

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ANTONY BROWN, ET AL., Petitioners v. PRO
FOOTBALL, INC., dba WASHINGTON REDSKINS, ET
AL.

CASE NO: 95-388

PLACE: Washington, D.C.

DATE: Wednesday, March 27, 1996

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ANTONY BROWN, ET AL., :
4 Petitioners :
5 v. : No. 95-388
6 PRO FOOTBALL, INC., dba :
7 WASHINGTON REDSKINS, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, March 27, 1996

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:20 a.m.

14 APPEARANCES:

15 KENNETH W. STARR, ESQ., Washington, D.C.; on behalf of
16 the Petitioners.

17 LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the United States, as amicus curiae, supporting the
20 Petitioners.

21 GREGG H. LEVY, ESQ., Washington, D.C.; on behalf of the
22 Respondents.

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1 P R O C E E D I N G S

2 (10:20 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 95-388, Antony Brown v. Pro Football, Inc.,
5 doing business as the Washington Redskins.

6 Mr Starr.

7 ORAL ARGUMENT OF KENNETH W. STARR

8 ON BEHALF OF THE PETITIONERS

9 MR. STARR: Mr. Chief Justice, and may it please
10 the Court:

11 This case brings before the Court an important
12 question under the implied labor exemption to the
13 antitrust laws. At issue is the legality of unilateral
14 action in the labor market taken by the 28 clubs of the
15 National Football League which enjoy monopsony power.

16 Using the considerable enforcement authority of
17 the Commissioner of the league, the clubs unilaterally
18 imposed a drastic salary restraint by eliminating
19 competition for a small minority of the 1,600 players of
20 the National Football League.

21 Specifically, the restraint fixed the
22 compensation of developmental squad players at a
23 parsimonious \$16,000 for the regular season in 1989.

24 The court below, reversing Judge Lamberth,
25 shielded the NFL clubs from antitrust scrutiny. The court

1 found a complete repugnancy between antitrust and
2 collective bargaining, and in the process gave
3 professional sports leagues virtually the same exemption
4 from antitrust scrutiny that only baseball had previously
5 enjoyed, and that Congress has never seen fit to grant,
6 and Congress knows full well how to create exemptions from
7 the antitrust laws, as it did so explicitly in the
8 statutory labor exemption.

9 For three reasons, we submit respectfully the
10 result below should not stand. First and foremost, our
11 primary submission, there is no clear conflict. There is
12 no repugnancy between antitrust and labor policy in this
13 particular setting of a competitive labor market.

14 To the contrary. For many years, from this
15 Court's decision in *Radovich* through the seminal case of
16 *Mackey v. The National Football League* and then beyond,
17 *McCourt* from the Sixth Circuit, applying the *Mackey*
18 analysis for professional hockey, the sports world, albeit
19 subject to antitrust scrutiny with respect to restraints
20 in the labor market --

21 QUESTION: Is *Mackey* a case from this Court,
22 Mr. Starr?

23 MR. STARR: No, Your Honor, it's an Eighth
24 Circuit case, Mr. Chief Justice. This Court has not had
25 occasion to address this issue.

1 There have been, Your Honor, a number -- Mr.
2 Chief Justice, a number of lower court decisions. Mackey,
3 the Eighth Circuit decision, articulated what was for many
4 years the subtle standard and applied in a wide variety of
5 cases, and as a result, the sports world, although it was
6 subject to antitrust scrutiny with respect to restraints
7 in the labor market, enjoyed labor peace and a moderation
8 of what would otherwise have been very extreme and rigid
9 restraints and limitations on employ freedom, the economic
10 freedom of players, which is ultimately what is at stake.

11 Not only is history and practical experience
12 reflected by the 30 years of antitrust history, not only
13 is history and practical experience a sure guide to the
14 court in its decision here today, but so, too, is basic
15 theory.

16 QUESTION: Well now, the 30 years you're talking
17 about, what, dates from Radovich?

18 MR. STARR: From Radovich, then Mackey was
19 decided in the 1970's, and then after Mackey a large
20 number of decisions in various industries, Your Honor,
21 including professional basketball.

22 QUESTION: Are you suggesting there were no
23 contrary decisions from the courts of appeals during this
24 period?

25 MR. STARR: Until 1989.

1 QUESTION: So the -- so it's from --

2 MR. STARR: The 1950's. This Court recognized
3 the implied labor exemption in a series of cases in the
4 1960's. Antitrust scrutiny had been traditionally
5 applied, other than to baseball -- this Court's historic
6 decision in baseball had historically been applied.

7 After this Court articulated the implied labor
8 exemption, numerous courts, led, first, by the Eighth
9 Circuit, which was the first circuit to address this
10 extensively in the 1970's, in the Mackey case, invalidated
11 the Rozelle rule.

12 The Rozelle rule was challenged by players who
13 were tied to the team under the reserve clause the Rozelle
14 rule, tied to the team for which they were playing which
15 had drafted them for the entirety of their careers.

16 The Eighth Circuit said, we apply a rule of
17 reason analysis. There is no exemption from antitrust
18 scrutiny.

19 And why is that? What is it that makes
20 professional sports different than the other conventional
21 industries that have shared with the Court concerns that
22 to adopt the rule that has been embraced, now, for many,
23 many years, until Powell and then recent decisions
24 including --

25 QUESTION: The Powell -- Powell is an Eighth

1 Circuit Case, too, is it not?

2 MR. STARR: It is, Your Honor.

3 QUESTION: Do you think the Eighth Circuit
4 thought Powell was inconsistent with Mackey?

5 MR. STARR: There was a division of opinion, but
6 the Eighth Circuit as a whole still concluded -- and, in
7 fact, we would still win, Your Honor, under the Powell
8 analysis for this reason.

9 Powell still applied Mackey to say, for there to
10 be an implied labor exemption there must have been an
11 agreed-to term. The employees and management must have
12 agreed. That is pivotal. That is the core of the implied
13 labor exemption.

14 QUESTION: Then why doesn't the exemption
15 disappear in any case in which there has been a collective
16 bargaining agreement at the date at which the agreement
17 expires?

18 I mean, in theory, why isn't there a violation
19 during the negotiation period that you're talking about,
20 whether or not that negotiation ultimately results in an
21 agreement?

22 MR. STARR: Because the test, Your Honor, and
23 this is our basic submission, is repugnancy. Is there
24 repugnancy for the antitrust laws to apply?

25 Under circumstances where employers are coming

1 together to determine, what are our proposals going to be
2 to the players association and the like, formulating those
3 proposals and the like, are, I believe, protected by the
4 implied labor exemption, which does what? It is, at its
5 core, protecting the ability of employees through their
6 labor organization to come together with employers through
7 collective bargaining to reach an agreement.

8 QUESTION: Okay, but then the criterion is not
9 agreement.

10 MR. STARR: I beg your pardon?

11 QUESTION: The criterion is not agreement, and I
12 don't see why, in principle, the agreement should -- when
13 there is an agreement following negotiations, I don't know
14 why that should in effect be the touchstone, or its
15 absence a demarcating point.

16 MR. STARR: Well, agreement is not, standing
17 alone, the touchstone by any means. In fact, let me be
18 clear about what the touchstone is. We think that by
19 virtue of the Sherman Act and the National Labor Relations
20 Act, two laws passed by the Congress of the United States,
21 the issue is, is there repugnancy to applying the
22 antitrust laws to this particular setting?

23 We know that there is not. We know it from
24 practical experience, but we also know that the other
25 side's essential submission is, well, you see, if you

1 allow antitrust scrutiny, that will end multiemployer
2 bargaining, and we know that not to be true.

3 And in particular, what is the situation here?
4 This is the unilateral imposition of terms of employment
5 by the employer cartel.

6 QUESTION: And prior to that point there is a
7 unilateral imposition by the multiemployer group of a
8 bargaining position.

9 MR. STARR: And, Your Honor, we think that is
10 inherently part and parcel of the collective bargaining
11 process, which unilateral implementation of terms is not.
12 That's the distinction, Your Honor.

13 QUESTION: Mr. Starr, I -- why does the conflict
14 between the antitrust laws and the labor laws have to rise
15 to the level of what you call repugnancy? I mean, it's
16 not as though the Sherman Act is a clear, fixed
17 prescription. As it's been interpreted by the courts it's
18 a rule of reason. Why isn't it enough that it is a more
19 reasonable disposition, given the labor laws, for a
20 certain thing to take place, rather than that thing must
21 be positively repugnant to the Sherman Act?

22 MR. STARR: Basic principles of statutory
23 construction, that the court is under a duty to interpret
24 the law so as to give full rein to both those --

25 QUESTION: To both statutes, but if --

1 MR. STARR: To both statutes.

2 QUESTION: -- one statute simply says,
3 unreasonable restraints of trade are not allowed, why
4 isn't it possible to say, well, in the context of labor
5 negotiations, what's reasonable is quite different from
6 what's reasonable in other contexts?

7 I mean, the Sherman Act is a very mushy statute.
8 It's not the kind of a statute that establishes a, you
9 know, a granite-like line which therefore is either
10 repugnant or not repugnant to later statutes.

11 MR. STARR: Your Honor, the theory, it seems to
12 me is, is there antitrust immunity? Are you immune from
13 the entire scrutiny that you have just described as
14 opposed to, must you at least be subjected to the
15 restraining, constraining influences of the antitrust
16 laws?

17 The question is immunity. What they are seeking
18 is immunity with respect to what? Not bargaining
19 positions. They're seeking immunity with respect to the
20 implementation of terms, which is the substantive --

21 QUESTION: If you can make that nice, neat
22 distinction, but I presume they also ultimately want some
23 kind of a contract, and I'm not sure that the imposition
24 of those terms after the moment of supposed impasse is
25 somehow categorically distinguishable from the process

1 which I presume is not necessarily over.

2 MR. STARR: Your Honor, this Court has already
3 charted the path in that very respect in Fort Halifax. It
4 has said the unilateral implementation of terms is, in
5 fact, quite a different kettle of fish than, and does not,
6 in fact, intrude upon the collective bargaining process.

7 A trilogy of cases that our colleagues on the
8 other side love to ignore, Metropolitan Life, Fort
9 Halifax, and this Court's unanimous decision in Livadas,
10 speak in terms of the collective --

11 QUESTION: Those were all ERISA cases, weren't
12 they?

13 MR. STARR: No, Your Honor. Livadas was, in
14 fact, a -- there were two issues involved in Metropolitan
15 Life, and Fort Halifax, and among the issues -- and this
16 Court addressed the National Labor Relations Act implied
17 preemption issue with respect to all.

18 And, indeed, in Livadas, Your Honor, the key
19 point made there was that as a matter of national labor
20 relations policy and giving meaning to section 7's right
21 on the part of employees to organize, that they should not
22 be put to what, this Court's felicitous language, the
23 unappetizing choice of choosing to associate together, to
24 bargain, on the one hand, versus giving up substantive
25 rights given to them by law.

1 Now, what is that body of law?

2 QUESTION: Those cases had nothing to do with
3 antitrust.

4 MR. STARR: That is --

5 QUESTION: I mean, I was brought up at my
6 mother's knee to believe that antitrust and labor law do
7 not mix, but the very reason that the NLRA was passed was
8 because judges decided it was a fine idea, under the
9 antitrust laws, to start enjoining trades unions and
10 interfering with the collective bargaining process.

11 So that's what my two questions are. First, why
12 is this case about organized sports? There's nothing
13 special about them, is there? This is --

14 MR. STARR: Yes --

15 QUESTION: Well, that's what I want to know.
16 The first question is -- that worries me, and if the
17 answer to this is no, then that's the end of that.

18 MR. STARR: Yes, the --

19 QUESTION: Why is this about organized sports
20 any more than Schechter is about chickens? Why isn't this
21 just a case about multiemployer bargaining units
22 throughout industry?

23 MR. STARR: Because of the critical structure
24 and nature of the sports industry, which is --

25 QUESTION: Well --

1 MR. STARR: -- which is -- which is -- comma,
2 which is, competition in the labor market. Employer
3 associations, in contrast to unions in conventional
4 industries exist for the very purpose of preserving
5 competition that the employers would like to eliminate.

6 QUESTION: In other words, you're saying that
7 if, in fact, the antitrust law applies to the joint
8 venture called the National Football League, it does not
9 apply to the five automobile companies or the 95
10 contractors that might create a multiemployer bargaining
11 unit. Is that your view?

12 MR. STARR: My view is there's implied labor
13 exemption that the conventional industries can say exist
14 because of what, unions in those conventional industries
15 have joined together for the very purpose of eliminating
16 competition in the labor market.

17 QUESTION: All right, so you're saying there is
18 a distinction.

19 MR. STARR: Clearly --

20 QUESTION: Then if I were to believe there was
21 not a distinction, and if there is, then this question is
22 irrelevant, but I'm not positive that there is.

23 MR. STARR: Your Honor, if --

24 QUESTION: If there is a distinction --

25 MR. STARR: Your Honor, if I may --

1 QUESTION: Yes.

2 MR. STARR: -- I refer the Court to Mr. Levy's
3 opposition to certiorari. He put a Roman numeral here,
4 and it's called Roman numeral III, and he said, this
5 doesn't apply outside sports. Sports is unique. Why?
6 Because of competition.

7 MR. STARR: I would like to reserve, if I may --

8 QUESTION: My second question is this --

9 MR. STARR: Yes, I'm sorry.

10 QUESTION: -- that how do you work your
11 exemption-nonexemption? There's a multiemployer
12 bargaining union. There are unions.

13 MR. STARR: Employers associations --

14 QUESTION: Don't the employers, like the union,
15 have to decide among themselves what will happen if they
16 reach an impasse? Don't they have to talk to each other
17 about what they're going to do --

18 MR. STARR: Yes --

19 QUESTION: -- and why isn't this all up to the
20 labor board, and not up to courts?

21 MR. STARR: Well, first of all, what we are
22 again talking about is not the process that Justice Souter
23 was referring to as well in terms of the formulation of
24 positions and the like. I believe that that is exempted
25 by the implied labor exemption. Why? Because there would

1 be a clear repugnancy to insert antitrust laws into that
2 setting, not with respect to the unilateral imposition of
3 terms, which is a substitute for a bargaining agreement.

4 QUESTION: Mr. Starr, I have one short question,
5 because I know you want to reserve your time. Was this
6 subject of reserved players fairly comprehended within the
7 scope of the collective bargaining discussions?

8 MR. STARR: No. Well -- oh, fairly comprehended
9 within, there was bargaining to impasse what was -- there
10 was never agreement.

11 QUESTION: Would you say it was fairly
12 comprehended within the scope of the discussions?

13 MR. STARR: Yes.

14 Thank you, Mr. Chief Justice.

15 QUESTION: Very well, Mr. Starr.

16 Mr. Wallace, we'll hear from you.

17 ORAL ARGUMENT OF LAWRENCE G. WALLACE

18 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
19 SUPPORTING THE PETITIONERS

20 MR. WALLACE: Thank you, Mr. Chief Justice, and
21 may it please the Court:

22 QUESTION: Mr. Wallace, would you tell us,
23 please, why the National Labor Relations Board is not
24 included in the brief filed by the Government? I guess
25 you are here just on behalf of the --

1 MR. WALLACE: That is correct. It is unusual --

2 QUESTION: -- Federal Trade Commission.

3 MR. WALLACE: -- for the National Labor

4 Relations Board to speak to issues of antitrust law.

5 They're not issues that have come before the board.

6 We worked with the board and its staff in

7 preparing our position, and we have a footnote at the end

8 of our brief which reflects the board's view on this

9 judgment and says that it's erroneous and would be

10 detrimental to labor as well as antitrust policy, but

11 beyond --

12 QUESTION: But it certainly isn't explained. We

13 don't know what the position might be.

14 MR. WALLACE: I understand that, Your Honor.

15 The -- we -- the board operates through majority vote. It

16 was undergoing some transitions in membership at the time

17 we briefed this case on an accelerated schedule, and it

18 was not practical for us to go beyond what we had been

19 authorized to say at the petition stage.

20 And I know the other side is trying to draw

21 solace from the fact that the board said the judgment

22 should be reversed rather than saying nothing, but I think

23 that that cuts more against them than in their favor.

24 If I may, I'd like to emphasize that --

25 QUESTION: And I guess the AFL-CIO couldn't --

1 did they have a vacancy in their boards, too? They
2 haven't filed an amicus brief here. That's rather
3 surprising.

4 MR. WALLACE: We filed a brief, and the brief
5 was prepared in collaboration and consultation with the
6 board's staff, and they were consulting with the members.

7 I think it's important to bear in mind the
8 distinction between whether there is antitrust scrutiny
9 available and whether there is an antitrust violation.

10 This Court's decision in Connell Construction
11 Company is a holding, with all respect, Justice Breyer,
12 that labor and antitrust do mix, and that the exemption
13 did not extend to the particular negotiation that was
14 involved there in trying to get the employer -- that was a
15 dissenting view in Connell that antitrust scrutiny had to
16 be ousted, but the majority of the Court held to the
17 contrary, and we have suggested in the latter two-thirds
18 of our footnote 5 in our brief, that there are other ways
19 to accommodate the policies of the National Labor
20 Relations Act --

21 QUESTION: Mr. Wallace --

22 MR. WALLACE: -- in applying the antitrust laws
23 without --

24 QUESTION: Mr. Wallace --

25 MR. WALLACE: -- expanding the exemption. Yes,

1 Justice --

2 QUESTION: -- before you go on with that, your
3 time is short, and there is a question that I'd like to
4 put to you, because the heart of your argument is that the
5 impasse is the point at which the antitrust laws come in,
6 and yet your brief was -- admitted that that's a difficult
7 time to determine.

8 As Justice O'Connor asked, I thought that we
9 would be enlightened by the view of the board on that
10 question, because it seems to me that it would be -- from
11 your own brief, it's very hard to know what is an impasse.
12 Is this temporary? There is a precedent of this Court
13 that suggests that. When is it really over?

14 MR. WALLACE: Well, we recognize that can be a
15 difficulty, although not a difficulty of much consequence
16 in a case of this nature in which the employers are
17 imposing new terms that were not included in the expired
18 agreement, and they're going beyond anything that the
19 National Labor Relations Act would have required them to
20 adhere to prior to impasse.

21 QUESTION: Well, the concession --

22 QUESTION: Mr. Wallace, isn't it true, as the
23 respondents suggest in their brief, that the hope and
24 expectation of the labor laws is that there is never a
25 complete impasse, that you go to negotiation for as long

1 as you can.

2 When you -- it's proving fruitless, each party
3 is left to its means of economic coercion, and they go to
4 it, and then eventually is it not expected -- hoped and
5 expected that they will come back to the table, and the
6 impasse will be at an end?

7 MR. WALLACE: There's no doubt that that is
8 true, and that bargaining can continue, and bargaining
9 collaboration among employers in a multiemployer unit can
10 continue, but the question --

11 QUESTION: So why is operating as a single
12 employer unit up until the mini-impasse, okay, but between
13 the mini-impasse and then during that period until they
14 sit down to the table again they have to stop acting as a
15 single employer?

16 MR. WALLACE: The National Labor Relations Act
17 requires them to abide by terms of the expired agreement
18 until impasse is reached, so their conduct is governed by
19 that. After that, there is -- they would not be violating
20 any requirement of the National Labor Relations Act to act
21 individually in making any changes that they choose to
22 make.

23 The question is, to what extent do -- does the
24 labor act require collaboration among employers, not all
25 of whom in these multiemployer groups are operating a

1 sports league where there is collaboration necessitated
2 under a quite --

3 QUESTION: Is it require or permit, Mr. Wallace?
4 I mean, even if the National Labor Board Act doesn't
5 require it, it might permit it.

6 MR. WALLACE: The fact that it permits it, or
7 has a remedy for it, is not enough for the judiciary to
8 find an implied exemption from the antitrust laws when
9 Congress never expressly granted an exemption, and under
10 this Court's holdings it's only an exemption that is by
11 necessary implication flowing from the very existence of
12 the scheme of the labor act that is to be recognized --

13 QUESTION: Suppose this proposal --

14 MR. WALLACE: -- to the minimum extent
15 necessary.

16 QUESTION: Suppose this proposal had come from
17 the player's side of the table, but they wanted, say,
18 \$3,000 a week, and the employer said, we'll do \$1,000 a
19 week, then there's an impasse, then the employers impose
20 the \$1,000-a-week scheme, what result?

21 MR. WALLACE: Our view is that after impasse the
22 employers cannot in concert agree to change the terms
23 under which they will pay without antitrust scrutiny being
24 applicable.

25 QUESTION: So the fact that the players

1 themselves negotiated it, or suggested it, is not
2 relevant?

3 MR. WALLACE: It's relevant to whether it's a
4 permissible change for individual members of the unit to
5 make under the National Labor Relations Act, or for that
6 matter it wouldn't violate the National Labor Relations
7 Act for the group to make the change after impasse, but it
8 would be subject to antitrust scrutiny, which might very
9 well apply a rule of reason in the context of a sports
10 league where you can't field teams individually. It's
11 quite different from --

12 QUESTION: Well then, would that satisfy you if
13 we affirmed the decision on the different ground that
14 although there's no antitrust immunity the rule of reason
15 in this situation permits employers to continue to operate
16 as a single employer unit --

17 MR. WALLACE: Well --

18 QUESTION: -- between the temporary impasse and
19 the final settlement of the dispute?

20 MR. WALLACE: Well, that is a question that the
21 court of appeals did not reach, and I think it would be
22 improvident for this Court to reach it, especially since
23 it isn't presented or briefed here.

24 QUESTION: It seems like a distinction without a
25 difference whether we say that the reason it's okay is

1 because you're exempted from the antitrust laws or you're
2 subject to the antitrust laws but the antitrust laws
3 permit this.

4 MR. WALLACE: But antitrust scrutiny is
5 something that draws distinctions depending on
6 circumstances and justifications for restraints that can
7 be very different if you're trying to field teams against
8 one another in comparison with --

9 QUESTION: Yes, but Mr. Wallace, then, I think
10 your reasonable --

11 MR. WALLACE: -- producing motion pictures, for
12 example, where one can go ahead without the other.

13 QUESTION: But Mr. Wallace, I think your
14 reasonable defense might well apply to a rule that says
15 only six players on the replacement squad, or something
16 like that, but I don't see how you could say it's a
17 reasonable -- doesn't violate the rule of reason to fix
18 the specific salary level.

19 MR. WALLACE: I never said it would not violate
20 the rule of reason.

21 QUESTION: But you didn't suggest we could
22 affirm.

23 MR. WALLACE: I said that it -- I wouldn't
24 suggest affirming. I -- what I suggested is that
25 antitrust scrutiny doesn't --

1 QUESTION: You're just teasing us with the
2 notion that the rule of reason might solve our problems.

3 (Laughter.)

4 MR. WALLACE: The rule of reason doesn't
5 necessarily mean the defendant wins. The defendant still
6 has to make a showing that satisfies the rule of reason.
7 It just means that it's not a per se violation.

8 QUESTION: Thank you, Mr. Wallace.

9 Mr. Levy, we'll hear from you.

10 ORAL ARGUMENT OF GREGG H. LEVY

11 ON BEHALF OF THE RESPONDENTS

12 MR. LEVY: Mr. Chief Justice, and may it please
13 the Court:

14 I would like to begin by following up on one of
15 Mr. Starr's answers to Justice Breyer's question, and that
16 is a question, or an answer about the choice required of
17 certain unionized employees.

18 I agree with petitioners that in certain
19 unionized industries employees have a choice to make, but
20 it is not the choice that petitioners assert. It is not a
21 choice between labor law rights and whatever antitrust
22 rights they may have.

23 The choice, instead, is between collective
24 bargaining with a single employer that bargains
25 independently, and collective bargaining with a

1 multiemployer bargaining unit, a group of employers that
2 bargain collectively as if they were a single entity.

3 The problem with petitioner's position is that
4 they want to have it both ways. They want to take full
5 advantage of the enormous benefits which this Court
6 recognized in Bonanno Linen that employees receive when
7 employers act collectively in the bargaining process, but
8 at the same time, they also want to exploit the leverage
9 of the antitrust laws which they can do only by claiming
10 that each member of the multiemployer unit is required to
11 act not collectively but independently. That fundamental
12 inconsistency pervades petitioners' every argument.

13 From the standpoint of the union, multiemployer
14 bargaining is voluntary. The union may withdraw its
15 consent at any time before the bargaining process begins,
16 but once it begins, multiemployer bargaining is a
17 bilateral process providing rights and obligations that
18 both sides must observe, and that neither side can escape.

19 That was the essence of this Court's opinion in
20 Bonanno Linen. Once bargaining began, each employer was
21 bound by its selection to engage in multiemployer
22 bargaining.

23 QUESTION: May I ask you, Mr. Levy, I realize
24 there's lots of difficulty determining when impasse occurs
25 and so forth and so on, but in your view of the law, does

1 there ever come a time when the employers would be --
2 would not be free to act collectively by imposing a term
3 such as was imposed in this case?

4 MR. LEVY: There may come a time, Your Honor.

5 QUESTION: And when would it come, in your view?

6 MR. LEVY: If the employees ultimately elect, in
7 good faith, and not as a strategic matter to engage -- to
8 get additional leverage in the collective bargaining
9 process, to give up their rights under the labor laws, but
10 I would argue that as long as they continue to bargain
11 collectively, that --

12 QUESTION: I'm trying to hypothesize a case -- I
13 understand the difficulty of measuring impasse, but where
14 everyone would agree that there's really an impasse,
15 there's no point in future bargaining. Could, at that
16 point, the employers continue to assert their will in the
17 way they did in this case?

18 MR. LEVY: Once the employers give up their
19 bargaining rights, the employee -- excuse me. Once the
20 employees give up their bargaining rights, the employers
21 could not take any affirmative steps, exercise their
22 economic weapons under the bargaining process. I agree
23 with that.

24 QUESTION: What happens in that respect in --
25 forgetting professional sports, there are lots of

1 multiemployer bargaining units agreed to by unions.
2 There's a history, isn't there?

3 MR. LEVY: Of course there is.

4 QUESTION: All right, so I've been searching,
5 and I can't find board precedent. I want to know what the
6 labor board thinks, and so I went in to try to find prior
7 cases. I couldn't find any.

8 What is the normal practice in -- outside of
9 professional sports? Why can't I find precedent? How do
10 employers deal with this? Don't they normally say to each
11 other, what we'll do if we reach an impasse, then don't
12 they later implement it as part of a normal bargaining
13 practice? What happens normally in labor law? There must
14 be some history on it. Why can't I find it?

15 MR. LEVY: Well --

16 QUESTION: Aside from my own inabilities.

17 MR. LEVY: I can't answer that question as to
18 why you can't find it, but there is no question, Your
19 Honor, that Congress intended to encourage the practice of
20 multiemployer bargaining.

21 QUESTION: We know that, but the issue would be,
22 is a decision by employers a) reached after the impasse or
23 b) reached prior, but implemented after? Is that a normal
24 part of collective bargaining with a multiemployer
25 bargaining unit?

1 I would look to the board for guidance there.
2 It's up to them to say, not up to judges, so why can't I
3 find what happens normally? What does happen normally?

4 MR. LEVY: The board has spoken on that subject,
5 Your Honor.

6 QUESTION: Where?

7 MR. LEVY: In its brief in Bonanno Linen which
8 this Court quoted in its opinion in Bonanno Linen. The
9 board made clear that among the economic weapons available
10 to the employers after impasse was to implement
11 unilaterally the terms of its last good faith bargaining
12 proposal.

13 The board has spoken on that, and in its
14 decisions the board has repeatedly made clear in contexts
15 involving multiemployer bargaining that unilateral
16 implementation of the last good faith bargaining proposal
17 is a -- is part and parcel of the collective bargaining
18 process. It is a traditional leverage.

19 Now, it was only a few months ago, in the
20 Silverman case, which we cited at page 30 of our brief,
21 when the major league baseball implemented a unilateral
22 terms and conditions of employment, that the baseball
23 players went to the board, and the board agreed with the
24 baseball players' position that that term had not been
25 unilaterally implemented in accordance with the labor

1 laws.

2 And only 6 weeks later the NLRB had obtained an
3 injunction against the court -- against the baseball
4 employers' implementation of that term, and that's exactly
5 what the football players should have done here.

6 They had a remedy if they were of the view that
7 the unilateral implementation of these terms was not in
8 good faith. Their remedy was to go to the labor board.
9 They could have done that and had a ruling within weeks.
10 Instead, we've had 6 years of expensive antitrust
11 litigation that has plagued the defendants, it has plagued
12 the courts, and it has poisoned labor relations in this
13 industry.

14 Congress provided a remedy for this. If there's
15 anything inappropriate, or if the employers implement
16 terms that are unreasonable. The players elected not to
17 pursue those remedies here.

18 In Bonanno Linen, to get back to Bonanno Linen,
19 the Court made clear that once the collective bargaining
20 process begins, the multiemployer bargaining process
21 begins, both sides are bound by the rules and terms that
22 apply in collective bargaining and the rules and terms
23 that apply to multiemployer bargaining units.

24 And in Justice Stevens' concurring opinion,
25 Justice Stevens pointed out that the individual employer

1 who wanted to withdraw from the multiemployer unit in
2 Bonanno Linen knew what the rules were when it chose
3 voluntarily to participate in the multiemployer bargaining
4 process, and he wrote that there was nothing inappropriate
5 about requiring that employer to abide by those rules
6 throughout the bargaining process.

7 The same is true here. This case is nothing
8 more than the flip side of Bonanno Linen.

9 QUESTION: Mr. Levy, the problem I have is, does
10 the bargaining process ever come to an end, because I
11 think you seem to agree that if it had come to an end,
12 then the antitrust laws would kick in.

13 MR. LEVY: In this industry at least, Your
14 Honor, I think it's clear that the bargaining process
15 itself never comes to an end.

16 QUESTION: It never comes to an end.

17 MR. LEVY: The NBA players represented to the
18 court in the Second Circuit in Williams, in a passage that
19 we quoted from a brief, everybody knows in this industry
20 that there's --

21 QUESTION: So basically what you're saying is
22 there is an industrywide understanding that you never have
23 impasse.

24 MR. LEVY: No. Impasse is merely a part of the
25 collective bargaining process, Your Honor.

1 QUESTION: Ah.

2 MR. LEVY: Everybody -- everybody may
3 anticipate --

4 QUESTION: See, all the other cases are before
5 impasse. That's why this one's --

6 MR. LEVY: No, everybody anticipates that there
7 will be impasse, but everybody also anticipates that
8 impasse will ultimately be broken. That's what the labor
9 board has repeatedly said, that impasse --

10 QUESTION: There's really no such thing as a
11 real impasse, then.

12 MR. LEVY: I believe that a real impasse, as the
13 labor board has articulated it, is simply a temporary
14 stage in the process.

15 QUESTION: Yes.

16 MR. LEVY: But the NLRB has --

17 QUESTION: But it could be one that would
18 justify decertification of the union.

19 MR. LEVY: In theory, that's right, Your Honor.
20 In theory, that's right.

21 QUESTION: But what would it take -- something
22 like that is what it would take for the antitrust laws to
23 kick in. That's the point that I think you were referring
24 to earlier.

25 MR. LEVY: That's right, although I would

1 condition that by saying that if decertification were
2 intended merely to allow the union to gain additional
3 leverage in collective bargaining, that the antitrust laws
4 should not kick in. That's sort of strategic
5 decertification, or tactical certification, in my view is
6 disruptive of a collective bargaining process.

7 QUESTION: It's a new concept, good faith
8 decertification.

9 (Laughter.)

10 MR. LEVY: Well, Justice Scalia, it is not a new
11 concept. That issue was litigated in the district court
12 in McNeil, and the court found on summary judgment that
13 there had been no sham decertification even though the NFL
14 claimed that that was what happened during the 1970's when
15 the union decertified.

16 QUESTION: Mr. Levy, in this respect you are
17 agreeing, if I understand you correctly, totally with
18 Judge Edwards on that, it ends when the union decertifies
19 so that there's no more bargaining regime.

20 MR. LEVY: I would like to add this wrinkle,
21 Your Honor, that certainly after the union decertifies
22 affirmative steps, affirmative exercise of economic
23 weapons taken by the employers is not protected by the
24 nonstatutory labor exemption.

25 There is a question which the courts have not

1 addressed about what happens to steps that the employers
2 have taken prior to decertification that remain in place
3 after the union decertifies.

4 In that situation, while the courts have not
5 addressed it the Solicitor General has indicated that it
6 would presumably be appropriate or necessary for the
7 employers to have at least some period of time, a
8 reasonable period of time to adjust their conduct to bring
9 it in conformity with the antitrust laws, otherwise you
10 have the anomalous situation of a private party
11 controlling whether or not prior conduct taken by the
12 employers that was lawful on day 1 became unlawful on day
13 2, and that, I think, would be an inappropriate course for
14 the court to take, but of course, that issue isn't
15 presented here.

16 With that caveat, though, I do agree with Judge
17 Edwards.

18 QUESTION: Well, that position requires you
19 basically to put the employees to a choice between
20 preserving unionization or exercising their rights under
21 the Sherman Act.

22 MR. LEVY: I don't think that's the choice the
23 employees are confronted with, Your Honor. I think --

24 QUESTION: Well, it sounds very much like it --

25 MR. LEVY: I --

1 QUESTION: -- if you say it doesn't end until
2 decertification, so --

3 MR. LEVY: I think there's an intermediate
4 choice for the employees, and that is, they could decide
5 no longer to participate in the multiemployer bargaining
6 process. Once that happens, once there's no multiemployer
7 bargaining, then you have a situation where --

8 QUESTION: The employees can make that choice?

9 MR. LEVY: It so -- the employees can certainly
10 make that choice before the bargaining process begins.

11 QUESTION: Well, how about at impasse?

12 MR. LEVY: At impasse, no, I don't think the
13 employees can make that choice.

14 QUESTION: So at that point they are put to the
15 choice, stick with unionization or exercise rights under
16 the Sherman Act, one or the other.

17 MR. LEVY: I think that's right if you accept
18 the premise that they do have rights under the Sherman
19 Act, that's right, there is a choice to be made there.

20 But the labor laws are structured in such a way
21 that --

22 QUESTION: Does that penalize them in some sense
23 under the National Labor Relations Act?

24 MR. LEVY: No, they have always --

25 QUESTION: I mean, we've been very protective of

1 employee rights --

2 MR. LEVY: Well, this is --

3 QUESTION: -- under the labor act, and does that
4 kind of a choice in effect amount to a penalty?

5 MR. LEVY: This is not the type of situation
6 like the Livadas case, to which Mr. Starr referred, where
7 a State court imposed a penalty on an employee's decision
8 to exercise his labor law rights.

9 In Livadas, Justice Souter made clear in his
10 opinion for the Court that if a Federal statute were to
11 impose the same choice, the issue would be entirely
12 different. The issue then would be one of statutory
13 harmonization, I think is the phrase that was used, and
14 what we're asked -- what the process that's required here
15 is the process of harmonizing the requirements of the
16 antitrust laws with the requirements of the labor laws.

17 The key point here, though is, as Justice Breyer
18 suggested earlier in the morning, is that the conduct that
19 is at issue here is really conduct that is at the core of
20 the labor laws, that at most it's at the very periphery of
21 the antitrust laws. This conduct is conduct that is --
22 that involves a mandatory subject of collective
23 bargaining.

24 QUESTION: But is there a way legally to bring
25 the board into the making of this decision? That is, is

1 it possible that if the board were to say, for example,
2 that it is not an unfair labor practice for a group of
3 employers to impose terms for the reason that it has
4 nothing to do with the collective bargaining relationship
5 in this instance, since many months ago they reached
6 impasse, at that point the antitrust laws would kick in?

7 What I'm looking for is, is there a way to turn
8 Justice Stevens' question about when you reach impasse, a
9 real one so that collective bargaining's out of it, is
10 there a way legally to bring the board into the making of
11 that decision?

12 MR. LEVY: I would assume that there is --

13 QUESTION: What would it be?

14 MR. LEVY: -- Your Honor, that at some point the
15 board could be asked to determine whether there is any
16 prospect of further use of economic weapons ultimately
17 leading to a collective bargaining agreement.

18 QUESTION: How could you do that? What would be
19 the legal route?

20 MR. LEVY: Well, one approach would be for the
21 employees to file an unfair labor practice charge with the
22 board, just as they could have done here. The players, in
23 our view, could have filed that unfair labor practice
24 charge days after the NFL decided unilaterally to
25 implement the salary term.

1 QUESTION: Contending what?

2 QUESTION: Yes --

3 QUESTION: Contending what?

4 MR. LEVY: Contending that the parties were not
5 at impasse, an issue that they've stipulated to here, or
6 that the proposal was not made in good faith. They could
7 have argued that \$1,000 a week wasn't enough, that to be a
8 reasonable proposal it had to be \$2,000 a week, but they
9 never pursued that. That is the remedy that the labor
10 laws have afforded them, and that's --

11 QUESTION: Does the board have the right -- I'm
12 unfamiliar with this. Does the board have the right to
13 determine the fairness of a proposal?

14 MR. LEVY: It has the right to determine whether
15 or not a proposal has been made in good faith and
16 negotiated in good faith.

17 QUESTION: And what would the standard be? How
18 would they judge something like -- this is a new one on
19 me.

20 MR. LEVY: They could -- one factor that they
21 could look at is to look at the terms of the offer. I
22 don't have any illusions here that if the NFL had
23 implemented unilateral -- or unilaterally terms that would
24 have paid these employees minimum wage, that -- about what
25 the NLRB would have said in those circumstances.

1 They would have said that in the context
2 presented that proposal was not made in good faith, but
3 here the proposal was \$1,000 a week, the employees had the
4 right to go to the NLRB to challenge whether or not that
5 term was sufficient, as one indication of whether it was
6 negotiated in good faith, and they elected not to do that.

7 QUESTION: I take it one of your concerns is
8 that if the petitioners prevail, then there will be an
9 incentive, or an inducement to reach impasse on the part
10 of the labor parties so that they can bring antitrust
11 remedies.

12 MR. LEVY: That's right. In fact --

13 QUESTION: Did the board address that in other
14 contexts, other than the duty to bargain in good faith?
15 In other words, has the board told us that it has concerns
16 with mechanisms that might lead to early impasse?

17 MR. LEVY: Other than to say that impasse --

18 QUESTION: Other than the duty to bargain in
19 good faith.

20 MR. LEVY: -- is a temporary phase in the
21 process, I don't know, but your prediction is, or your
22 suggestion is precisely what happened in the eighties in
23 the McNeil case, where after -- or in the Powell case.
24 After the Eighth Circuit decided Powell, on the next
25 business day the NFL Players Association came to the NFL

1 and said, we're at impasse, even though the district court
2 in that case had made it clear that the parties' positions
3 weren't that far apart.

4 And why did they say they were at impasse?
5 Because they thought, they had the view that that would
6 allow them to move forward and file an antitrust suit, and
7 to get the leverage that an antitrust suit would provide
8 them in the collective bargaining process.

9 That is an incentive -- given the compulsive
10 power, the coercive power of an antitrust suit, treble
11 damages and attorneys' fees, and the possibility of the
12 intervention of the antitrust enforcement authorities, it
13 is a very powerful addition to the collective bargaining
14 process.

15 QUESTION: Mr. Levy, do we owe any deference to
16 the views of the Federal Trade Commission and the
17 antitrust division and the rather obscure view of the
18 labor board on this matter?

19 MR. LEVY: I think not, Your Honor. There has
20 been no request for Chevron deference, for example --

21 QUESTION: You don't have to make a request for
22 it.

23 MR. LEVY: No, but there has been no request by
24 the agency for that sort of deference, but I would like to
25 make one point that I think is relevant --

1 QUESTION: Well, you have to give me a better
2 answer than that. Your only answer is, we don't owe them
3 deference because they didn't make a request for it?

4 MR. LEVY: No, this is an issue for the -- they
5 haven't even made a request for it. This is an issue
6 which the agencies are entitled to no deference, and it's
7 the role of the courts to determine what the appropriate
8 interplay is of the labor laws and the antitrust laws.

9 QUESTION: Well, why isn't it up to the board,
10 very much, since the implied exemption grows out of the
11 interpretation of the National Labor Relations Act as
12 enacted against a background of the Sherman Act.

13 MR. LEVY: I think that the board has provided
14 plenty of ingredients upon which this Court has relied in
15 the past and upon which it should rely here to shape the
16 Court's opinion.

17 It has made clear, for example, that impasse is
18 a transient stage in the process. It has made clear that
19 unilateral implementation of employment terms is an
20 authorized economic weapon. It has made clear that
21 multiemployer bargaining is favored.

22 Those are all items as to which this Court said
23 in Buffalo as well as Bonanno Linen --

24 QUESTION: It has made clear that it disagrees
25 with the judgment below.

1 MR. LEVY: But we don't know why, Your Honor,
2 and I suggest that part of the reason that we don't know
3 why is that the board is not prepared to sign on to some
4 of the views of the labor laws that are articulated in the
5 Solicitor General's brief, but on the question of
6 deference, I'd like to go back to one other point that --

7 QUESTION: Well, for one thing, we don't have
8 any agency ruling, we don't have any agency adjudication,
9 and we have the agency coming in, at least one agency, and
10 telling us how it thinks we ought to decide the case, but
11 I didn't know that we applied Chevron deference to
12 positions that are just taken in briefs.

13 MR. LEVY: You don't. That's my point, Your
14 Honor. I agree with you entirely. There has been no
15 request for deference of any kind here.

16 The only conclusion that I think you can draw
17 here is that the -- that this Court, in reliance on the
18 principles that have been articulated by the board in
19 other decisions in other cases, in other briefs and
20 representations to this Court, including in Bonanno Linen
21 itself, and we cited the NLRB's brief in Bonanno Linen,
22 and this Court cited it in its opinion itself, that those
23 views ought to be the ones that shape this Court's opinion
24 to the extent that it needs the views of any agency in
25 determining the appropriate intersection of these two

1 bodies of law.

2 QUESTION: May I ask another question, Mr. Levy?
3 This is really a tricky case. Is there any other case to
4 which you can call my attention in which an implied labor
5 exemption from the antitrust laws has been recognized when
6 there was no agreement between a labor union and
7 management?

8 MR. LEVY: Well, I'd start with the Eighth
9 Circuit's decision in Powell, Your Honor, which -- when
10 there's never been an agreement, excuse me, or where
11 there's been no agreement on the --

12 QUESTION: When that which is sought to be
13 exempt is not an agreement.

14 MR. LEVY: Yes.

15 QUESTION: In Jewel Tea it was an agreement,
16 and --

17 MR. LEVY: In the Powell case is one example.
18 There's Wetterau Foods in the Eighth Circuit, which we
19 cite in our brief.

20 QUESTION: No cases from this Court, though.

21 MR. LEVY: No cases in this Court, no. There
22 are only four cases that -- in which this Court has
23 directly addressed the exemption. Each of those cases did
24 involve an agreement, but the Court never held that an
25 agreement was necessary, and I think all parties here,

1 including the Government and the dissent below, recognized
2 that agreement is not necessary --

3 QUESTION: You see, one reason it occurs to me
4 the agreement might be a touchstone, and I'm by no means
5 at rest on this, is that the Sherman Act focuses its
6 attention on agreements, and when you talk about
7 processes, I think well, maybe there's no violation of the
8 Sherman Act at all when you're just negotiating the
9 processes. The thing that the Sherman Act always looks at
10 is there an agreement in restraint of trade, and the
11 exemption says, well, this category of agreements is not
12 covered by the Sherman Act.

13 Now, I'm a little unclear why we don't have any
14 category of agreements to which labor is not a party that
15 are somehow brought within a labor exemption for labor --
16 you know, the labor union exemption, which up to now has
17 focused on agreements --

18 MR. LEVY: Well --

19 QUESTION: -- which labor is a party.

20 MR. LEVY: -- in part I would answer your
21 question by saying that labor has agreed to the process,
22 and the process includes an arrangement whereby employers
23 collectively can act together as a single entity in
24 collective bargaining. They may together, as a single
25 entity, implement proposed terms and conditions of

1 employment that have been bargained in good faith to
2 impasse.

3 In effect, what the labor laws have done here is
4 that they have removed the agreement, if you will, among
5 the employers by treating the employers in the context
6 presented here as a single employer.

7 QUESTION: And I suppose an agreement between
8 the employer and the employees necessitates a subagreement
9 among the employers. That is, they agree among themselves
10 to come up with a particular offer.

11 MR. LEVY: In the multiemployer --

12 QUESTION: And they agree among themselves to
13 bargain collectively, as a unit.

14 MR. LEVY: In the multiemployer context, that's
15 certainly true.

16 QUESTION: Yes, but that agreement wouldn't
17 violate the Sherman Act. Just agreeing on how you go into
18 a bargain wouldn't -- that wouldn't violate the Sherman
19 Act. You could subject to antitrust scrutiny and not have
20 any problem. It would be if they all said, no matter what
21 happens we're not going to pay these guys any more than
22 \$1,000 a week, forever and ever and ever. That would
23 violate the Sherman Act.

24 MR. LEVY: Well, Justice Stevens, I think that
25 if the employers agreed to lock out their employees at

1 impasse there's no question that that conduct would be
2 protected by the nonstatutory labor exemption, even the
3 petitioners state that, and that's a classic example of an
4 agreement among the employers, if you will, that does not
5 involve any consent or agreement of employees. You
6 couldn't imagine any action taken by the employers to
7 which the employees would be more likely to object than a
8 lock-out.

9 QUESTION: But going back to the case in which
10 there has been no consent to multiemployer bargaining, and
11 the employers all agree that they will come up with a
12 uniform set of terms, that's subject to the Sherman Act.

13 MR. LEVY: If you accept the premise that the
14 antitrust laws apply to a labor market --

15 QUESTION: Yes. Yes.

16 MR. LEVY: I would agree entirely --

17 QUESTION: Yes. Yes.

18 MR. LEVY: -- Your Honor, that is subject to
19 the -- and that's the reason why, if the employees agree,
20 or the employees decide not to participate in
21 multiemployer collective bargaining, that there is no
22 antitrust issue of any kind presented here. That's sort
23 of an intermediate stage for employees in numerous
24 industries.

25 They want to have the benefits that are afforded

1 by multiemployer bargaining, joint pensions, health
2 benefits, all of those sorts of things that the Court
3 recognized in Bonanno Linen, but they also want to treat
4 the employers as separate entities when it suits their
5 bargaining interests.

6 One point I wanted to mention in response to Mr.
7 Starr's comments about the notion of monopsony, and this
8 shouldn't take long, but there are a couple of points I
9 ought to make with regard to that issue, because the
10 notion of monopsony, the concept of monopsony pervades the
11 petitioners' brief, but it is quite interesting that that
12 concept never appears anywhere in the briefs for the
13 Government, the antitrust enforcement agencies.

14 The reasons are two. First and most important,
15 there is no possibility here that the NFL could have
16 exercised monopsony power in this market. The reason is
17 that there's only one seller in the market. The only
18 seller in the market was the union, and the union is no
19 less a monopolist here than the NFL is a monopsonist. In
20 fact, the unions --

21 QUESTION: But Mr. Levy, here I understood this
22 collective bargaining agreement preserved the right of
23 individual players to negotiate their own terms, their own
24 salaries.

25 MR. LEVY: The collective bargaining agreement

1 did preserve the right --

2 QUESTION: So how can you say there's only one
3 seller of services? Every player except this one group
4 involved in this case are individual sellers.

5 MR. LEVY: Well, the collective bargaining
6 agreement didn't preserve the right for these players --

7 QUESTION: No, I understand.

8 MR. LEVY: -- to negotiate their own salaries.

9 QUESTION: But as to the market as a whole you
10 can't say there's only one seller.

11 MR. LEVY: Well, Your Honor, each of the
12 employees may have been negotiating their salaries, but
13 they were doing so through the auspices of the union,
14 through the auspices of the National Football League
15 Players Association.

16 QUESTION: I thought a lot of them had their own
17 agents.

18 MR. LEVY: They do, but they are agents of the
19 union, they are not agents of the players, Your Honor.

20 QUESTION: I see.

21 MR. LEVY: They're represented as the union.

22 But putting that aside, the record flatly
23 contradicts the notion that for these players, that the
24 NFL was the only purchaser of services in the market. The
25 record is quite clear at pages 2004 and -5 of the court of

1 appeals joint appendix, as one example, that the Canadian
2 Football League and the Arena Football League were active
3 in this market. They hired some members of the petitioner
4 class before they were developmental squad players for the
5 NFL, and others they hired after, so there's no reason
6 that monopsony ought to be an issue here.

7 Finally, one point I would like to emphasize is
8 that the employees are not without weapons for remedies of
9 their own if harsh or unreasonable employment terms are
10 imposed by the employer. First and most important, as
11 we've noted, the employer's right to implement an impasse
12 is limited only to proposals that have been negotiated in
13 good faith. The NLRB stands ready, as it did in
14 Silverman, to enforce that requirement if unreasonable
15 terms of unduly restrictive terms are imposed.

16 Second, and very important, the union has
17 economic weapons of its own. The union can call a strike,
18 it can authorize a slow-down, it can engage in peaceful
19 picketing in an effort to persuade management to
20 accommodate the union's views. None of those steps were
21 taken here.

22 Third --

23 QUESTION: What would a slow-down be in a
24 football game?

25 (Laughter.)

1 MR. LEVY: Well, the -- to give just one
2 example, the players could -- they don't -- it doesn't
3 have to be in a football game. It could be in practice.
4 The players could refuse to report to practice.

5 They could do any one of a number of things that
6 would, in effect, make life more difficult for their
7 employers, but the weapons aren't limited to a slowdown.
8 They could call a strike. They could engage in picketing.
9 Those are traditional weapons that the labor laws afford
10 to employees, none of which were selected here.

11 And third and most important, the union can
12 return to the bargaining table. Once negotiations resume,
13 the employers remain obligated to negotiate in good faith.
14 They remain obligated, for example, to provide employees
15 financial information that can be used for the collective
16 bargaining process. They remain obligated to bargain
17 collectively as a multiemployer unit.

18 This Court recognized in *Bonanno Linen* that in
19 almost every situation such steps are appropriate and
20 effective in breaking a bargaining impasse. The same
21 would have happened here, I submit, if instead of filing
22 an antitrust suit the players had returned to the
23 bargaining table with the National Football League.

24 I appreciate the Court's attention.

25 QUESTION: Thank you, Mr. Levy.

1 Mr. Starr, you have 3 minutes remaining.

2 REBUTTAL ARGUMENT OF KENNETH W. STARR

3 ON BEHALF OF THE PETITIONERS

4 MR. STARR: Yes. We --

5 QUESTION: Mr. Starr, before you -- I have a
6 very quick question. I won't take much of your time.

7 If, as you say, the employers cannot continue to
8 bargain as a unit once there's been impasse, and each one
9 has to bargain on his own, are they -- is each one, in
10 bargaining on his own, limited to the last offer that had
11 been made in the bargaining process?

12 MR. STARR: Your Honor, the premise is
13 incorrect. Our premise is not that there cannot be
14 bargaining after impasse. What there cannot be is the
15 unilateral implementation of terms as substituted, if I
16 may, enforced by the cartel.

17 QUESTION: Oh, I understand, but presumably each
18 individual employer can then impose his own terms.

19 MR. STARR: Absolutely.

20 QUESTION: Now, may those terms --

21 MR. STARR: An individual employer --

22 QUESTION: Must those terms be the terms that
23 had been bargained collectively? Can they only impose --

24 MR. STARR: That is a substantive issue under
25 labor law that does not admit of a ready answer. That is

1 to say, it may be that if you depart from that last term,
2 and you unilaterally impose -- it's complicated, Your
3 Honor, but I'm being very brief on this.

4 That is, if you depart from your last offer that
5 may -- may -- be evidence of bad faith bargaining on the
6 part of the -- but if I may, what is at issue -- I have
7 about 2 minutes.

8 What is at issue here is this stark choice that
9 has been -- that I think Justice O'Connor has captured, an
10 unappetizing choice that I think Mr. Levy has been very
11 clear about, that the real remedy is, in fact, to
12 decertify, and that is a stark choice that this Court has
13 held in a number of its backdrop posit -- backdrop
14 opinions, Metropolitan Life, Fort Halifax, and Livadas.

15 QUESTION: That is the real remedy absent a
16 charge before the board.

17 MR. STARR: Well, that is a real -- the broad
18 point that I think those cases stand for, Your Honor, and
19 I cite the Court's language in Fort Halifax that both
20 employers and employees come to the bargaining table with
21 a backdrop, and that is to say that this does not repeal
22 the Fair Labor Standards Act, does not repeal OSHA and the
23 like.

24 Those are backdrop rights that the parties can
25 bargain about, but Fort Halifax makes it enormously clear

1 that there is, in fact, an ability on the part of an
2 employee, a union, to in fact invoke those backdrop
3 rights, and that is a very critical part of the
4 understanding of the structure of the labor laws.

5 And, in fact, in terms of national labor policy,
6 let us remember what this case is about: an effort to
7 secure an implied exemption from the antitrust laws
8 when -- and I don't think this is obscure at all -- the
9 National Labor Relations Board has concluded that this is
10 wrong. The D.C. Circuit's decision is wrong as a matter
11 of law and may do serious harm to labor policy, and why is
12 that the stark choice.

13 I thank the Court.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Starr.
15 The case is submitted.

16 (Whereupon, at 11:19 a.m., the case in the
17 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

ANTONY BROWN, ET AL., Petitioners v. PRO FOOTBALL, INC., dba WASHINGTON REDSKINS, ET AL.
CASE NO. 95-388

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BY Ann Marie Federico

(REPORTER)