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Sherman remarked:

[E]ither a foreigner or a native may escape ‘the criminal part of the law’ by staying out of our jurisdiction . . ., but if they have property here it is subject to civil process . . . [A foreigner] may combine or conspire to his heart’s content if none of his co-conspirators are here or his property is not here. 21 Cong. Rec. 2461, reprinted in Earl W. Kinter, ed., The Legislative History of Federal Antitrust Laws and Related Statutes, Part I, The Antitrust Laws at 126 (1978).

Accordingly, the legislative history further justified the court’s refusal to apply the criminal provisions of the Sherman Act to Jujo’s conduct.

In summary, despite finding sufficient contacts to establish personal jurisdiction over Nippon, the United States District Court for the District of Massachusetts granted Nippon’s motion to dismiss. The court explained that the Government’s criminal indictment failed to present evidence of a vertical price fixing agreement between Jujo and the Japanese trading companies. Furthermore, the court held that the Sherman Act did not permit it to rule on alleged activities occurring solely outside of the United States.

**NFL’s fixed wage plan exempt from antitrust laws**

*by Paul Lukitsch*

In certain circumstances, labor unions and multi-employer groups may negotiate free from the restrictions embodied in the federal antitrust laws. In *Brown v. Pro Football Inc.*, 116 S. Ct. 2116 (1996), the United States Supreme Court held that the National Football League (“NFL”), a group of football clubs, is immune from a player’s association antitrust class action. The class action was brought after an impasse in negotiations; the football clubs, bargaining together, implemented a unilateral wage plan. In reaching its decision, the Court ruled that a “nonstatutory” antitrust exemption implicit in the federal labor laws applies. The Court stated that this exemption, which is aimed at encouraging the collective bargaining process, shielded the employers from the antitrust laws and allowed the implementation of a unilateral wage plan.

In 1987, a collective bargaining agreement between the NFL and the NFL Players Association (“Association”), a labor union, expired. During negotiations over a new contract, the NFL adopted a plan which would permit each club to establish a “developmental squad” of up to six “first-year” or rookie players. The developmental squad would include players who had failed to secure a position on a regular player roster, and under the plan, the developmental squad would play in practice games and occasionally in regular games as substitutes for injured players. The plan provided for these squad members to receive the same weekly salary as regular contracted players.

In April of 1989, the NFL presented this plan to the Association and proposed that the squad members should receive $1,000 per week. The Association disagreed, insisting that the developmental squad players should receive the same benefits from club owners as those provided to regular players, including allowing squad members to negotiate individually with club owners regarding their respective salaries. After two months of negotiations, the two groups reached an impasse. The NFL unilaterally implemented its last good faith offer at the proposed $1,000 weekly salary and distributed uniform contracts to the club owners. The NFL then advised the club owners of resulting disciplinary actions to those owners who did not follow the weekly salary provisions.

As a result of the NFL’s unilateral implementation, 235 developmental squad members subsequently brought this class action suit against the NFL and its member clubs. The Association claimed that the NFL’s and the club owners’ agreement to
pay a $1,000 per week salary
violated the Sherman Act, 15 U.S.C.
§ 1 (1996), which forbids agree-
ments in restraint of trade. A federal
district court found in favor of the
Association, and a jury awarded it
$30 million in damages. On appeal,
the Appellate Court for the District
of Columbia Circuit reversed,
holding that a nonstatutory antitrust
exemption barred the Association’s
claims. The Supreme Court granted
certiorari and Justice Breyer
delivered the 8-1 majority opinion,
holding that the NFL’s unilateral
implementation of the fixed wage
plan after a bargaining impasse is
exempt from the antitrust laws.

Existence and scope of the
implicit “nonstatutory”
antitrust exemption

In rejecting the Association’s
antitrust claims, the Court relied on
earlier Supreme Court precedent
which states that an implicit
“nonstatutory” exemption from the
application of the antitrust laws
exists in certain circumstances.
Previously, the Court ruled that the
public policy considerations implicit
in federal labor laws under 29
U.S.C. § 151 et. seq. aim to promote
free and private collective bargain-
ing, requiring good faith negotiation
over wages, hours, and working
conditions. According to the Court,
an exemption is implicit in this
policy—Congress did not consider
the judicial use of the antitrust laws
as appropriate for labor disputes, but
rather viewed conflicts under the
labor statutes as administrative
resolutions appropriately left to the
National Labor Relations Board
(“NLRB”). In effect, the implied
exemption takes labor-related
disputes out of the hands of the
antitrust courts.

Further, the Court found that for
meaningful collective bargaining to
take place, an exemption to the
antitrust laws is necessary to give
effect to the federal labor statutes
and to promote the peaceful settle-
ment of labor disputes through
mediation and negotiation. For
example, the Court noted that
allowing the antitrust laws to
interfere with collective bargaining
does not allow employers to safely
discuss pre-impasse offers. In
essence, the Court determined that
the collective bargaining process
would grind to a halt if groups are
prohibited from making competi-
tion-restricting agreements among
themselves that are often necessary
to further a collective labor-manage-
ment goal.

Although the Association
conceded that an exemption exists, it
claimed that the exemption did not
apply in the present context.
Consequently, the Court analyzed
the scope of the exemption. Specifi-
cally, the Court determined whether
the exemption applies to multi-
employer bargaining and whether
Congress intended the exemption to
be effective with respect to the
NFL’s tactic of implementing a
multi-employer wage plan after a
bargaining impasse.

Writing for the majority, Justice
Breyer explained that, as of 1994,
multi-employer bargaining accounts
for more than 40% of all major
collective bargaining agreements.
He further stated that multi-em-
ployer bargaining is a prevalent
method of collective bargaining
used in many industries, including
professional sports, and offers
several advantages to both labor and
management. Citing NLRB cases
and treatises on the subject, the
Court concluded that the practice of
multiemployer bargaining plays an
important part in the nation’s
industrial relations system.

Justice Breyer additionally noted
that the courts and the NLRB have
held that the federal labor laws
permit the implementation of
changes to preexisting conditions
under an earlier contract after a
bargaining impasse. In order to
implement changes after a bargain-
ing impasse, the Court noted that
two requirements must be satisfied.
First, the new terms must be
“reasonably comprehended” within
previous employer proposals prior to
the impasse to assure that less
favorable terms will not be imposed
through the unilateral implemen-
tation of changes. Second, the new
terms must not involve unfair labor
practices. For example, employers
must bargain in good faith.

By adhering to these require-
ments, the Court concluded that a
unilateral implementation of a post-
impasse multi-employer proposal
constitutes an “integral part of the
bargaining process” which gives
effect to our nation’s labor policy of
promoting peace through strength-
ened collective bargaining.

Collective bargaining
disputes should be kept
out of antitrust courts

Lastly, the Court refused to
subject multi-employer post-impasse
implementation to the antitrust laws.
In particular, the Court expressed
concern that antitrust courts would
have to answer numerous questions regarding the procedure of collective bargaining for wages, hours, and working conditions. By not limiting the scope of the antitrust laws, the Court concluded that the inherent benefits of collective bargaining would be in jeopardy. Moreover, the Court noted that nonexpert judges or juries may premise antitrust liability on a premeditated agreement of uniform behavior on the part of the employers or on the lack of an independent decision of a competing employer.

Justice Stevens's dissent — an exemption from the exemption

In his dissent, Justice Stevens pointed out that an accommodation must exist for the Congressional policy favoring collective bargaining and the Congressional policy favoring free competition in business markets. Although Justice Stevens conceded that a nonstatutory exemption from the antitrust laws is necessary in certain circumstances, he indicated that the unique nature of the professional sports industry warrants a nonapplication of the exemption from the antitrust laws.

Justice Stevens noted that all salaries in the professional sports industry are individually negotiated—a practice which does not exist in any other industry. He emphasized that this practice existed both before and after a 1982 collective bargaining agreement which granted players an express right to negotiate their respective salaries individually with club owners. However, because this "developmental squad" introduces a new expansion of the traditional salaried players, he maintained that the current imposition of fixed wages on a player’s benefits package was not foreseeable during the original 1982 collective bargaining agreement. Thus, Justice Stevens found the "developmental squad" to warrant special attention. In agreeing with the district court, he concluded that the "developmental squad" is a novel idea which was not entertained by the 1982 agreement between the players and the NFL. Therefore, Justice Stevens determined that the antitrust exemption, normally intrinsic to a collective bargaining agreement, should not apply because the Association did not negotiate the players’ rights in the original 1982 agreement. Thus, Justice Stevens concluded that the antitrust exemption, coupled with the lack of a mutually agreed upon collective bargaining agreement, would infringe upon the Association’s freedom to contract and would contradict the very purpose of the exemption—the ability to negotiate freely.

Independent service organizations survive Kodak's motion for summary judgment on Sherman Act claims

by Patrick McGovern

In Eastman Kodak v. Image Technical Service, Inc., 504 U.S. 451 (1992), the Supreme Court affirmed a lower court’s ruling that a genuine issue of material fact existed as to whether Kodak possessed market power in the relevant market for service and parts for its machines even though Kodak lacked market power in the relevant market for the sale of its copying equipment. The Court held as a matter of law that a single brand of product or service can be a relevant market under the Sherman Act. Further, the Court clarified its earlier standard for summary judgment enunciated in Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), by stating that a plaintiff in an antitrust case does not carry a special burden to defeat a motion for summary judgment. The Court referred to its decision in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), which held that a nonmoving party can survive a motion for summary judgment if the court finds that the party’s inferences are reasonable.

Kodak's policy to maintain own products

Kodak manufactured and sold copiers and micrographic equipment and replacement parts for its equipment and offered service for Kodak equipment. Kodak provided 80% to 95% of the service for Kodak ma-