The NFL Players Association's Agent Certification Plan: Is it Exempt from Antitrust Review?

Lori J. Lefferts

The 1982 collective bargaining agreement between the National Football League Players Association (NFLPA) and the National Football League Management Council (NFL)[1] limits player representation in salary negotiations to "the NFLPA or its agent."[2] On its face, this provision appears to deny NFL players the option of retaining their own agents. However, shortly after the enactment of the Agreement, the NFLPA created the *NFLPA Regulations Governing Contract Advisors*.[3] The Regulations provide a means by which applicants may apply for NFLPA "agent" status. If the applicants are certified by the NFLPA, they are authorized to act as agents subject to their compliance with the Regulations.[4]

This system of regulating player representatives was born out of growing concern by NFL players regarding the quality of representation available to them for negotiating player contracts with NFL clubs.[5] In view of reports citing the existence of incompetent and unscrupulous agents,[6] a need clearly exists for some means of control over the agents. A disturbingly high number of professional athletes have fallen victim to misrepresentation, ranging from conflicts of interest (such as one agent representing two or more athletes on the same team),[7] to the gambling away of player paychecks.[8] Such abuses have led sports unions to consider regulating agents' practices and qualifications.[9] The NFLPA was the first sports union to impose a formal method of regulating the conduct of agents rep-

---

1. *Collective Bargaining Agreement between National Football League Players Association and National Football League Management Council (1982)* [hereinafter cited as *Collective Bargaining Agreement*].

2. *Id.* at 32. The provision reads in full: "A player will be entitled to receive a signing or reporting bonus, additional salary payments, incentive bonuses and such other provisions as may be negotiated between his club (with the assistance of the Management Council) and the NFLPA or its agent."

3. *NFLPA Regulations Governing Contract Advisors* (1983) [hereinafter cited as *Regulations*].

4. *Id.* at 2. *See infra* notes 26-36 and accompanying text.

5. *Regulations*, *supra* note 3, at i.

6. Comment, *The Agent-Athlete Relationship In Professional and Amateur Sports: The Inherent Potential For Abuse and The Need For Regulation*, 30 BUFFALO L. REV. 815, 819-28 (1981).

7. *See* J. WEISTART & C. LOWELL, THE LAW OF SPORTS § 3.19.a, at 328 (1979).

8. *See* Montgomery, *The Spectacular Rise and Ignorable Fall of Richard Sorkin, Pro's Agent*, N.Y. Times, Oct. 9, 1977, § 5, at 1.

9. Closius, *Not At The Behest Of Nonlabor Groups: A Revised Prognosis For a Maturing Sports Industry*, 24 B.C. L. REV. 341, 395 (1983).

resenting its players. A threshold issue raised by the Regulations is whether the means used by the players' association to control agents' activities is immune from antitrust scrutiny by virtue of the labor exemption.[10]

A discussion of the history of the labor exemption and how it has been applied in the sports context follows. This Note then describes the common models of labor-management relations and how the relationship created in the 1982 NFLPA Collective Bargaining Agreement differs from these traditional models. It also discusses the development of the labor exemption and its application to the NFLPA Regulations. This Note concludes with an analysis of the defenses available to the NFLPA in the event of an antitrust challenge to its restraints on agents.

I. MODELS OF LABOR-MANAGEMENT RELATIONS

A. *The Exclusive Representation Model*

A common labor-management relationship seen in the trucking, auto, and steel industries involves only two entities: union and management.[11] This relationship is created when laborers form a "bargaining unit," defined as "a particular group of employees with a similar community of interest appropriate for bargaining."[12] The bargaining unit selects a union to represent the employees for purposes of collective bargaining.[13] Section 9(a) of the National Labor Relations Act provides that the union "shall be the *exclusive representative* of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."[14]

Under this model, the union and the employer negotiate a contract known as a collective bargaining agreement. This agreement regulates the terms and conditions of employment.[15] All employees in the bargaining unit are bound by the agreement, and the employer is prohibited from dealing with individual employees.[16]

B. *The Agent-Exclusive Model*

This bargaining arrangement, employed in the field of entertainment, consists of three entities: a union, management, and a group of agents hired for independent representation by the individual workers.[17] As in other industries, a recognized bargaining representative becomes the exclusive bargaining agent for all members of that bargaining unit.[18] Em-

10. The ultimate question of whether the restraints are valid under the antitrust laws is beyond the scope of this Note. Only the initial issue of whether the restraints qualify for protection from antitrust review will be discussed.

11. *See* MORRIS D. FORKOSCH, A TREATISE ON LABOR LAW, 852 (1965).

12. BLACK'S LAW DICTIONARY 136 (5th ed. 1979).

13. National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1974).

14. *Id.* (emphasis added).

15. C. GREGORY & H. KATZ, LABOR AND THE LAW 525 (1979).

16. *Id. See also* J.I. Case Co. v. National Labor Relations Board, 321 U.S. 332 (1944), the leading case defining the concept of exclusive representation.

17. *See* H.A. Artists & Assocs. v. Actors' Equity Ass'n, 451 U.S. 704, 706-07 (1980).

18. *See supra* notes 12-14 and accompanying text.

ployers may, however, bargain individually with the employee.[19] The Supreme Court, in *J.I. Case Company v. National Labor Relations Board*,[20] recognized the validity of the agent-exclusive agreement, observing that "where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining."[21] All individually negotiated contracts, however, are subordinated to the collective agreement and may not waive any of its benefits.[22]

The agent-exclusive model is easily applied to professional sports. The union officials meet with the management and bargain for the basic contract. Collective bargaining agreements in professional sports commonly provide only minimum terms and conditions of employment and allow each player to negotiate individually for more favorable terms.[23] Where the union leaves off, the agent picks up by negotiating for additional compensation for his client.[24] The agent is compensated for his services by the player he represents.[25] The process results then in two independent bargaining sessions: first, between union and management, and second, between player (by way of his agent) and management. The NFLPA agreement, however, does not quite fit the agent-exclusive model.

C. *The Anomaly of the 1982 NFLPA Collective Bargaining Agreement*

The 1982 NFLPA Collective Bargaining Agreement creates an apparent hybrid of the exclusive representation and the agent-exclusive models. The Agreement provides that "a player will be entitled to receive a signing or reporting bonus, additional salary payments, incentive bonuses and such other provisions as may be negotiated between his club . . . and the NFLPA or *its agent*."[26] This is similar to the agent-exclusive model, in that it allows players to bargain individually for more favorable terms.[27] Yet, as in the exclusive representation model, the agreement prohibits negotiations by anyone other than a union agent.[28]

Soon after the Agreement was completed, the NFLPA established the *NFLPA Regulations Governing Contract Advisors*,[29] which set out a new agent regulation system.[30] The Regulations provide that "[p]ersons who

19. *J.I. Case Co.*, 321 U.S. at 338.
20. 321 U.S. 332 (1944).
21. *Id.* at 338.
22. *Id.* at 336.
23. J. WEISTART & C. LOWELL, *supra* note 7, at § 6.07, 808. Although some athletes choose to handle their individual bargaining themselves, a vast majority hire a specially skilled agent. In theory, an agent with training and experience will be better able to bargain for an agreement commensurate with the abilities of the player. Comment, *The Agent-Athlete Relationship*, *supra* note 6, at 816-19.
24. *See* J. WEISTART & C. LOWELL, *supra* note 7, at § 3.18b., 326-28.
25. *See* J. WEISTART & C. LOWELL, *supra* note 7, at § 3.18a., 323-26.
26. *Collective Bargaining Agreement*, *supra* note 1, at 32 (emphasis added).
27. *See supra* notes 17-25 and accompanying text.
28. *See supra* notes 11-16 and accompanying text.
29. The Player Representatives met to discuss the subject in May, 1983. The effective date of the *Regulations* is September 4, 1983. *Regulations*, *supra* note 3, at i.
30. *Id.*

wish to represent NFL players in individual contract negotiations . . . *must* comply with the Regulations and become '[c]ertified' as an NFLPA Contract Advisor before doing so."[31] The NFLPA bases its authority to assert such a requirement on the exclusive representation language of the National Labor Relations Act § 9(a)[32] and on the Collective Bargaining Agreement provision limiting bargaining to only the NFLPA or its agents.[33]

Reading the Regulations and the Agreement together, it appears that a person who wishes to represent an NFL player must become an "agent" of the NFLPA.[34] To do this, one must first be certified by the NFLPA and, upon certification, must abide by the Regulations.[35] The intent of the NFLPA is not to separate the veteran player from his chosen agent, as it may first appear, but to require the agent to subject himself to the control of the Players Association. Thus, while supposedly negotiating for the salary of a specific player, the agent is representing the NFLPA. The union's control over these agents raises the question of the arrangement's validity under antitrust laws. However, before its validity need ever be decided, an escape from antitrust review is available in the labor exemption. If this exemption is applicable, immunity from antitrust review is complete.[36]

II. DEVELOPMENT OF THE LABOR EXEMPTION FROM ANTITRUST SCRUTINY

The labor exemption protects certain union activities from the Sherman Antitrust Act. The Sherman Act provides that "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal."[37] Employers used the statute in the early 1900s to suppress the growth of struggling labor unions.[38] Congress responded in 1914 with the Clayton Act which furnished a significant exemption for legitimate union activities.[39] Section six of the Clayton Act provides that "[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof."[40] The Norris-LaGuardia Act[41] further protected unions in matters involving labor controversies. The Supreme Court's unwillingness to grant absolute immunity to unions, however, destroyed belief that these statutes totally relieved labor of antitrust sanctions.[42] In

31. *Id.* (emphasis in original).
32. 29 U.S.C. § 159(a). *See also supra* note 14 and accompanying text.
33. *Regulations, supra* note 3, at 1.
34. *See supra* notes 1-4 and accompanying text.
35. *Regulations, supra* note 3, at i.
36. J. WEISTART & C. LOWELL, *supra* note 7, at § 5.04.a., 524-25.
37. 15 U.S.C. § 1 (1976).
38. J. WEISTART & C. LOWELL, *supra* note 7, at § 5.04.a., 528.
39. Ch. 323, § 6, 38 Stat. 731 (1914) (current version 15 U.S.C. § 17 (1982)).
40. *Id.*
41. 29 U.S.C. §§ 101-115 (1982). The Norris-LaGuardia Act widened the scope of protected union activities in addition to limiting the use of injunctions in labor controversies. J. WEISTART & C. LOWELL, *supra* note 7, at § 5.04, 529.
42. J. WEISTART & C. LOWELL, *supra* note 7, at § 5.04, 529.

1941, the Court, in *United States v. Hutcheson*,[43] recognized Congress' intent to exempt legitimate union activities from the sweep of antitrust laws, but limited the extent of the exemption.[44] *Hutcheson* involved two unions competing to perform construction work for a mutual employer. The disappointed candidate refused to arbitrate as agreed, called a strike against the employer, and encouraged a boycott of the employer's products.[45] The Court held the activity to be protected from the Sherman Act, based on section six of the Clayton Act, but only "[s]o long as [the] union acts in its self-interest and does not combine with non-labor groups."[46] *Hutcheson* marked the Court's first attempt to define the statutory labor exemption by setting out two requirements: an existing union self-interest and the absence of combining with a non-labor group.[47] Application of the latter requirement, however, remained uncertain because *Hutcheson* involved merely a unilateral action by the union.[48]

One of the first cases to find that certain union activity fell outside the scope of the labor exemption involved just such a conspiracy with a non-labor group. *Allen Bradley Company v. Local Union No. 3, International Brotherhood of Electrical Workers*,[49] involved an agreement between the electrical workers, union, manufacturers of electrical supplies, and employees of contractors who installed those products. The contractors agreed to purchase goods only from manufacturers employing union members, and the manufacturers obligated themselves to sell their products only to unionized contractors.[50] Although the union acted in its self-interest, the Court denied the arrangement antitrust immunity because, among other factors, it affected parties outside the immediate employment relationship.[51] The Court concluded that "when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions. . . ."[52] The *Hutcheson* doctrine, limited by *Allen Bradley*, represented the general rule regarding the statutory labor exemption for the following twenty years.[53]

The Clayton Act, creating the statutory labor exemption, deals only with "the existence and operation of labor . . . organizations . . . carrying out [a] legitimate [object]."[54] This exemption protects only unilateral restraints; it does not expressly grant immunity to restraints contained in agreements between employers and unions. The companion cases of

43. 312 U.S. 219 (1941).
44. *Id.* at 232.
45. *Id.* at 228.
46. *Id.* at 232.
47. *Id.*
48. J. WEISTART & C. LOWELL, *supra* note 7, at § 5.04, 531.
49. 325 U.S. 797, (1945).
50. *Id.* at 799.
51. *Id.* at 809. "[The agreement] was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City." *Id.*
52. *Id.*
53. Roberts & Powers, *Defining the Relationship between Antitrust Law and Labor Law: Professional Sports and the Current Legal Battleground*, 19 WM. & MARY L. REV. 395, 424 (1978).
54. 15 U.S.C. § 17. *See also supra* text accompanying note 40.

United Mine Workers v. Pennington[55], and *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*[56] addressed the issue of whether the labor exemption could be extended to the bilateral collective bargaining process. By concluding affirmatively, the court created a nonstatutory labor exemption. In *Pennington*, the Court held a collective bargaining agreement between a union and a multi-employer bargaining unit, clearly within the self-interest of the union, to be beyond the scope of the labor exemption.[57] The union had entered into a conspiracy with several large coal companies to impose wage scales upon smaller, nonunion companies, forcing them out of the industry.[58] Affirming the principles set forth in *Allen Bradley*, the Court expressed a great concern about the possible injury to a party not immediately involved in the employer-union relationship: "[A] union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units."[59] Although the third-party injury was a necessary factor to the holding, the critical element in *Pennington* was the union-employer "conspiracy" to regulate conditions beyond their immediate bargaining concerns.[60]

That same day, in *Jewel Tea*, the Court showed a willingness to extend the exemption to certain collective bargaining agreements, despite a restraint on the competition. The *Jewel Tea* agreement established restrictive operating hours of food store meat departments.[61] Although the effect on non-parties to the agreement was "apparent and real" as in *Pennington*, the Court refused to apply antitrust scrutiny in *Jewel Tea* because the concern of the union members was "immediate and direct," and this concern outweighed the third party injury.[62] The Court considered the "crucial determinate" to be the "relative impact [of the agreement] on the product market and the interests of union members,"[63] and thereby created a balancing approach to determining availability of the exemption. *Jewel Tea* recognized that a "proper accommodation" between the congressional policy favoring collective bargaining and the congressional policy favoring free competition requires that some union-management agreements be granted a limited nonstatutory exemption from antitrust laws.[64]

Although the Court did not so expressly state, it seemed to apply the *Jewel Tea* balancing test in *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local Union No. 100.*[65] In *Connell*, a union pressured a general contractor into signing an agreement that it would subcontract for

55. 381 U.S. 657 (1965).
56. 381 U.S. 676 (1965).
57. 381 U.S. at 669.
58. *Id.* at 664.
59. *Id.* at 665.
60. J. WEISTART & C. LOWELL, *supra* note 7, at § 5.04, 534-35. Immediate bargaining concerns include wages, hours, and other terms and conditions of employment.
61. 381 U.S. at 676, 679-80.
62. *Id.* at 691.
63. *Id.* at 691 n.5.
64. Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975).
65. 421 U.S. 616 (1975).

mechanical work only with firms that were party to the union's collective bargaining agreement.[66] The union, however, had no interest in representing employees of the general contractor.[67] The contractor later sought to void the agreement on antitrust grounds.[68] The Court determined that the union's goal to organize as many subcontractors as possible was legal, but stated that "the methods the union chose are not immune from antitrust sanctions simply because the goal is legal."[69]

Denying the union an exemption from the antitrust laws, the Court stated:

> Here [the union], by agreement with several contractors, made nonunion subcontractors ineligible to compete for a portion of the available work. This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.[70]

Such a substantial restraint will be upheld under the Court's balancing approach only if the union's objective is to protect the most fundamental of employee interests.[71]

III. APPLICATION OF THE LABOR EXEMPTION TO THE NFLPA REGULATIONS

A. *The Statutory Labor Exemption*

In 1981, the Supreme Court considered an agent certification scheme similar to that created by the NFLPA. In *H.A. Artists & Associates, Inc. v. Actors' Equity Association*,[72] an actor's union unilaterally imposed a licensing system for the regulation of theatrical agents.[73] Like the NFLPA, the actors' union had collective bargaining agreements with employers, which determined minimum conditions of employment while permitting an actor to negotiate for terms more favorable than the union agreement.[74] The Equity regulations, however, allowed union members to retain only licensed agents. In order to obtain a license, an agent was required to comply with the conditions prescribed by the union.[75]

The most important of the regulations prohibited the agent from receiving a commission on the minimum salary portion of an employment contract. Further, the agent's commission for the portion exceeding the

66. *Id.* at 618-19.
67. *Id.* at 619.
68. *Id.*
69. *Id.* at 625.
70. *Id.*
71. J. WEISTART & C. LOWELL, *supra* note 7, at § 5.04, 539. Fundamental employee interests include concern for wages and other conditions of employment.
72. 451 U.S. 704 (1981).
73. *Id.* at 707.
74. *Id.* at 706-707.
75. *Id.*

minimum was limited to 10% of that amount.[76] In *Actors' Equity*, a group of agents refused to abide by the conditions and instituted a lawsuit contending that the regulations violated the Sherman Act.[77]

The district court had applied the *Hutcheson* two-prong test and concluded that the union's conduct was within the scope of the statutory exemption.[78] The court based its holding on two findings: first, the cooperating agents did not constitute a "nonlabor group" and, therefore, any combination of the union and the agents would not be fatal to the union's claim of the exemption; and second, the regulations were designed to protect the minimum wage bargained for by the union and were therefore clearly in its self-interest.[79] On appeal from the Second Circuit, the United States Supreme Court affirmed the district court holding.[80] The Court focused on whether the combination of the union and the agents was a combination with a "nonlabor group."[81] To determine this, the Court applied the test articulated in *American Federation of Musicians v. Carroll*,[82] which focused on whether there was "job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors."[83] This type of relationship would make the agents a "labor group."[84] The *Actors' Equity* Court agreed with the court of appeals in that, given the agents' powerful position within the structure of the industry, "the union cannot eliminate wage competition among its members without regulation of the fees of the agents."[85] Therefore, the actors' agents must be considered a "labor group."[86]

Actors' Equity appears to be consistent with the NFLPA's claim that it, too, should be granted the antitrust exemption. However, a close analysis of this opinion reveals distinctions between the two situations that are too important to ignore. The Supreme Court decision and each of the lower court decisions disclose that the principal reason the *Actors' Equity* regulations were validated was the great dependency actors have on their agents to obtain employment.[87] This dependency allows an agent, in the absence of any exterior control, to charge exorbitant fees.[88] The actor has the choice of either paying the agent the excessive fee or not finding work as an actor.

The district court stated that "an actor without an agent does not have the same access to producers or the same opportunity to be seriously con-

76. *Id.* at 709.
77. *Id.* at 710.
78. H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n, 478 F. Supp. 496, 499 (1979).
79. *Id.* at 502.
80. 451 U.S. 704, 704-05 (1981).
81. *Id.* at 717.
82. 391 U.S. 99 (1968).
83. *Id.* at 106.
84. *Id.*
85. 451 U.S. 704, 720 n.27 (citing H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n, 622 F.2d 647, 651 (2nd Cir. 1980)).
86. 451 U.S. at 721.
87. *See infra* note 92 and accompanying text.
88. 451 U.S. at 707.

sidered for a part as does an actor who has an agent"[89] and "without an agent, an actor would have significantly lesser chances of gaining employment."[90] The court of appeals feared "[t]he possibility that job-hungry actors will work through agents who take excessive commissions."[91] The Supreme Court sought to protect the actor's minimum wage from an unscrupulous agent standing in a much stronger bargaining position than the actor:

> The peculiar structure of the legitimate theatre industry, where work is intermittent, where it is customary if not essential for union members to secure employment through agents, and where agents' fees are calculated as a percentage of a member's wage, makes it impossible for the union to defend even the integrity of the minimum wages it has negotiated without regulation of agency fees. The regulations are "brought within the labor exemption [because they are] necessary to assure that [minimum] wages will be paid."[92]

In light of the *Actors' Equity* Court's reasoning, there is serious doubt whether the NFLPA would prevail on the labor exemption issue when facing an antitrust challenge. The chief concern in *Actors' Equity*, i.e., protecting the actor by prohibiting an agent from receiving a commission on an actor's employment contract that offers only the minimum wage,[93] is non-existent in the NFLPA situation. A professional athlete's agent plays a role entirely different from a theatrical agent. A sports agent takes no part in the player-selection draft, and thus an NFL player has no need for an agent until after he has been chosen by an NFL team. Even then, the player needs an agent only to secure terms more favorable than the collective bargaining agreement. A player may choose to simply sign the Standard Player Contract,[94] without participating in individual bargaining, and receive the minimum salary—all without the aid of an agent. It follows that a sports agent does not have nearly as much leverage over the athlete as the theatrical agent has over an actor. In addition, there were approximately 23,000 "job-hungry" actors in *Actors' Equity* at the time of the Court's decision,[95] whereas there are approximately 1372 NFL players, all of whom are employed.[96]

Thus, although the licensing system in *Actors' Equity* appears to be very similar to the arrangement created by the NFLPA, the decision would not be controlling. The Supreme Court's rationale for its holding is simply not applicable in the sports context. However, concluding that *Actors' Equity* cannot be applied does not determine whether the NFLPA's regula-

89. 478 F. Supp. at 496, 497.

90. *Id.* at 502.

91. 622 F.2d 647, 651.

92. 451 U.S. at 720 (footnote omitted) (quoting *Carroll*, 391 U.S. at 112).

93. *See supra* note 79 and accompanying text.

94. The Standard Player Contract contains the minimum terms and conditions which were bargained for in the Collective Bargaining Agreement.

95. 451 U.S. 704, 706.

96. *Official 1984 National Football League, Record & Book*, 12. This figure is based on the current Active List maximum for the 28 NFL clubs.

tions are exempt from antitrust laws by virtue of the statutory labor exemption.

The first prong of the *Hutcheson* test requires the unilateral restraint to be in the union's self-interest.[97] In addition, the Clayton Act requires the restraint to be in the furtherance of legitimate objectives.[98] In *Actors' Equity*, the Court dismissed this first-prong issue without any discussion, stating "Equity's regulations are clearly designed to promote the union's legitimate self-interest."[99] The question of the NFLPA's legitimate self-interest, however, cannot be so easily dismissed.

The purpose of the NFLPA's regulatory system is to improve the "quality of representation."[100] Although extremely vague, this objective falls within the player's interest. However, the question is not whether the objective is in the player's self-interest, but whether the restraint, i.e., the regulations imposed on the agents, is in the player's self-interest.

The first requirement of the regulatory-system restraint is that agents must be certified by the NFLPA before they may negotiate a player contract.[101] However, the NFLPA Regulations do not clearly express the criteria for certification. Section two of the Regulations is entitled "Requirements of Certification," but it gives no real guidance as to what factors the players' association will consider in determining certification.[102] The Regulations reveal only that a person seeking agent status must file a "verified [a]pplication" and, upon filing, shall conform with the Regulations.[103] Within thirty days, the NFLPA will make a certification determination.[104] If denied, the applicant may appeal the decision to an arbitrator.[105]

The right to arbitration seems to protect the applicant from NLFPA's abuse of the power to deny certification. However, the players' association has self-created powers which limit the effect of arbitration. First, the regulations provide the the arbitrator be selected by the Executive Committee of the NFLPA.[106] The applicant, denied agent status, plays no part in the selection process. The possibility that the selected arbitrator will be in alliance with the policies and beliefs of the players' association is a clear disadvantage to the applicant. Second, a dispute arises only when there is some doubt about the NFLPA's justification for its action due to an ambiguity in the standards for certification. The Regulations articulate four grounds for denial: (1) failure to comply with the interim system used prior to the enactment of the Regulations; (2) prior conduct involving fraud, misrepresentation, embezzlement, misappropriation of funds, or theft; (3) making false or misleading statements of a material nature in the

97. *See supra* note 46 and accompanying text.
98. *See supra* note 40 and accompanying text.
99. 451 U.S. 704, 721.
100. Regulations, *supra* note 3, at i.
101. *See supra* note 31 and accompanying text.
102. *Regulations, supra* note 3, at 3.
103. *Id.*
104. *Id.* at 4.
105. *Id.* at 5.
106. *Id.* at 24.

application; and (4) "[a]ny other conduct which adversely affects competence, credibility, or integrity of the applicant."[107] However, grounds for denial include, "*but [are] not limited to*" the above.[108] Along with the NFL's power to amend the Regulations,[109] there is a provision that allows it to enact additional grounds that would eliminate ambiguities in the certification process. In this way, the NFL retains complete control over who becomes certified.

The arbitrator's role is to interpret and apply the Regulations. If the cause for denial is so clear as to leave only one interpretation of the provision, the arbitrator has no choice but to uphold the decision of the NFLPA.[110] For example, the NFLPA may, within its power, add a provision which requires an applicant to have a college degree to be eligible for certification. However unreasonable an arbitrator may believe this to be, the requirement is clear and must be enforced.

Accordingly, although the purpose of the Regulations, i.e., to improve the quality of representation, is in the player's self-interest, the NFLPA's power to amend the Regulations to add new grounds for denial of certification allows it the broad power to determine who may act as an agent. Although the NFLPA may employ this power strictly in the player's self-interest, it could just as easily use the power to advance illegitimate objectives. The NFLPA may use the Regulations to prevent certain applicants from being certified for reasons other than their lack of competence. There is no evidence that the NFLPA has or ever will abuse this power to arbitrarily deny certification, but the power itself creates a restraint which may not be in the players' self-interest. In order to insure that the system will act for the benefit of the players, minimum criteria must be expressly stated in the Regulations. In addition, certification must be mandatory after the criteria have been met.

Furthermore, the restraints do not end after agents are certified. They must thereafter comply with further restrictions.[111] Section five of the Regulations governs the conduct of agents.[112] They are required to "[b]ecome and remain sufficiently educated in the areas of league structure and economics, applicable Collective Bargaining Agreements and other governing documents, basic negotiating techniques, and developments in sports law and related subjects."[113] They must annually attend one of the scheduled NFLPA briefings on individual contract negotiations.[114] The Regulations also prohibit certified agents from holding a financial interest in any professional football team, either directly or indirectly.[115]

The avowed purpose of these restrictions is to "[a]ssure the most effec-

107. *Id.* at 4-5.
108. *Id.* at 4 (emphasis added).
109. *Id.* at 25.
110. Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). As Justice Douglas stated, the "[arbitrator] does not sit to dispense his own brand of . . . justice."
111. *Regulations*, *supra* note 4, at 3.
112. *Id.* at 12.
113. *Id.* at 13.
114. *Id.*
115. *Id.*

tive representation possible in individual contract negotiations; and . . . [a]void any conflict of interest which could potentially compromise the best interests of NFL players."[116] Although the definition of "self-interest" as used in the *Hutcheson* test has not been clearly set out,[117] the Supreme Court has analyzed restrictions to determine their effects on the traditional union concerns of wages, hours, and other terms and conditions of employment.[118] The NFLPA states that the Regulations are to insure "the most effective representation" and to protect the "best" interests of the players,[119] but the Regulations seek to protect interests well beyond the scope of basic interests that the labor exemption intends to protect. In view of the broad power the NFLPA has created in itself to grant certification at will along with its unnecessarily confining restrictions, the Regulations, under the *Hutcheson* test, cannot enjoy the protection of the statutory labor exemption.

B. *The Nonstatutory Labor Exemption*

The nonstatutory labor exemption provides limited immunity from antitrust scrutiny for certain management-union agreements.[120] The nonstatutory exemption first appeared in *Jewel Tea*, where the Supreme Court granted immunity to restraints contained in a collective bargaining agreement.[121] The Court has been unwilling, however, to exempt acts that may cause injury to a third party not immediately involved in the bargaining relationship.[122] As *Jewel Tea* showed, third party restraints found in collective bargaining agreements will be exempted only if the concern of the union members outweighs the injury to the outsider.[123]

For the most part, third party restraints have not been the prevailing allegation in sports-antitrust litigation. The most common charge has been management's restraint on player mobility.[124] Perhaps the most important of the recent sports-labor cases is *Mackey v. National Football League.*[125] Armed with general labor exemption precedent, John Mackey successfully attacked the NFL's "Rozelle Rule," which required a new club acquiring a free agent to compensate the free agent's former club.[126] The district court found the Rozelle Rule to be a significant deterrent to clubs that wanted to

116. *Id.* at 12.
117. Allied Int'l Inc. v. Int'l Longshoreman Ass'n., 492 F. Supp. 334, 337 (D. Mass. 1980).
118. *Id.*
119. *See supra* note 116, and accompanying text.
120. *See supra* notes 65-71 and accompanying text.
121. *See supra* notes 61-64 and accompanying text.
122. Berry & Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 CASE W. RES. L. REV. 685, 757 (1981).
123. *See supra* notes 61-71 and accompanying text.
124. *See* Flood v. Kuhn, 407 U.S. 258 (1972); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), *modifying* 407 F. Supp. 1000 (D. Minn. 1975), *cert. dismissed*, 434 U.S. 801 (1977); Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975); Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974).
125. 543 F.2d 606 (8th Cir. 1976), *modifying* 407 F. Supp. 1000 (D. Minn. 1975), *cert. denied*, 434 U.S. 801 (1977). Berry & Gould, *supra* note 122, at 759.
126. 543 F.2d at 610-11. Compensation consists of whatever the two teams may agree to. If no agreement can be made, an award of one or more players to the former club may be made at the discretion of the league commissioner. 407 F. Supp. at 1004.

sign free agents.[127] The NFL claimed the Rozell Rule was exempt from antitrust scrutiny on the ground it was the product of a union-management agreement.[128]

On appeal, the Eighth Circuit, interpreting *Jewel Tea* and *Pennington*, created a three-prong test to determine the availability of the labor exemption.[129] First, the restraint on trade must primarily affect only the parties to the collective bargaining relationship. Second, the agreement sought to be exempt must concern a mandatory subject of collective bargaining. Finally, the agreement must be the product of bona fide arm's-length bargaining.[130] The *Mackey* court found the Rozelle Rule satisfied the first two prongs, but disallowed the labor exemption because the evidence was insufficient to show the Rule resulted from a bona fide arm's-length negotiation.[131]

In *Smith v. Pro-Football*,[132] a former All-American college football player, who was expected to become one of the League's finest defensive backs, challenged the player selection draft. James Smith signed as a rookie with the Washington Redskins. His contract entitled him to a $23,000 "bonus" for signing, an additional $5,000 if he made the team, and a salary of $22,000 for that year. A serious neck injury in the last game of his rookie season ended his career.[133]

Smith alleged that the draft violated antitrust laws because it gave the Redskins the exclusive right to negotiate his contract thereby preventing him from negotiating with other teams for the true value of his services.[134] The defendants argued that the NFL draft is a subject of mandatory collective bargaining between the League and the NFLPA and therefore falls within the labor exemption.[135] The district court quickly dismissed the labor exemption defense because Smith had signed with the Redskins before the League and the NFLPA completed the collective bargaining agreement.[136]

Jewel Tea, *Mackey*, and *Smith* involve restraints on a party outside the collective bargaining relationship. The NFLPA, however, may argue that its agents are part of the relationship. This argument stems from sec-

127. 407 F. Supp. at 1006. For a thorough explanation of the Rozelle Rule and its effects, see 407 F. Supp. at 1006-1007.

128. 543 F.2d at 612.

129. One commentator states that the *Mackey* test is a slightly inaccurate interpretation of the holdings in *Jewel Tea* and *Pennington*. *See* Closius, *supra* note 9, at 369-382.

130. 543 F.2d at 614.

131. *Id.* at 616.

132. 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

133. 593 F.2d at 1176.

134. 420 F. Supp. 738, 741.

135. *Id.*

136. *Id.* at 742. In dictum, however, the court discussed factors which it would have considered had the agreement been effective at the signing of Smith's contract. One factor was that "the draft would work . . . to the detriment of potential employees, persons neither party to the agreement nor members of a union which is party to the agreement." *Id.* at 743. Nevertheless, the court suggested that after balancing labor policies and antitrust policies, as required by *Jewel Tea*, the restraint may warrant the nonstatutory labor exemption. Although the court would have found these facts within the scope of the exemption, its language implies that a different set of facts, one including restraints on "the functioning of a free product market," would demand a contrary result. *Id.* at 742-44.

tion 9 of the National Labor Relations Act which gives the NFLPA the exclusive right to represent union members.[137] The NFLPA apparently exercised this right in Article XXII, section 2 of the 1982 agreement, under which the privilege to negotiate additional salary payments was limited to "the NFLPA or its agents."[138] The argument is that those certified as agents are actually "agents" of the NFLPA and, therefore, part of the union-management relationship. If this is so, the agreement contains no third party restraint. Consequently, under *Jewel Tea*, a court should grant the nonstatutory labor exemption.

The NLFPA's argument fails on a number of grounds. Even assuming that these agents are actually agents of the union, this fact alone does not establish them as parties to the agreement. The National Labor Relations Act section 9(a), states that agreements with respect to wages, hours, or other conditions of employment shall be negotiated by a union selected "by the majority of employees in a unit appropriate for such purposes."[139] The Supreme Court, in *Pennington*, held that the union and employees of one bargaining unit cannot negotiate for the wages, hours, and working conditions for another bargaining unit.[140] In order for workers to be in the same bargaining unit, they must have substantially similar interests in those immediate bargaining concerns.[141] Under these criteria, NFLPA agents would certainly not be within the same bargaining unit as football players. The 1982 agreement is a contract between the League and a bargaining unit made up of NFL players. As of the time of the 1982 argument, no authority existed to bind agents, and therefore, they are, in reality, third parties.

Application of the *Jewel Tea* balancing test demands that the interests of the players outweigh the injury to the agents in order for the restraint to be exempt from antitrust scrutiny.[142] The NFLPA restraints are numerous and vary in their severity. The would-be agent who is denied certification suffers the most extreme injury. This restraint is similar to that in *Connell*, where an agreement between a union and several contractors prevented nonunion subcontractors from getting work.[143] A court upholds such an extreme restraint only where it is imposed to protect the most fundamental interests of union members.[144] The interests protected by the NFLPA, however, are not merely the fundamental concerns of a union.[145] Although the union is making a commendable effort to eliminate unscrupulous and incompetent agents, its concern cannot justify restraints as severe as those which are found in the NFLPA Regulations. Under the *Jewel Tea* labor exemption balancing test, the interest of the players' association cannot outweigh the great injury to third party agents.

137. National Labor Relations Act, ch. 372, § 9,49 Stat. 453 (1935) 29 U.S.C. § 159(a) (1982).
138. *Collective Bargaining Agreement, supra* note 1, at 32.
139. 29 U.S.C. § 159(a) (1982).
140. 381 U.S. at 666.
141. C.J. MORRIS, THE DEVELOPING LABOR LAW 414 (1983).
142. *See supra* note 123 and accompanying text.
143. 421 U.S. 616 (1975). *See supra* notes 65-71 and accompanying text.
144. *See supra* note 61 and accompanying text.
145. *See supra* notes 116-19 and accompanying text.

The above discussion may be moot in light of failure to meet *Mackey's* three-prong test.[146] The last prong requires that the restraints sought to be protected be the product of bona fide arms-length bargaining.[147] The NFLPA Regulations were not part of the collective bargaining agreement. The NFLPA Board of Player Representatives and the Executive Committee[148] unilaterally adopted them after the Agreement became final. Accordingly, the agents, who are subject to the restraints, had no input in the drafting of the Regulations. Failure to meet any one of *Mackey's* three prongs results in denial of the nonstatutory labor exemption.[149]

The purpose of the nonstatutory labor exemption is to validate restraints found in management-union agreements.[150] Because the NFLPA Regulations are not contained in such an agreement, application of the nonstatutory exemption test is inappropriate. However, even if the exemption applied, the restraint is, in fact, on a third party and the interests being protected are not the basic concerns of a union. Consequently, the injury to the agents would not withstand the test of *Jewel Tea.*

IV. CONCLUSION

The National Football League Players Association created an agent regulatory system in order to ensure quality representation for NFL players. However good the intentions of the NFLPA may be, the Regulations must be legally valid in order to be enforceable. In an antitrust challenge, the initial issue, and the issue discussed in this Note, is whether the labor exemption from antitrust attack is applicable.

The statutory labor exemption was created to protect unilaterally-imposed restraints by unions, but only if they are in the union's self-interest. "In the union's self interest" has been limited to mean only the basic concerns of rate of pay, hours, and conditions of employment. The NFLPA Regulations impose restraints on certified agents, and the interest being protected by such restraints is the desire for "the most effective representation possible." This alone, places the Regulations beyond the scope of the statutory exemption. In addition, the NFLPA has retained the power to add to the list of grounds for denial of certification. The NFLPA may use this power to advance illegitimate interests which should not be protected by the exemption.

The nonstatutory labor exemption's purpose is to provide the same protection from antitrust laws for restraints contained in agreements between employers and the union. The mere inclusion of a restraint in a collective bargaining agreement, however, does not automatically shelter it from antitrust scrutiny. Where the nonstatutory exemption is appropriate, the court establishes whether the restraint has resulted in injury to a third

146. *See supra* note 130 and accompanying text.
147. *Id.*
148. *Regulations, supra* note 3, at i.
149. 543 F.2d at 613-14.
150. *See supra* note 120 and accompanying text.

party. If so, the balancing of union concerns against possible injury determines the availability of the exemption. Again, because the NFLPA restraints are intended to protect more than just the fundamental job-related concerns, and because the possible injury is extreme (complete prohibition from representing NFL players), the Regulations fail to meet the nonstatutory labor exemption test.

Thus, the NFLPA Regulations do not meet the requirements for either the statutory or nonstatutory labor exemption. They are therefore subject to the scrutiny of antitrust laws.