Marquette Sports Law Review

Volume 3
Issue 1 *Fall*

Article 6

The Effect of *McNeil v. NFL* on Contract Negotiation in the NFL - That Was Then, This is Now

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THE EFFECT OF *MCNEIL v. NFL* ON CONTRACT NEGOTIATION IN THE NFL — THAT WAS THEN, THIS IS NOW

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I. INTRODUCTION

In 1990, the standout quarterback for the New Orleans Saints, Bobby Hebert, was unable to come to terms for a new contract with his team. Despite the fact that Hebert previously led the Saints to their first winning season and first playoff appearance in franchise history, the Saints were unwilling to pay Hebert anything close to what he believed he deserved. Although a "free agent" because his prior contract with the Saints had expired, like virtually all other NFL "free agents" for more than a decade, he attracted no offers from any other club during the two-month period that such offers could have been extended. As time went by and no progress on a new contract was made, Hebert asked the Saints to trade him to a club that would offer him pay more commensurate with his worth. Despite a significant offer from the Los Angeles Raiders to trade for Hebert, the Saints refused to trade him to the Raiders or anyone else. The Saints also became more aggressive in their dealings with Hebert, vilifying him in the media, insulting his wife, and making a "take it or leave it" offer presenting Hebert with a Hobson's choice: Either take a totally unacceptable offer or sit out the season and not be paid. As a matter of principle, he chose the latter. Even though Hebert had no contract with the New Orleans Saints and even though he sat out the entire 1990 season, in 1991 he remained the property of the Saints, unable to negotiate with any other professional football club in the NFL.[1]

In 1992, All-Pro tight end Keith Jackson of the Philadelphia Eagles found himself in the same situation that Hebert was in two years earlier. Jackson was a free agent unable to come to terms for a new contract with

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1. The above summary is taken from the summary of Bobby Hebert's testimony in *McNeil v. National Football League*. *See* Transcript of Record at 3648-3763, McNeil v. National Football League, 790 F. Supp. 871 (D. Minn. 1992) (No. 4-90-476).

the Eagles and unable to obtain offers from any competing clubs. As time passed, the Eagles became more aggressive in their negotiations with Jackson. Jackson missed all of training camp and the first weeks of the season with no indication that he could reach a contract with the Eagles, failing his capitulation to the Eagles' terms.[2] However, unlike Hebert, Jackson ultimately obtained his freedom and signed a lucrative contract with the Miami Dolphins. This article discusses the reasons for the different outcomes and the prospects for future NFL free agents.

One pivotal event separates the endings of Hebert's and Jackson's stories. On September 10, 1992, a jury in Minneapolis, Minnesota, rendered its verdict in *McNeil v. National Football League*.[3] After hearing testimony since mid-June, the jury concluded that the restrictions on free agent movement in the NFL were unreasonably restrictive and a violation of the antitrust laws. Within days of that verdict, several players — including Jackson — sought a temporary restraining order (TRO) and preliminary injunction to prevent the NFL from enforcing their restrictions against the players who sought the relief.[4] The court granted the TRO and for five days Jackson and the others were given the opportunity to solicit offers from any NFL club without restriction. Thus, instead of sitting out the entire season as the exclusive property of one team, as Hebert had to do, Jackson signed a new contract with the Dolphins and, in doing so, signaled that the jury in *McNeil* had ushered in a new era in the National Football League.

II. MOVING FROM THEN TO NOW — THE COURSE OF FREE AGENCY LITIGATION

A. Mackey v. NFL and the Demise of the Rozelle Rule

Since the 1970s, Minneapolis has been the center of a long course of litigation challenging restrictions on free agency imposed by the National Football League. The seminal case concerning football free agency before this latest string of decisions was *Mackey v. National Football League*,[5] the lawsuit that successfully challenged the then-existing restraints on player

2. This summary is taken from the complaint and the declaration of Keith Jackson in *Jackson v. National Football League*. Transcript of the Record, Jackson v. National Football League, 802 F. Supp. 226 (D. Minn. 1992) (No. 4-92-876).

3. 790 F. Supp. 871 (D. Minn. 1992).

4. Jackson v. National Football League, 802 F. Supp. 226 (D. Minn. 1992).

5. 407 F. Supp. 1000 (D. Minn. 1975), *aff'd in part, rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

movement known as the "Rozelle Rule."[6] After fifty-six days of trial, Judge Earl Larson found that the restrictions contained in the Rozelle Rule were not immunized from antitrust scrutiny by operation of the nonstatutory labor exemption and were both a *per se* violation and a violation of the Rule of Reason under the antitrust laws.[7] On appeal, the United States Court of Appeals for the Eighth Circuit affirmed Judge Larson's labor exemption and Rule of Reason analysis, although it rejected the *per se* finding.[8] The result was a monumental victory for the players and a monumental decision in sports law.

The NFL and its member clubs subsequently sought review by the United States Supreme Court, but withdrew their petition when the parties reached a collective bargaining agreement and settled the litigation in 1977.[9] Although the Rozelle Rule was dead, the 1977 collective bargaining agreement contained a new set of restrictions on player movement — the Right of First Refusal/Compensation system ("RFR/C system"). The RFR/C system was designed to address what at the time were viewed as the primary evils associated with the Rozelle Rule — namely, the contract option provision and the unknown compensation. Under the RFR/C system, veteran players could negotiate to eliminate the option clause from the player contract. If the option clause was included in a player contract, there was to be at least a 10% increase in salary over the previous year. Compensation was specifically defined in the collective bargaining agreement based on a grid comprised of a horizontal line representing years of experience in the league, a vertical line representing salary levels, and several diagonal lines establishing draft choice compensation. In theory, the provisions of the 1977 collective bargaining agreement eliminated the fear associated with the unknown compensation component of the old Rozelle Rule. However, nothing changed in terms of free agent movement.

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6. Two components of the Rozelle Rule substantially hindered a player's ability to change clubs. First, in order to become a free agent under the Rozelle Rule, a player had to play out his option — the final year of his contract — at a 10% decrease in salary from the previous year. If a player was willing to make the financial sacrifice and play out the option, making him available to receive offers from other clubs, his former club was entitled to compensation from the new club for the loss of his services. If the two clubs were unable to agree on the appropriate compensation, the NFL Commissioner, Pete Rozelle, would unilaterally determine the compensation. There were no guidelines to restrict his decision. With few players willing to play out their option and even fewer clubs willing to take their chances with the unknown compensation, there was virtually no movement under the Rozelle Rule. *Mackey*, 407 F. Supp. at 1004-06.

7. *Mackey*, 407 F. Supp. 1000.

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

9. National Football League v. Mackey, 434 U.S. 801 (1977).

In addition to the reforms of the option clause and the compensation scheme, the 1977 collective bargaining agreement provided clubs with a right of first refusal in the event a veteran free agent player received an offer from another club. If the player's former club made a qualifying offer as defined by the collective bargaining agreement, that club would retain a right of first refusal to match any other club's offer or it would receive draft choice compensation pursuant to the grid if the club chose not to exercise the right of first refusal. These same provisions (with certain modifications to the compensation grid) were also contained in the 1982 collective bargaining agreement between the clubs and the players' union.

Although the reforms were meant to address perceived problems with the Rozelle Rule, the effect of the restrictions on player movement was the same. For the ten-year period from 1977 to 1987, when the collective bargaining agreement expired, only one player changed clubs out of the thousands of free agents who were subject to the draft choice compensation.[10]

B. The Litigation Continues — Powell v. NFL

1. The Beginning of the End of the RFR/C System

When negotiations began for a successor agreement to the 1982 collective bargaining agreement, the players were determined to eliminate the RFR/C system contained in the 1977 and 1982 collective bargaining agreements to ensure that players, at some point in their careers, would have the opportunity to be true free agents. After lengthy negotiations between the union and the clubs and after an unsuccessful strike by the players, several players filed the case of *Powell v. NFL*, challenging the legality of the RFR/C system in Federal Court in Minneapolis.[11]

In their answer to the *Powell* complaint, the NFL and its member clubs asserted a defense that the RFR/C system was exempt from the antitrust laws by operation of the non-statutory labor exemption. Within several weeks of the commencement of the action, both sides moved for summary judgment on the labor exemption issue and the plaintiffs sought a prelimi-

10. In 1977, Norm Thompson moved from the St. Louis Cardinals to the Baltimore Colts. Tom Friend, *Marshall Given "Good Change" of Redskins by Agent*, WASH. POST, Mar. 13, 1988, at D3. Although Wilber Marshall was portrayed as having moved as a free agent in 1988 after the collective bargaining agreement expired, the NFL's documents demonstrate that he was actually traded by the Chicago Bears to the Washington Redskins. Thus, no additional players subject to the RFR/C system moved between 1977 and the end of the *McNeil* trial. Appellees Appendix T at 399-401, Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989) (No. 89-5901).

11. Powell v. National Football League, 678 F. Supp. 777 (D. Minn. 1987), *superceded by* 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 111 S.Ct. 711 (1991).

nary injunction to halt the enforcement of the RFR/C system pending resolution of the case on the merits.

Following argument on the labor exemption issue in late December 1987, Judge David Doty of the United States District Court for the District of Minnesota entered an order that created the framework for deciding the labor exemption issue.[12] Judge Doty determined that the labor exemption survived the expiration of the collective bargaining agreement but declined the NFL's request to extend the exemption in perpetuity if the restrictions had at one time been embodied in a collective bargaining agreement.[13] Instead, Judge Doty determined that once the parties reached a bargaining impasse, thereby permitting the League to unilaterally change the terms and conditions of employment, there was no longer any purpose served by continuing the non-statutory labor exemption.[14] Because Judge Doty said he was unable to determine whether the parties had in fact reached a bargaining impasse, he declined to rule on the motion at that time.[15]

The existence of an impasse was also being considered simultaneously in another forum. On September 16, 1987, the NFL had filed an unfair labor practice charge with the National Labor Relations Board against the National Football League Players Association (NFLPA), the then-existing players' union, alleging that the NFLPA had refused to bargain in good faith over the terms and conditions of employment as required by the National Labor Relations Act.[16] Among other things, the NFLPA alleged in defense of the unfair labor practice charge that it was not required to continue to meet and bargain with the NFL because the parties had reached impasse in negotiations. Upon investigation of the NFL's charge, the Associate General Counsel for the National Labor Relations Board's Division of Advice declined to issue a complaint against the NFLPA, concluding that the parties had in fact reached a bargaining impasse prior to the NFLPA's refusal to meet and bargain over the terms and conditions of employment.[17]

After the NLRB's dismissal of the NFL's unfair labor practice charge, the players renewed their motion on the labor exemption issue. Judge Doty granted the players' motion for summary judgment on the labor exemption issue concluding that the parties had in fact reached impasse and, therefore, the non-statutory labor exemption would not insulate the RFR/C system

12. *Id.*
13. Powell v. National Football League, 690 F. Supp. 812, 815 (D. Minn. 1988).
14. *Id.*
15. *Id.* at 818.
16. *In re* National Football League, NLRB Case No. 2-CB-12117 (Apr. 28, 1988), *cited in* Powell v. National Football League, 888 F.2d 559, 569 (8th Cir. 1989).
17. *Id.*

from antitrust review.[18] Despite finding that the players were suffering irreparable harm because of the operation of the RFR/C system and that they were likely to succeed on the merits of their antitrust challenge, Judge Doty refused to grant the plaintiffs' motion for a preliminary injunction because, in his view, the Norris-LaGuardia Act prohibited injunctions with respect to union management disputes.[19] Finally, Judge Doty certified his labor exemption ruling for immediate interlocutory review by the Eighth Circuit pursuant to 28 U.S.C. § 1292(b).[20]

2. The Birth of Plan B

In November 1988, after the court's impasse determination, the NFL presented to the NFLPA what it termed alternative bargaining proposals. "Plan A" called for the continuation of the RFR/C system with respect to free agency and provided for some minimal enhancements to non-salary benefits under the collective bargaining agreement. In the alternative, "Plan B" slashed benefits to players but gave free agency to a limited number of players on each team's roster. Under Plan B as proposed, each club was permitted to restrict forty, forty-two, or forty-four players, depending on the club's final standings (the best clubs could protect the fewest players). Those players who were unrestricted, whether or not they had a contract in place, would be allowed to negotiate with any team other than their current one for a two-month period without being subject either to a right of first refusal or the compensation system. However, restricted players, even if their contracts had expired, continued to be subject to the RFR/C system.

Although touted by the NFL as a new beginning to bargaining, both proposals had previously been rejected by the NFLPA.[21] Not surprisingly, the NFLPA once again rejected both proposals. Shortly after Judge Doty's decision indicating that the players were likely to succeed on the merits of their challenge to the then-existing RFR/C system, the NFL informed the Players Association of its intent to unilaterally implement Plan B, effective February 1, 1989.

The players immediately went to court seeking to preliminarily enjoin the imposition of Plan B on the ground that, as proposed, its changes were purely cosmetic and would limit "free agency" to only those players whom

18. Powell v. National Football League, 690 F. Supp. 812 (D. Minn. 1988).
19. *Id.*
20. *Id.* at 814-18.
21. Affidavit of Richard A. Berthelsen, Powell v. National Football League, 888 F.2d 559 (8th Cir. 1989) (No. 89-5041).

the clubs would normally release from year to year. Moreover, the players were losing their benefits so that there was no *quid pro quo* for the imposition of the RFR/C system. Within days after the hearing on plaintiffs' motion for a preliminary injunction, the NFL announced that it was modifying Plan B so that thirty-seven players per club, irrespective of the club's prior finish, would be protected, instead of the forty to forty-four players included in the original plan. This change resulted in freedom for an additional 142 players.[22]

The imposition of Plan B which resulted from the *Powell* litigation was significant in two fundamental respects. First, for those players who were left unrestricted, it meant free agency and the ability to have their salaries determined by competition and market forces.[23] As shown during the existence of competing leagues and during the operation of Plan B, competition causes unrestricted players' salaries to go up. Second, Plan B demonstrated that the RFR/C system not only restricted players' abilities to move to other teams, but it also showed that the system significantly held down salaries for those players subject to the system. Important evidence was introduced in the *McNeil* trial showing the effects of free agency under Plan B, a system adopted because of the *Powell* litigation.

3. The Players' Decision to Abandon Union Status

On November 1, 1989, the Eighth Circuit Court of Appeals reversed Judge Doty with respect to the termination of the non-statutory labor exemption.[24] In a two to one decision, the Eighth Circuit determined that impasse was not an appropriate end point for the labor exemption because of its effect on collective bargaining. Instead, the court indicated that so long as there was a collective bargaining relationship, the exemption protected an employer from antitrust scrutiny. Although noting the exemption would at some point terminate, the court specifically declined to establish

22. This change is significant in terms of the number of players who have moved under Plan B: 229 in 1989; 184 in 1990; 139 in 1991; and 169 in 1992. Thomas George, *N.F.L. Veterans Jump at Plan B*, N.Y. TIMES, Apr. 3, 1991, at B10.

23. Plan B did not provide complete free agency to unrestricted players because those players were unable to negotiate with their own teams during their short window of free agency. Frequently, a player's own team had the best knowledge of his skills and often a player wished to remain with his old team for a variety of reasons, so this limitation was significant.

24. Powell v. National Football League, 888 F.2d 559, *superceded by* 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 111 S.Ct. 711 (1991).

an end point for the labor exemption, but it concluded that the parties had not reached that point.[25]

In the wake of the Eighth Circuit's opinion and the court's refusal to reconsider the opinion *en banc*,[26] the *Powell* plaintiffs petitioned the United States Supreme Court for *certiorari* review of the Eighth Circuit decision. In support of the players' position, the Attorneys General of nine states filed an amicus brief noting the adverse effect that the Eighth Circuit's decision would have on state antitrust laws. The Supreme Court initially deferred the decision on the players' *certiorari* petition, inviting the Justice Department to file a brief outlining the government's position on the non-statutory labor exemption in the opinion issued by the Eighth Circuit.[27] In December 1990, the Solicitor General filed a brief with the Supreme Court, indicating the government's position that the Eighth Circuit's opinion was contrary to law and should be reversed.[28] Notwithstanding the briefs filed by the state attorneys general and the Justice Department, the Supreme Court voted seven to two to deny the players' *certiorari* petition.[29]

In the aftermath of the Eighth Circuit's *Powell* decision, the players were faced with a dilemma. They could continue to bargain collectively with the NFL with the hope of reaching a satisfactory agreement, but by doing so they would continue to insulate the NFL from the operation of the antitrust laws. In the alternative, they could abandon their union status and forego their right to collectively bargain with the NFL.

After weighing the benefits and the disadvantages of both courses of action, the players determined that it would be in their best interest to cease collective bargaining and no longer function as a union. The players' union, the NFLPA, immediately disclaimed interest in representing NFL football players in collective bargaining. At team meetings, more than 930 of the 1,500 players signed petitions stating that they did not want the NFLPA or anyone else to represent them in collective bargaining.[30] As a consequence,

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25. A strong dissent was registered by Judge Gerald Heaney, who stated that the majority opinion may leave, as the only option, abandonment of union status to obtain protection of the antitrust laws. *See Powell*, 888 F.2d at 570 (Heaney, J., dissenting).

26. The refusal to reconsider provoked another strong dissent, this time from Chief Judge Donald Lay, who said that the panel majority had "impliedly overruled this court's longstanding, well-recognized precedent" in *Mackey*. *Id.* at 572 (Lay, J., dissenting). Judge Lay went on to write, "this court's unprecedented decision leads to the ineluctable result of union decertification in order to invoke rights to which players are clearly entitled under the antitrust laws." *Id.* at 573 (Lay, J., dissenting).

27. Powell v. National Football League, 496 U.S. 903 (1990).

28. Amicus Curiae Brief of the United States, Powell v. National Football League, 496 U.S. 903 (1990) (No. 89-1421).

29. Powell v. National Football League, 111 S.Ct. 711 (1991).

30. McNeil v. National Football League, 764 F. Supp. 1351, 1354 n.1 (D. Minn. 1991).

the NFLPA, among other things, ultimately changed its bylaws so that its officials are now prohibited from engaging in collective bargaining, and the NFLPA's tax status was changed from a labor union to a professional association.[31]

Taking those steps cleared the way for the players to again challenge the RFR/C system, this time as embodied in Plan B. The Plan B restraints for restricted players had virtually the same effect as the old RFR/C system, and it operated in an inequitable fashion. First, restricted players subject to the RFR/C system received virtually no offers. Since February 1, 1989, only three players received offers from other clubs — and all three were matched by the players' old clubs.[32] Moreover, players lost a substantial portion of their nonsalary benefits, which the league had earlier contended was the *quid pro quo* for the RFR/C system. Thus, the vast majority of players were being restricted from freely marketing their services and were receiving nothing in return. Players who were left unprotected (*i.e.*, those players who were not among a club's thirty-seven restricted players), on the other hand, were able to negotiate contracts in the free market, thus creating situations in which back-ups were being paid more than starters at the same position. For example, offensive lineman Dave Richards, a starter with the San Diego Chargers, was paid less than Mark May, whom the Chargers signed through Plan B to serve as Richards' back-up.[33] Similarly, many clubs refused to pay signing bonuses to veteran players, who were forced to sign new contracts with their old clubs by operation of the RFR/C system. Those same clubs, however, because of competition, paid signing bonuses to free agents whom they signed under Plan B, creating yet another situation in which back-ups were treated better than starters because of the back-ups' ability to negotiate in a free market.

4. The Challenge to Plan B

In early April 1990, after the free agency signing period for the 1990 season had expired, a group of players led by New York Jets running back Freeman McNeil filed suit in the United States District Court for the District of New Jersey challenging the restrictions under Plan B as violations of

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31. *Id.* at 1354.

32. Bruce Smith of the Buffalo Bills received an offer from the Denver Broncos, Ray Childress of the Houston Oilers received an offer from the Chicago Bears, and Pat Swilling of the New Orleans Saints received an offer from the Detroit Lions. Thomas George, *Lions Woo Swilling With a Lofty Offer*, N.Y. TIMES, Mar. 25, 1992, at B15.

33. Transcipt of the Record at 412, McNeil v. National Football League, 790 F. Supp. 871 (D. Minn. 1992) (No. 4-90-476); Record at 3982-86, *McNeil* (No. 4-90-476); Plaintiff's Trial Exhibit 804-A, *McNeil* (No. 4-90-476).

the antitrust laws.[34] In the first major ruling of the *McNeil* litigation, the New Jersey Court granted the NFL's motion to transfer the case to Minnesota,[35] thereby making Minnesota yet again the scene for determination of the legality of player movement.

In *McNeil*, the NFL once again raised the labor exemption defense, claiming that Plan B was the product of bona fide arms length bargaining. Judge Doty, however, rejected that position, holding instead that, because the NFLPA was no longer a labor union and thus there was no longer a collective bargaining relationship, the non-statutory labor exemption had expired.[36] That ruling, which the Eighth Circuit declined to review on an interlocutory basis, permitted the plaintiffs to proceed with the trial on the merits concerning the RFR/C system.

III. *McNeil v. NFL*: Free Agency on Trial

The *McNeil* trial began on June 15, 1992, with jury selection. When the dust of voir dire and peremptory strikes had settled, the jury that remained was comprised of all women, most of whom disclosed that they were not sports fans at all. The make-up of the jury prompted some interesting results. One reporter wrote about the stark contrast between the jurors and NFL club owners, noting, for example, the way one of the jurors arrived at the courthouse (at the back door on her bicycle) as compared to the arrival of Art Modell, owner of the Cleveland Browns (who drove up to the front door in a chauffeured limousine).[37] At least one of the owners publicly expressed displeasure with the make-up of the jury. Pat Bowlen, the owner of the Denver Broncos, stated that he did not want "eight women who are basically domestic housewives [to] decide the future of the National Football League."[38] Reaction to Bowlen's comments was swift and strong. For example, Cathy Henkel, president of the Association for Women in Sports Media, was quoted as saying: "It appears to be quite archaic thinking and the kind of thinking that got them where they are today."[39] Although his name was on the NFL's witness list, Bowlen did not testify at the trial.

Inside the courtroom, all eight plaintiffs testified, and explained how Plan B affected them both personally and financially. In addition, agents

34. McNeil v. National Football League, No. 90-1402 (D.N.J. 1990).

35. *Id.*

36. *McNeil*, 790 F. Supp. 871.

37. Bob Oates, *They Have Hands That Might Rock the Cradle*, L.A. Times, Aug. 2, 1992, at C3.

38. *Bowlen Hopes NFL Skips Jury*, Rocky Mount. News, July 22, 1992, at B5.

39. Denise Tom, *Bowlen's "Housewife" Remark Called "Ridiculous," "Archaic,"* USA Today, July 24, 1992, at 2C.

for the players testified about their experiences in attempting to negotiate contracts under the RFR/C component of Plan B. In sharp contrast, not one owner testified throughout the entire thirty-six days of testimony. That is not to say that the owners did not come to Minneapolis. In fact, a number of owners were in the court at any given time observing the proceedings. However, as the plaintiffs' attorney noted in his closing argument, "not one of them would make that, what is it, forty, fifty, sixty-foot walk up to that witness stand."[40]

One event, more than any other, drew a significant amount of media attention during the trial. During the course of discovery in the *Powell* and *McNeil* cases, plaintiffs pursued detailed financial records of the clubs and league in order to probe the defendants' defense that free agency would wreak financial havoc among the clubs. The league bitterly fought with the players in an effort to avoid disclosing the financial data. In the end, however, they were required by court order to provide plaintiffs with the detailed financial information.[41] Much of the financial information was then used by plaintiffs' expert economist, Dr. Roger Noll, to rebut the league's economic calamity defense. Dr. Noll testified that the documents show that the clubs are very profitable entities — more profitable than they claim, because of money taken by owners in the form of salaries, through related party transactions, and by other means. It was the first time that such detailed information relating to the league's finances had been aired in public.

While the players contended that the RFR/C system component of Plan B held salaries down, the league countered that everyone, owners and players alike, had prospered under the system, and therefore the players were not suffering any injury even if the RFR/C system was in fact overly restrictive. The league's attorneys repeatedly cross-examined the plaintiffs and their agents utilizing charts showing the amounts of money earned by the players over the course of their careers, and the amounts of raises received despite the restrictions on their ability to negotiate contracts in the free market.

Finally, following a full day of closing arguments by the lawyers and instructions from the court, the jury deliberated two days and ultimately returned a verdict on September 10, 1992, finding that the RFR/C system had a substantially harmful effect on competition for players services; that

40. Transcript of the Record at 8623, McNeil v. National Football League, 790 F. Supp. 871 (D. Minn. 1992) (No. 4-90-476).

41. Even then, they failed to disclose all of the data ordered by the court. In the middle of the trial, Magistrate Judge Floyd Boline found that the NFL defendants "bushwhacked" the plaintiffs by failing to make full disclosure and ordered a $15,000 sanction against the NFL. *See* Order, *McNeil* (No. 4-90-476).

the system significantly contributed to competitive balance; that the system was more restrictive than reasonably necessary; and that the plaintiffs had suffered economic injury as a result of the imposition of the system.[42] The RFR/C system in Plan B was dead.

IV. AFTER *McNEIL*: THE LITIGATION GOES ON

A. Jackson v. NFL

On the day the jury returned its verdict, at least ten veteran players remained unsigned in the NFL and were thus not being paid as the season progressed. Those ten players immediately filed suit, seeking to prevent the continued imposition of the Plan B restrictions against them and seeking damages for the injuries suffered for the imposition of the system.[43] Accompanying their complaint was a motion for a temporary restraining order that would permit the ten players to immediately gain free agency. Before the hearing on the plaintiffs' motion for a temporary restraining order, six of the ten plaintiffs were either unconditionally released, thereby making them free agents, or were traded at their request to another club with which they signed a contract, leaving only four plaintiffs unsigned and restricted.[44]

On September 24, 1992, Judge Doty issued an order temporarily restraining the NFL from enforcing the RFR/C system or any other system for a period of five days.[45] The court also ordered that, at the end of the five days, there be a hearing on a preliminary injunction to extend the terms of the temporary restraining order until the matter could be fully adjudicated on the merits. Three of the four players, Keith Jackson, Garin Veris and Webster Slaughter, signed contracts with other teams during this brief period.[46] The fourth, D.J. Dozier, was unconditionally released by the Detroit Lions so he could negotiate with other teams. At the league's request, Judge Doty canceled the hearing on the preliminary injunction. Still remaining in the *Jackson* case are the players' claims for damages resulting

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42. Transcript of the Record at 3-5, *McNeil* (No. 4-90-476). The jury also awarded damages to four plaintiffs: Mark Collins $178,000; Frank Minnifield $50,000; Dave Richards $240,000; and Lee Rouson $75,000. These damages were tripled under antitrust laws.

43. Jackson v. National Football League, 802 F. Supp. 226 (D. Minn. 1992).

44. The original plaintiffs were Keith Jackson, D.J. Dozier, Thomas Everett, Louis Lipps, Stephone Paige, Joseph Phillips, Webster Slaughter, Natu Tuatagaloa, Garin Veris and Leon White. Before the plaintiffs' motion could be heard, Lipps, Paige, Phillips, Tuatagaloa and White were given unconditional releases making them free agents. Lipps eventually signed with the New Orleans Saints, White signed with the Los Angeles Rams, and Tuatagaloa signed with the Seattle Seahawks. Everett was traded by Pittsburgh to Dallas and he signed with the Cowboys.

45. *Jackson*, 802 F. Supp. 226.

46. Jackson signed with the Miami Dolphins, Veris with the San Francisco 49ers, and Slaughter with the Houston Oilers.

from imposition of the Plan B restrictions against them prior to the time they were given their freedom, either by release or by operation of the restraining order.

B. Other Pending Litigation

Although the *McNeil* jury verdict was a significant victory for the players in their fight to gain free agency, it was by no means the last step in the process. The *McNeil* plaintiffs have scheduled a hearing on their motion for a permanent injunction against enforcement of Plan B or any other system the league may seek to impose against plaintiffs. Players argued that the verdict against the NFL puts the onus on the league to come to court and demonstrate that any new system would satisfy the antitrust laws, rather than requiring the plaintiffs to repeatedly challenge each new system that the league may seek to impose to replace Plan B.[47]

In addition, a class action was filed in Minnesota by Philadelphia Eagles defensive end Reggie White and others seeking to enjoin the future enforcement of Plan B or any other system, and seeking damages for the prior imposition of Plan B as well as for the clubs' refusal to negotiate individual benefit packages such as individual insurance coverage.[48] The plaintiffs in the *White* case scheduled a hearing on their request for a preliminary injunction to block the league from enforcing Plan B against any players for the 1993 season.

V. The Effects of Free Agency Litigation on NFL Contracts

There can be little doubt that competition for player services has increased and will continue to increase player salaries. In the two recent examples of competition — interleague competition between the NFL and the United States Football League (USFL) and competition for unrestricted players under Plan B within the NFL, the effects of competition have been dramatic.

During the USFL years, when the NFL had competition, salaries skyrocketed. The NFL had to pay substantially higher salaries to keep players from signing with the rival league. During the *Powell* litigation, NFL lawyers contended that it was the rapidly increasing salaries from the USFL years that made the RFR/C system outmoded because most players

47. *See* United States v. United States Gypsum Co., 340 U.S. 76 (1950). *See also* Ford Motor Co. v. United States, 405 U.S. 562 (1972); Zenith Radio Corp. v. Hazeltine, 395 U.S. 100 (1968).

48. White v. National Football League, No. 4-92-906 (D. Minn. 1992).

began making salaries that would trigger high compensation.[49] Furthermore, Michael Glassman, an economist from Washington, D.C., testified in the *McNeil* trial that during 1984, when competition between the USFL and the NFL was in full swing, the average salary increases were more than twice the percentage received immediately prior to and immediately after the USFL years.[50] Similarly, Glassman testified about competition's effect on unrestricted players' salaries under Plan B. By comparing the contracts that the unrestricted players received from their new clubs with the contracts they had with their old clubs, Glassman determined that those players received on average a nearly 42% higher salary.[51]

Additionally, the small dose of free agency resulting from the temporary restraining order in *Jackson* confirms that salaries rise when there is competition for players' services.[52]

VI. CONCLUSION

Competition is obviously the best way to determine salaries, and it is clearly the wave of the future. Although the course of litigation has been long and difficult — and seemingly without end — the results are dramatic and could not have been obtained without it. Free agency not only establishes salaries by the free market, but it also allows the players to negotiate individual benefit packages such as insurance and severance. It opens up the opportunity to receive guaranteed money through signing bonuses and guaranteed contracts. It gives players freedom to choose where and for whom they will play and where they will live. This freedom — taken for granted by almost everyone — is long overdue for professional football players in this country.***

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49. Transcript of Record at 155, 171, 197, Powell v. National Football League, 690 F. Supp. 812 (D. Minn. 1988) (No. 4-87-917).

50. Plaintiff's Trial Exhibit 417A, *McNeil* (4-90-476).

51. Plaintiff's Trial Exhibit 438B, *McNeil* (4-90-476).

52. Gordon Forbes, *Slaughter Catches on Oilers*, USA TODAY, Sept. 30, 1992, at 1C; Gordon Forbes, *Jackson Flips to Dolphins for $6 Million*, USA TODAY, Sept. 29, 1992, at 1C; Michael Martinez, *Veris (49ers) and Jackson (Dolphins) Hook On*, N.Y. TIMES, Sept. 29, 1992, at B9.

*** Editor's note: Since this article was written, a settlement has been reached in the cases discussed above. Judge Doty granted preliminary approval of the settlement on February 26, 1993 and a final approval hearing is set for April 16, 1993.