CHAPTER 15
LABOR-MANAGEMENT RELATIONS AND SPORTS: REPRESENTATION AND UNFAIR LABOR PRACTICES

I. Introduction

This chapter will provide a more intense overview of unfair labor practices and representation cases as they arise in the context of professional sports. The primer chapter familiarized the students with the union organizing process both from the standpoint of the strategies employed in attempting to unionize an employer's operation as well as the National Labor Relations Board's involvement in terms of the legal processes attending union organizing attempts. If the primer chapter has not been designated as a discrete reading assignment, then some review should be undertaken in terms of what is involved in the determination of an appropriate collective bargaining unit and the idiosyncrasies of sports that may indicate the inevitability of certain unit configurations. In particular, there should be some discussion of the difference between voluntary recognition and NLRB certification, the community of interest factors that are considered whenever there is a dispute as to the appropriateness of a collective bargaining unit, the procedures to be employed in making such determinations, and the possibility that, in professional sports, existing unit configurations (which, in most cases, have been the result of a voluntary recognition and consensual arrangement) might change in the next several years.

The introduction is brief given the fact that the primer chapter has set the stage for the material that will be covered in both Chapters 15 and 16. It does highlight those areas of particular concern and those areas that have generated the most significant controversy in terms of representation and unfair labor practice litigation before the NLRB. Alerting students to these issues and earmarking the cases that will assist in the resolution of such questions will foster student preparation and, hopefully, provoke more animated discussion of these issues when they are considered in the lead cases and the Notes and Questions that follow.

II. The Representation Process

Case: North American Soccer League v. NLRB

Primary reason for inclusion: To illustrate the rare example in professional sports where there has been a litigated controversy over the bargaining unit.

Points to emphasize:

1) This case ended up in the United States Court of Appeals because the NASL refused to bargain, thereby generating an unfair labor practice complaint, eventually reviewable in the appropriate U.S. Court of Appeals. Generally, issues involving representation questions are not appealable beyond the NLRB determination. A tactic that is sometimes employed, but frequently frowned upon, is to refuse to bargain, prompting the filing of unfair labor practice charges and an adverse decision, eventually reaching culmination in an appellate court where the unit issue may be revisited.

2) In appropriate circumstances, several employers may be required to bargain jointly with a collective bargaining representative. There is a difference between consensual multi-employer bargaining, in which the appropriate employing unit may be each individual employer, and joint employer or single employer bargaining, where the nature of the employing unit requires that bargaining continued to be conducted in an across-the-board fashion.
3) The question of appropriate bargaining unit status from the standpoint of employees is separate and distinct from the joint employer finding. Having decided that the league must bargain on a joint basis, the NLRB still had to decide what the appropriate bargaining unit of employees would be, including designation of supervisory personnel and other questions affecting the body of employees that would be represented by the players' association, assuming that a majority of the players exercised their franchise in support of union representation. On page 690, the court takes pains to differentiate the NASL situation from the *Greenhoot* case. Due to the centralized control of labor relations policies and the interdependence of the various clubs in terms of formulating rules governing wages, hours, and working conditions, the joint employer finding was inevitable and league-wide, across the board bargaining was deemed to be the only appropriate vehicle to develop a harmonious collective bargaining relationship.

**Notes and Questions:**

N&Q 1 focuses on subtle distinctions between a joint employer and a single employer finding. For all intents and purposes, such distinctions are not significant in the context of the collective bargaining relationships that have developed in professional sports. Certainly they could affect employer liability and also could affect the degree to which current bargaining configurations in terms of the employee bargaining unit and the possibility of the joint employer bargaining on a club-by-club basis could be impacted.

N&Q 2 resurrects the question of whether existing collective bargaining units may be altered in the coming years. With the possible advent of rival leagues, this becomes an omnipresent possibility. However, insofar as current league structure is concerned, because the existing collective bargaining agreements are scheduled to remain in effect at least through the year 2000, this issue is one of largely academic curiosity at the present time.

N&Q 3 focuses on the status of the commissioner. This issue has not yet been definitively resolved but students should be reminded of the discussion of the commissioner as head of the player relations council, and the Notes and Questions following the *Vincent* case, as well as the "commissioner fine" issues that were raised in the *NFL Management Council* case. The question is joined further in the first *Silverman* case on page 710.

N&Qs 4, 5 and 6 discuss both the real and hypothetical situations of new organizing activity in professional sports. N&Q 4 particularly requires the students to revisit the primer in terms of the basic procedures employed by a union in an attempt to organize an employer. N&Q 6 more or less seeks to stimulate the students' creativity in terms of ways in which the respective parties attempt to persuade employees to vote for or against a labor organization in a union campaign. Clearly the development of a new league and the unique employment conditions endemic to professional sports would remove the situation from the rubric of traditional industrial bargaining. However, at the same time, many of the same concerns would apply in the professional sports context. Typically, an employer in this situation would attempt to ensure that those concerns of players that could be alleviated by union representation are addressed at the initial stages of the league's formation and the development of labor relations policies. Of course, if there is no competing league, it will be difficult to make a judgment as to competitive salaries and other matters that may allay player fears and forestall the possibility of union organizing.

The second question raised in N&Q 6, though poorly phrased, attempts to elicit student response on the question of a league that favors one labor organization over another. That is, if confronted with labor organization and two or three potential labor unions are involved, what
problems are presented if an employer chooses one labor organization over the other. Obviously, this requires students to address Sections 8(a)(2) and 8(b)(1)(A) and to identify the unfair labor practice liability inherent in showing favoritism to one union or cooperating or dominating that labor organization in any way. Here, students should be referred to that portion of the primer dealing with those unfair labor sections and also to pages 708 and 709 following the Seattle Seahawks case.

The final question in N&Q 6 requires a review of the primer section dealing with threats, interrogations, promises, and surveillance. This TIPS analysis generally covers most relevant points in terms of an employer's potential liability for violating rules governing the parties' pre-election "campaigning."

III. Unfair Labor Practices

(A) Discriminatory Treatment for Engaging in Protected Concerted Activity

Case: NFL Management Council and NFL Players Ass'n

Primary reason for inclusion: To provide students with a major unfair labor practice case dealing with Sections 8(a)(1) and 8(a)(3) of the NLRA and exposing them to the type of analysis employed in a major work stoppage attended by unfair labor practice activity.

Points to emphasize:

1) Upon an unconditional offer to return to work, strikers are entitled to their former jobs if those jobs or substantially equivalent jobs are available and if the employees are capable of performing them. Of course, in an unfair labor practice strike, the employees are entitled to their jobs even if it would require the employer to terminate the services of the replacement employees.

2) Both the Administrative Law Judge and the NLRB found that the union unconditionally offered to return to work and thereby demanded reinstatement of employees to available jobs.

3) The league imposed a deadline rule which placed limitations on the players' ability to return to work as requested. Thus, the denial of employment opportunity and the alleged interference with protected rights, as well as the discriminatory treatment of returning strikers, was triggered by the imposition of the deadline rule -- particularly at the eleventh hour. In these types of situations, the NLRB and the courts will employ various tests to ascertain employer liability. At the threshold, the NLRB and the courts will assess the degree of intrusion upon employee rights and, if such intrusion is not inherently destructive, will apply a type of balancing test in which the employer will be provided the opportunity to submit legitimate business reasons for the conduct. If the impact on employee rights is comparatively slight, and the employer has offered some valid rationale, the General Counsel must offer proof of anti-union animus to sustain his or her burden. (See N&Q 2 following this case and N&Qs 1 through 4 following Seattle Seahawks.)

4) The reasons offered by the league for the justification of the rule were found to be pretextual. Students should be aware of the fact that, even where the decision to employ or reinstate is inherently subjective, such as in the context of professional sports, an employer's offered reasons for the rule must still survive scrutiny under a good faith
standard. In this case, the league offered reasons that simply failed to survive even a cursory review. Perhaps the most dramatic example of the pretextual nature of the league's response is its contention that the deadline rule was imposed for safety reasons. In reality, no other deadline rule in a non-strike setting had been so strict; the suggestion was clear that the rule has been intended to retaliate against strikers rather than to protect their health and safety.

5) The Board does not even reach the question of whether the conduct is inherently destructive, finding that even with a comparatively slight interference, the employer must still show some type of business justification for the rule, which it has failed to do in this case.

Notes and Questions:

N&Qs 1, 2, and 3 focus on the points emphasized above, particularly the need for the General Counsel to demonstrate antiunion motive in this context. It is safe to say that the discriminatory conduct, combined with the absence of any type of legitimate business reason created the inference of antiunion motive justifying the finding of 8(a)(1) and 8(a)(3) violations in this case. At the conclusion of N&Q 3, there is some discussion regarding the need to show motive. Students should be asked whether or not motive is also implicitly considered in an 8(a)(1) situation. For example, as a general proposition, employers must have knowledge of union or concerted activity prior to a finding of a violation of Section 8(a)(1) for interference with such activity. Some commentators have suggested that knowledge is of questionable relevance unless the NLRB and the courts are attempting to ascertain the motivation underlying certain conduct. For example, if an employer gives a pay raise during a union organizing drive, without any knowledge that such activity is underway, it is unlikely that the NLRB would find an unfair labor practice stemming from the employer's alleged attempt to influence the outcome of the campaign. Thus, if this type of scienter is a prerequisite to a finding of a violation of Section 8(a)(1), have we not also implicitly suggested that the employer's motive to pay money as a bribe to woo employees away from voting for the union was the employer's motivation?

N&Q 4 provides background information on the 1987 strike and reminds students of the circumstances surrounding the eventual negotiation of the current collective bargaining agreement following that strike.

Case: Seattle Seahawks

Primary reason for inclusion: To demonstrate that, notwithstanding the inherent subjectivity in making employment decisions and the equally inherent difficulty in sustaining an unfair labor practice against a club, certain types of management conduct will not be immune from scrutiny and, as in the previous case, could result in unfair labor practices.

Points to emphasize:

1) Students should become intimately familiar with the Wright-Line test as it is the formula employed by the NLRB to ascertain liability in the context of a mixed motive or pretextual discharge situation.

2) The NLRB is extremely deferential to the credibility findings of administrative law judges and will, wherever possible, defer to such findings based on the expertise of the fact finder and his or her opportunity to observe the demeanor of witnesses.
3) In this case, the NLRB adopted the findings of the Administrative Law Judge and
the NLRB did not credit the testimony of management personnel. Given the disparate
treatment of the charging party, the NLRB found that his reassignment was a product of
his union activity and thus violative of Section 8(a)(3).

4) Again, when an employer offers reasons justifying a particular course of action, it
must be prepared to prove that such action was consistent with prior conduct and that it
was not merely a pretext for conduct designed to discourage union membership or
affiliation.

Notes and Questions:

N&Qs 1 and 2 summarize the history of the Seattle Seahawks case and rehash the Wright-
Line mixed motive test that is discussed in the case. It is important to note that Wright-Line does
provide an employer who has acted with antiunion motive to explain that such conduct would
have occurred notwithstanding the improper motivation.

N&Q 3 entails a sophisticated administrative law analysis that may be beyond the confines
of a sports law course. Simply stated, the question asks if a reviewing court is supposed to consider
the entire record as a whole and, if so, how does the command square with the notion that the
NLRB may review the case as if it were before it de novo? See 5 U.S.C. §§ 556 and 557. See also,
Bernard Schwartz, Administrative Law, § 10.7.

N&Q 4 bears repetition because it emphasizes the subjective nature of the sports personnel
decisions and illustrates that the standard for determining whether or not certain conduct is
appropriate will be based on one's good faith rather than a reasonable person/objective standard.
Yet, even with a more relaxed good faith standard, certain types of conduct will still run afoul of
Sections 8(a)(1) and (3).

N&Q 5 is a fascinating situation in which both authors of this text participated. Subsequent to the NFLPA's decertification and victorious prosecution of the McNeil lawsuit
under the antitrust laws, the NFLPA and the NFL negotiated a 7-year collective bargaining
agreement. The authors participated in the filing of unfair labor practice charges before Region
5 of the NLRB in which hundreds of pages of position papers were advanced in support of charges
that the negotiation between the NFL and the NFLPA was unlawful. The gist of the charges
centered on the fact that the labor negotiations had begun prior to the time the NFLPA had been
recertified as collective bargaining representative. Therefore, the NFL was negotiating with a
union that did not, at the time, represent a majority of NFL players. The issue never reached a
denouement because Norman Braman, owner of the Philadelphia Eagles, sold the club to
entertainment mogul Jeffrey Lurie and, as part of the terms of that purchase agreement, all unfair
labor practice charges were withdrawn.

N&Qs 6 and 7 provide additional background on the strike that occurred in 1982. The
question posed in N&Q 7 requires students to differentiate an economic strike from an unfair
labor practice strike. In the latter, the employees cannot be permanently replaced; they are
entitled to their former jobs upon demand, even if replacements have been hired. This issue was
addressed in Chapter 14 and students should be referred to the discussion of strikers' rights.

(B) The Refusal to Bargain in Good Faith
As the primer chapter and the brief introductory material to this section illustrate, employer refusals to bargain may assume many forms. In the cases, several of these types of unlawful activity are considered.

(1) Refusal to Furnish Information

Case: Silverman v. MLB Player Relations Comm., Inc.

Primary reason for inclusion: To provide an example of a refusal to bargain predicated on an employer's refusal to furnish relevant information.

Points to emphasize:

1) This case assumed critical importance because the denial of the injunction would de facto have compelled the MLBPA to strike or "hold its peace" for another two years.

2) It is a settled principle that a collective bargaining representative is entitled to relevant information as part of the bargaining or grievance adjustment process. Difficult questions, however, surround whether such information is available when it involves an employer's proprietary financial data. Generally, this information is off-limits unless the employer has, in a manner of speaking, waived its privilege by claiming an inability to pay.

3) At various points during these negotiations, league and individual club officials made comments suggesting that free agency and increasing salaries threatened competitive balance. These protests, however, were not made at the bargaining table and were not made by members of the Player Relations Committee. In discussing this aspect of the case, students should be asked to focus upon who actually made the comments, what was their status (i.e., are not club owners "employers" even if they lack official title as a member of the collective bargaining team), and whether their protests amounted to a claim of a financial inability to meet the players' demands.

Notes and Questions:

The answer to the first N&Q would seem to be that Werker has missed the boat. Whether Marvin Miller may have known or speculated about the owners' financial condition is irrelevant to a determination of the union's right to obtain substantiation and verification. On the contrary, disclosure of the information not only could have either dispelled Miller's doubts and possibly resulted in a softening of the union's position or exposed the league's remonstrations as pretexts -- in either event, a more meaningful negotiation may have resulted.

N&Q 2 provides interesting history and N&Q 3 raises a question that is answered in the opinion itself. Because of the arrangement between the owners and the Players' Association, a strike deadline had been set; the denial of the injunction forced the players to strike for fear that the status quo would be maintained for several more years while the unfair labor practice charges were pending.

N&Qs 4 and 5 raise issues addressed earlier regarding the status of the commissioner as agent of the employers (owners). In this case, the issue became secondary because the comments in question had been made away from the bargaining table and, in a literal application of prevalent authority, did not amount to a claim of financial impossibility triggering a "duty to furnish." However, if the "bargaining table" had been construed to include other venues incident
to actual negotiations, the commissioner's comments, as well as the statements made by other owners, may have resulted in an order requiring the owners to turn over important proprietary information. The new role of the commissioner in the bargaining process will undoubtedly cause him to be more circumspect in what he has to say in response to positions taken and demands made by the Players' Association.

N&Qs 6 and 7 provide a little history on the continuing controversy surrounding baseball owners' crying of wolf and protests that free agency will sound the death knell for meaningful competition. In truth, owners have consistently failed to provide hard evidence for their fears and the views of respected economists have cast further doubt on the validity of the league's claims. See, e.g., Andrew Zimbalist, Baseball and Billions (1992).

N&Qs 8 and 9 set the stage for cases that follow. These cases will demonstrate that litigation over the duty to bargain with an exclusive collective bargaining representative has had a profound impact on the current labor-management situation in professional sports.

(2) Bypassing the Collective Bargaining Representative

Case: Morio v. North American Soccer League

Primary reason for inclusion: To provide an illustration of the exclusivity concept and the manner in which sports league owners may run afoul of Section 8(a)(5) by ignoring the collective bargaining representative.

Points to emphasize:

1) The NASL in various ways dealt directly with bargaining unit players and otherwise bypassed the certified collective bargaining representative by unilaterally implementing changes in the players working conditions. The most dramatic example of such conduct was the league's negotiation of individual deals with players subsequent to the certification of the union as collective bargaining representative.

2) The league did not contest that it engaged in the alleged conduct of bypassing the union. The league contended that the initial unit determination was incorrect and they questioned their duty to bargain. As suggested earlier, because an employer cannot appeal an adverse representation decision (e.g., an appropriate unit finding) it will at times simply refuse to bargain, hoping to get the unit issue before the Court of Appeals on review of the unfair labor practice finding that the refusal to bargain constituted a violation of Section 8(a)(5). Recall in the primer chapter, an adverse decision from an administrative law judge in an unfair labor practice case can be appealed to the NLRB in Washington, D.C., and eventually to the appropriate United States Court of Appeals.

3) As part of the relief, the court renders the individual deals voidable (as opposed to void) at the behest of the union. This remedy may seem somewhat bizarre, but the rationale is simply that the union is the exclusive representative and bargains on behalf of all unit employees. Yet, there may be aspects of the individual contracts that are beneficial to the players and the court allows the union to make that determination.

4) While sophisticated pre-emption questions are certainly beyond the scope of this block of instruction, an interesting question would present itself if the individual employee wished to retain a contract that the union "voided." Could the employee seek to enforce

Notes and Questions:

N&Q 1 addresses the issue raised in the "points to emphasize" above. It is certainly conceivable that those contracts could have been voided to the extent that they were negotiated subsequent to the certification of the union as collective bargaining representative. Even if the contract pre-dated the certification, it is arguable that all individual bets are off in terms of wages, hours, and working conditions. If the individual contracts presumed to guarantee minimum benefits even in the event of a successful union organizing, then the pre-emption/state law enforcement issue referenced above again could take center stage.

N&Q 2 introduces the *Midland* case. Although *Midland* is totally unrelated to sports, it presents a useful analog that may resurrect itself in sports arbitration and unfair labor practice cases in the future. It is, at least, an important building block that will facilitate an understanding of those sports cases that have arisen due to the tension created by a collective bargaining agreement that allows special covenants and limited individual bargaining.

**Case:** *Midland Broadcasting Co.*

**Primary reason for inclusion:** To present students with an illustration of case authority in which a balancing test was applied to ascertain whether individual bargaining violated the exclusivity principle in the context of a union's qualified waiver.

**Points to emphasize:**

1) Footnote 1 contains waiver language that arguably permits the employer and individual employees to conduct some one-on-one bargaining. Students should compare this language to the special covenants provisions in a typical collective bargaining agreement covering professional athletes.

2) The dissent attacks the majority's approbation of the individual bargaining stressing that such conduct ranged beyond the narrow parameters of the "waiver."

3) The dissent acknowledges the legitimacy of the waiver, but it emphasizes that negotiation of any term that falls below the CBA minimum, regardless of the corresponding benefit, will implicate Sections 8(a)(5) of the NLRA.

Notes and Questions:

N&Qs 1 through 4 expound upon the basic points advanced in *Morio* and *Midland*, and provide some interesting arbitral authority in the sports context. The true test of the students' appreciation of this issue will lie in their handling of the Problem at the end of this section (page 735). There is no definitive answer; but they should be able to identify the potential 8(a)(5)/breach of contract issues prompted by the individual bargaining and also should be able to call upon the Special Covenants provision as a viable defense (as far as it goes).

(3) *Unilateral Implementation of a Mandatory Subject of Bargaining*
Case: Silverman v. MLB Player Relations Comm., Inc.

Primary reason for inclusion: To highlight the decision that played an integral role in the ending of the 1994-95 baseball strike.

Points to emphasize:

1) Judge Winter, who has long been a proponent of resolving labor market restraint problems through the labor law route as opposed to antitrust litigation (see, e.g., Wood v. NBA, 809 F.2d 954 (2d Cir. 1987)), took the owners to task for unilaterally changing working conditions prior to a legitimate impasse.

2) The court found that the anti-collusion provision, free agency, and salary arbitration were mandatory subjects of bargaining. Judge Winter stressed that to catalog such issues as permissive subjects of bargaining would "ignore the history and economic imperatives of collective bargaining in professional sports." This finding was crucial to the General Counsel's case and doomed all league attempts to impose these terms absent a bona fide impasse.

3) The most remarkable aspect of Judge Winter's conclusion perhaps is his finding that salary arbitration is a mandatory subject. He acknowledges that interest arbitration is a permissive subject, but he refuses to clarify salary arbitration as "interest arbitration." Students should be asked whether Judge Winter's conclusions are logical given the common definition of interest arbitration. (Here, you may want to jump ahead briefly to pages 747-750 and refer back to page 681-682 to give students a wider view of arbitration.) This discussion should provoke a brief, but lively debate and, hopefully, will provide some indications of whether the students understand the concepts of unilateral changes, post-impasse employer prerogatives, and interest arbitration.

Notes and Questions:

N&Q 1 focuses upon an issue that has been subject to robust debate in the circuits. Our personal experience also reflects that it is a favorite topic among law school moot court denizens. Students should be able to assess the implications of a "just and proper" standard vis-a-vis and approach that applies traditional equitable principles. In this instance, the granting of an injunction saved the baseball season and provoked the eventual negotiations resulting in the current settlement.

In N&Q 2, the players returned to work because they were able to resume play without the owner-imposed changes in salary arbitration, anti-collusion, etc. Further, the finding of further bad faith bargaining in the wake of the Second Circuit's decision could visit contempt consequences upon the owners. Therefore, the players returned to work with a greater outlook on the prospects for a meaningful settlement. One other factor should not be ignored. The players offer to end the strike, after a major victory in the courts, enabled them to gain a considerable advantage in the battle for public support. In all respects the players took the "high road" -- not an incidental feature in the ultimate resolution of the remaining issues.

N&Q 3 speaks for itself. If the adopters of this casebook will indulge a touch of jaundiced editorializing about Albert Belle and Jerry Reinsdorf -- they deserve each other. It is truly a marriage made in heaven.