement and a concomitant reduction in player continuity and that the quality of play in the NFL would be affected to the financial detriment of both the teams and the players.³⁸

The court of appeals, in reviewing the evidence presented at trial with respect to existing player turnover by way of trades, retirements and new players entering the NFL, confirmed the district court's conclusion that the team owners' arguments respecting the need for player continuity could not justify the Rozelle Rule. While recognizing that the NFL has a strong interest in maintaining competitive balance among its teams, the court concluded that the Rozelle Rule was not essential to the maintenance of such competitive balance and was, in effect, much too restrictive.³⁹

Putting aside the views of the *Mackey* court, one need only look to the example of Major League Baseball as an answer to whether true free agency can succeed. Notwithstanding the elimination of stringent restrictions upon the freedom of movement by players from team to team in Major League Baseball since 1976, and the attractiveness of certain cities over others, a competitive balance among baseball teams has been maintained. There is a great similarity between baseball and football that partly explains why a balance will persist. In both sports, only a given number of players on a team can be starters. For example, an outstanding third baseman, who played on a regular basis with one team, would not want to play for another team with an outstanding third baseman and share the position. Likewise, an outstanding quarterback, who was a

36. *Id.*

37. *Id.* at 621.

38. *Id.*

39. *Id.*

starter on one team, would not want to play for another team with an outstanding quarterback and share the position. Consequently, football itself precludes the minimization of competitive balance, which would result in uninteresting, lopsided games.

In 1982, during negotiations between the NFLMC and the NFLPA for a new collective bargaining agreement, Garvey maintained that the owners had no incentive to seek out quality free agent players because team owners shared most of their revenues, and therefore, owners would not make any more money by producing a winning team.⁴⁰ The fallacy in this position becomes apparent when one recognizes that money is not what motivates one to become an owner, as the financial rewards present in 1982 (and today) were not present when most of the current owners acquired their teams.⁴¹ NFL team owners are driven to success by self-esteem and ambition, which are the very same attributes which led them to become successful businessmen. If the owners were not concerned with winning, they would not dismiss head coaches as often as they do and burden themselves with huge guaranteed contract payments which must be made to coaches. What must be concluded is that the criticisms of free agency by representatives of both management and the players have proven to have little validity.

VI. 1987-88 NEGOTIATIONS

In the Spring of 1987, while preparing for negotiations for a new collective bargaining agreement to become effective upon expiration of the 1982 Agreement, the current NFLPA management adopted free agency as one of the major objectives of the NFL players. They also made a proposal for the payment of playoff bonuses to *owners* as an incentive for winning and, thereby, created an incentive to acquire available free agent players who would, theoretically, enable teams to win more games.⁴² Specifically, in *Game Plan '87*,⁴³ the NFLPA proposed a league-wide playoff pool of money for owners to win during the playoffs on the theory that if the owner whose team wins the Super Bowl gets richer as a result, he will have an incentive to pay more to get the best possible players.⁴⁴

40. See Memorandum, *supra* note 27.

41. The Federation of Professional Athletes, a member of the AFL-CIO claims that every NFL team now makes a yearly profit. It has been reported, for instance, that the average net profit for NFL teams in 1985 was \$4.4 million. Speech by Michael J. Duberstein (June 1986), reprinted in Lawdible, Vol. 7, No. 4 (July 1986).

42. GAME PLAN '87, *supra* note 2, at 11.

43. See *supra* text accompanying note 2.

44. *Id.*

In a true free agency system in which the assignment of draft choices by the Old Club to the New Club would be eliminated, players would have much more bargaining power. When this bargaining power is coupled with what should be substantially increased team revenues from a new international television contract in 1990,⁴⁵ players should be able to obtain more equitable compensation.

Because of the short span of the average NFL career, reported to be a little less than four years,⁴⁶ it is especially critical for players to have greater bargaining power through individual negotiations from the onset of their careers. Such greater bargaining power would also enable players to negotiate "guaranteed contracts" which, while common in professional basketball and baseball, are few and far between in professional football.⁴⁷ The guaranteed contracts negotiated through increased bargaining leverage, gained in a true free agency system, would eliminate the "unilateral aspect" of NFL player contracts.

In the course of the 1982 negotiations, Garvey had contended that NFL owners operate in secret sessions to set wages.⁴⁸ However, a review of player salaries throughout the league reveals that such is not the case as salaries vary widely from team to team.⁴⁹ In a true free agency system, lower paying teams would be forced to pay higher salaries in order to prevent their players from moving to other teams upon the expiration of those players' contracts.⁵⁰

Under the present system, players have almost no bargaining leverage and are forced to enter into contracts for periods of time longer than they would prefer, in order to obtain greater compensation.⁵¹ Because of the short life-span of an average NFL career, players often are forced to negotiate away their opportunities to negotiate a second contract. Under

45. A new agreement between the NFL and the three major networks was recently signed including for the first time, a schedule of games in Europe. Currently, all NFL teams share revenue derived from network television equally. In 1986, for instance, each team grossed \$17.6 million from network television. *GAME PLAN '87*, *supra* note 2, at 27.

46. *Los Angeles Times*, Oct. 13, 1987, Part III, at 7, col. 3.

47. Ninety-five percent of Major League Baseball contracts, fifty percent of National Basketball Association contracts and four percent of National Football League contracts are guaranteed. *GAME PLAN '87*, *supra* note 2, at 14.

48. *See Memorandum*, *supra* note 27.

49. In 1987-88, for example, the Los Angeles Raiders spent \$22,627,000 on player salaries, as opposed to only \$12,924,000 by the Minnesota Vikings. *Los Angeles Times*, Jan. 25, 1988, Part III, at 3, col. 1.

50. Even though it is reported that all NFL teams turn a profit, this type of system could have a detrimental effect on some less fortunate owners.

51. Players are forced to enter into long-term contracts particularly when bonuses are involved because general managers are interested in amortizing bonuses over the term of the contracts.

a true free agency system, players could negotiate for greater compensation, because of greater bargaining power, without having to submit to contracts for long periods of time.

As set forth in *Game Plan '87*, in addition to greater compensation, a true free agency system would enable players to realize substantial non-economic benefits, such as the opportunity to choose to play for a team with a more compatible coach or system;⁵² the opportunity to play for a team in a city which would provide more suitable educational and/or career opportunities; the opportunity to play under conditions more suitable to a player's particular preferences; and, the opportunity to play closer to home towns and/or families.

VII. CURRENT LEGAL ACTION

On September 22, 1987, after two regular season games had been played, the negotiations between the NFLPA and the NFLMC for a new collective bargaining agreement reached a stalemate, mainly over the issue of free agency.⁵³ The NFL players failed to report to training camps throughout the League and refused to participate in any more games until an equitable compromise on the various issues could be reached and a new bargaining agreement could be made.⁵⁴

As a result of the NFL players refusal to perform in regular season games, the NFL teams signed available free agent players, most of whom had been released during pre-season training camps weeks earlier, and staged "replacement" games.⁵⁵ On October 15, 1987, as the replacement games continued and negotiations failed to produce a new bargaining agreement and the regular NFL players became frustrated over such failure, the regular players returned to training camps to prepare for participation in the remaining regular season games.⁵⁶ Also on October 15, 1987, the NFLPA filed an action against the NFL in the District Court of Minneapolis seeking to eliminate the draft of college players and the "Right of First Refusal/Compensation System," on the grounds that such constraints violated antitrust law.⁵⁷

On December 30, 1987, the court heard a motion filed by the

52. In many instances, a player responds more readily to a particular coach's style and personality and a player's skills are more adaptable to a particular offensive or defensive system.

53. USA Today, Sept. 25, 1987, at 8C, col. 1.

54. The Sporting News, Oct. 5, 1987, at 43, col. 1.

55. *Id.*

56. Football News, Oct. 27, 1987, at 3, col. 1.

57. Powell v. National Football League, No. 4-87-917 (D. Minn. filed Oct. 15, 1987). The NFLPA and the NFLMC entered into a new collective bargaining agreement as a result of

NFLPA to enjoin the NFL from enforcing the "Right of First Refusal/Compensation System" in connection with approximately 528 NFL players whose contracts were to expire on February 1, 1988. This would allow players to solicit contract offers from other teams, free of the system.⁵⁸ The NFLPA argued that while "freedom of movement" was the subject of collective bargaining between the NFLPA and the NFLMC, an impasse in negotiations over such issues had been reached and anti-trust law should be applied so that the "Right of First Refusal/Compensation System" should be declared void.⁵⁹ However, the NFLMC had filed a complaint with the NLRB, that the NFLPA had not been negotiating in good faith and, therefore, there could not be an impasse in the negotiations.⁶⁰ The court took the matter under submission and ruled, on January 29, 1988, that no decision could be rendered until a decision was made by the NLRB on the claim filed by the NFLMC that the NFLPA had not been negotiating in good faith.⁶¹

At the time of publication, the NLRB had not issued a decision on the NFLMC's claim that the NFLPA did not negotiate in good faith. Accordingly, the court will wait to rule further on the NFLPA's effort to enjoin the enforcement of the current restraints on freedom of movement by players from team to team.

VIII. CONCLUSION

Contrary to past assertions that true free agency would not benefit the players because NFL teams would not bid for available free agents, it should be recognized that only one NFL team has to bid for a free agent for a true free agency system to succeed. Over the past few years, there have been instances involving free agents in which no "draft choice compensation" was required (only the Old Club's right of first refusal was imposed upon the New Club), which have clearly demonstrated that a true free agency system, without draft choice compensation, will succeed.

These instances arose from the Article XIII provision of the 1977 Collective Bargaining Agreement, which eliminated "draft choice compensation" for players who played for non-NFL teams and returned to the NFL two or more years after their initial draft.⁶² The 1982 Agree-

negotiations conducted subsequent to the *Mackey* decision. The *Powell* action is necessary to obtain a judgment based upon current facts and circumstances. *See supra* note 1.

58. Telephone interview with Michael J. Duberstein, Research Director for the NFLPA (Feb. 5, 1988).

59. *Id.*

60. *Id.*

61. *Id.*

62. NFLPA-NFLMC Collective Bargaining Agreement, Art. XIII, at 22-26 (1977).

ment provided for the elimination of draft choice compensation upon a player's return to the NFL four or more years following the date of his initial draft.⁶³

Tom Cousineau, a linebacker from Ohio State, was drafted by an NFL team, but chose to play in the Canadian Football League ("CFL") instead. Cousineau returned to the NFL from the CFL after the team's right of compensation had terminated and he was offered substantially more money by other teams than had ever before been offered to players in his circumstance.⁶⁴ Most recently, in the Spring of 1987, Mervyn Fernandez, a wide receiver from San Jose State, left the CFL to sign a contract with the Los Angeles Raiders and was able to command a substantial amount of compensation in his initial NFL contract because the "right of draft choice compensation" had been eliminated.⁶⁵ These examples of higher compensation through greater leverage would become the rule rather than the exception upon the institution of a true free agency system in the NFL, which could be gained by a decision in the current litigation favoring the NFL players or through negotiations for a new collective bargaining agreement.

Although this article has pointed out that many of the arguments made by the owners in *Mackey* against a *true* free agency system have little foundation, a *true* free agency system with all of its advantages for the players, could still prove to be detrimental to the National Football League. Many Major League Baseball clubs have claimed that they have been unable to operate at a profit since the institution of free agency in 1976,⁶⁶ and all Major League Baseball clubs were found guilty in arbitration of collusion for failing to bid on players who became available as free agents in 1985.⁶⁷ Many National Basketball League clubs have claimed that they had been unable to operate at a profit from the institution of free agency in 1981 until the institution of a limitation on the amount

63. NFLPA-NFLMC Collective Bargaining Agreement, Art. XIII, § 7, at 20 (1982).

64. Cousineau was drafted in the First Round in 1980 by the Buffalo Bills, went to the CFL for the 1980 and 1981 seasons and returned to the NFL in 1982. Buffalo retained the right of first refusal, but no right to compensation. The Houston Oilers offered \$3.5 million over five years, but Buffalo matched the offer and traded him to the Cleveland Browns. Cousineau with that contract earned \$700,000 annually, compared to the league average at that time of \$102,250. USA Today, Feb. 22, 1988, at 4C, col. 1.

65. Fernandez was drafted in the 10th Round by the Los Angeles Raiders in 1983, went to the CFL and returned after four years to the Raiders. The Raiders retained their right of first refusal, but no right of compensation. The Raiders made Fernandez an offer of \$9.3 million over four years, including \$7.7 million to sign, which includes a 30-year annuity starting in 1996. The 1987 average NFL salary was reported to be \$211,506. USA Today, Feb. 22, 1988, at 4C, col. 1.

66. The Sporting News, Feb. 1, 1988, at 32, col. 1.

67. The Sporting News, Feb. 29, 1988, at 30, col. 1.

teams may spend on player compensation.⁶⁸

There are various alternatives to "total free agency" that could be implemented by the NFL. Gene Upshaw, Executive Director of the NFLPA, claims that the NFLPA has proposed almost ten different forms of free agency, including limitations on the teams selecting players and the amounts of money to be paid to free agents.⁶⁹ Jack Donlan, Executive Director of the NFLMC, in responding to the NFLPA's proposals, insists that the system was liberalized by an increase in the amount of players salary for which draft choice compensation is awarded. Furthermore, he added that the NFL will never agree to an elimination of the "Right of First Refusal/Compensation System."⁷⁰

On the basis of the foregoing, it appears that some modification, as opposed to elimination, of the existing system might be acceptable to both players and owners and would be preferable to total free agency. Such modification could consist of the maintenance of the right of first refusal, for a time, and an adjustment of the salary/compensation sliding scale so that the amount of salary offered by the New Club, requiring high round draft choice compensation to be given to the Old Club, is greatly increased.⁷¹ If such a modification can be agreed to, the NFL

68. Telephone interview with Terry Lyons, Assistant Public Relations Director for the National Basketball Association (Mar. 21, 1988).

69. *Pro Football Weekly*, Oct. 6, 1987 at 5, col. 1.

70. *Id.*

71. *Pro Football Weekly* published and proposed a modified free agency system that this author thinks may be acceptable to both sides. Old Clubs would retain a right of first refusal, and could demand a form of compensation from the New Club. Examples of compensation would be as follows:

Rounds 1 and 3 draft choices for a third year player who signs a contract with a New Club for the amount of \$750,000 or more; a round 1 draft choice for a player who signs a contract with a New Club for an amount between \$500,000 and \$750,000; a round 2 draft choice for a player who signs a contract with a New Club for an amount between \$400,000 and \$500,000; a round 3 draft choice for a player who signs a contract with a New Club for an amount between \$300,000 and \$400,000; and a round 4 draft choice for a player who signs a contract with a New Club for an amount between \$200,000 and \$300,000.

Clubs would retain the right of first refusal for players who would be offered by the New Club an amount between \$150,000 and \$200,000, but no draft choice compensation would be awarded to the Old Club. Players who would be offered an amount less than \$150,000 would be free to move from one team to another without any right of first refusal or draft choice compensation. The foregoing figures would be applicable to third year players and would be increased in the amount of \$20,000 for each additional year of experience. *Pro Football Weekly*, Oct. 9, 1987, at 4, col. 1.

The author further believes that to make such a system *fair* for the players, an Old Club's right of compensation should end after a player's fourth year. After six years, the Old Club's right of first refusal should also cease. Since the average length of a player's career is approximately four years, any contract made beyond that period should statistically be his last. For that reason, the player should be able to negotiate, free of restrictions such as right of first refusal and compensation.

will remain sound and its players will have gained greater economic security in a profession that is by its nature insecure.