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STEP UP TO THE SCALE: WAGES AND UNIONS IN THE SPORTS INDUSTRY

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The free enterprise system which developed in the United States has long vaunted the concept called competition as the alleged key to progress and prosperity. However, as a result of an imbalance of information and power, "competition" has become degraded by unfairness, exploitation, and even monopoly. In response to these imbalances, Congress has promulgated safeguards embodied in the Sherman Antitrust Act and the National Labor Relations Act to preserve the virtues of competition. One aspect of this unfairness and exploitation has been demonstrated over the years through wage competition. This competition has been utilized in industries in order to divide individuals providing services, to depress wages, and to reduce opportunities.

The professional team sports industry is not exempt. The monetary interests of a few highly paid, "big name" players have long been pitted, by general managers and player personnel directors, against the more modestly paid, lesser known players who make up the vast majority of individuals seeking to perform in professional team sports. Ed Garvey, former Executive Director of the NFL Players Association, vividly portrays this scenario in the following passage:

> [T]he NFL has split the players into haves and have-nots. They obfuscated the human issues by emphasizing the economic issues. It was simply divide and conquer. The original message to the linemen was: "Are you *really* on strike so quarterbacks can get more money? I thought you were smarter than that, son. We won't bid for you. We will bid for the quarterbacks, and when we do, there won't be any money left in the pot for you. It's none of my business because its [sic] *your union*, but if I were you, I'd get my fanny into camp before that good-looking rookie beats you out of your job."[1]

The divisiveness of wage competition has also been perpetuated by the influence of agents who have concentrated their recruitment and

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1. Ed Garvey, *Foreword to The Scope of the Labor Exemption in Professional Sports: A Perspective On Collective Bargaining in the NFL*, 1989 DUKE L.J. 328, 335.

representational efforts upon the lottery picks, the first round draft picks, and the "star" free-agents without consideration for the wage and team performance concerns of their current or prospective client's present or potential teammates. This article deals with bidding for the services of athletes in professional team sports. More specifically, it concentrates on the promotion of fair competitive bidding based upon skills and performance through the elimination of wage competition and replacement by the institution of league-wide wage scales negotiated by players unions. In light of the vested interests of agents against the institution of a wage scale, its validity shall be established through an analysis of current labor and antitrust laws. Further, although the professional team sports industry has unique qualities distinguishing it from other unionized industries, collectively bargained wage scales are not only viable, but also an appropriate function of the duty of fair representation owed by players unions or associations.

I. WHAT'S THE PROBLEM?

A. Sports Bargaining

Sports leagues today collectively bargain with players unions about fringe benefits and conditions of employment. Unlike most industries with a unionized work force, sports leagues allow the individual player to bargain for his own salary directly with management.[2] This aspect of bargaining makes sports league negotiation a bifurcated process whereby the players association establishes minimum player contract terms, and an agent representing the player deals with the financial issues of salary, length of contract, bonuses and guarantees.[3] Although Section 9(a) of the National Labor Relations Act makes the players union the exclusive bargaining representative of players, the failure of players unions to pursue league-wide wage scales in bargaining with management has caused them to waive their exclusivity and to allow wages to be individually negotiated.[4]

The appropriateness of this system and the influence of agents has been commented upon by Robert C. Berry and William B. Gould in the following passage:

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2. Phillip J. Closius, *Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry*, 24 B.C. L. REV. 341, 385 (1983).

3. Robert C. Berry & William B. Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 CASE W. RES. L. REV. 685, 705-06 (1981).

4. Closius, *supra* note 2, at 385.

> The rationale for this bifurcation is largely historical and arguably inappropriate today. Such bifurcation is, nevertheless, the prevailing state of the art. Consequently, agents and attorneys play an active, influential role in negotiations. The prominence of these agents and attorneys . . . [makes them] a visible force with whom [players unions, owners and players] must bargain.[5]

Further, this bifurcated system of negotiations creates a situation where, despite collectively bargained minimum standards, players with, and especially those without reputations, are vulnerable to the abuses of agents who extract exorbitant fees that effectively reduce a player's receipt below the minimum rate. Agent fees derived as a percentage of a player's gross salary rather than upon the amount of time spent in providing representation can serve to intensify wage competition among players as union members through individual salary negotiation and leave job hungry athletes prone to exploitation.[6]

Agents may argue that the market can take care of the problem of exploitation that plagues individual salary negotiation. After all, the market of available agents is extensive, and players should be able to distinguish good agents from bad agents. Ultimately, the bad agents would be driven out of the market by competition from the good agents. In addition, agents may argue that the imposition of a league-wide wage scale upon players would intrude upon the freedom of players and agents to contract and participate in voluntary exchange.[7] This freedom advances individual autonomy and promotes the efficient operation of labor markets through contracts that meet the unique needs of the particular parties.[8] According to this line of argument, a wage scale would be seen as a foreign element in the agent-athlete contractual relationship imposed by a remote body which is not likely to have better information about individual preferences than the contractual parties holding them.[9]

The market, however, fails to address the lack of financial and entrepreneurial information on the part of athletes, especially those at the entry level in professional sports, seeking to overcome the intense competition to obtain positions on professional team rosters. A wage scale negotiated by players unions would not only obviate this lack of information in salary negotiations, but also focus upon the problem alluded to above regarding the imbalance in quality representation. Many athletes

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5. Berry & Gould, *supra* note 3, at 706.
6. *Id.* at 802.
7. Richard Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).
8. *Id.* at 951.
9. *Id.* at 954.

lack the bargaining power that comes with collegiate notoriety, first round draft pick or lottery status, and consequently do not attract "big name" agents. Some athletes are not able to obtain an agent at all and become vulnerable to the "take it or leave it" or "first and final offer" player contracts rendered by team management.

In addition, the league-wide wage scale would be negotiated, not by a remote public body, but by players union representatives elected by the players themselves to determine wages, hours, and other terms and conditions of employment. These unions are experienced and knowledgeable in the unique needs and concerns of professional athletes. Under Section 8(a)(5) of the National Labor Relations Act, players unions, unlike individual athletes, have a statutory right to obtain information from league management necessary and relevant to protect the bargaining interest of its members. Further, under Section 8(b)(1)(A) of the National Labor Relations Act, players unions, unlike agents, as the exclusive bargaining representative, would have a duty to fairly represent all of its members, even in negotiations over player salaries.

On the other hand, under the current bifurcated system, an agent's actions may have an impact on the client's athletic performance which is greatly influenced by the athlete's financial position.[10] For example, rookies and veterans may get stuck in a long-term contract negotiated by their agent that does not reflect proven performance or value to a franchise's success. The contract may also reduce the athlete's attractiveness to another team uninterested in being shackled with a long-term contract. This situation only fuels the motive for contract renegotiations, competition to be the highest paid player at a position, and holdouts, resulting in instability and lower athletic performance that definitely affect the working conditions of other bargaining unit employees.

Similarly, agents who represent both rookies and veteran athletes can play off the interests of the veteran client in favor of a more lucrative rookie client. Further, the availability of quality entry level players has a vital effect upon the contract dollar value and conditions obtained for veteran players. For instance, in the NFL the price tag for every valuable player is likely to be two draft choices.[11] In light of the vital effect of rookies (who are not in the bargaining unit until they sign with a team) upon veterans bargaining unit players; league-wide wage scales covering

10. JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS, § 3.17, at 319 (1979).
11. Lawrence Shulruff, *The Football Lawyers*, A.B.A. J., Sept. 1985, at 48.

rookies and veterans would be a legitimate result of the union's duty to provide fair representation to all of its members.[12]

B. *Salary Proliferation and the Salary Cap*

We have all heard of the exorbitant contracts given to the highly touted, but unproven, inexperienced rookie who does not live up to expectations. We have also heard of the magnificent long-term guaranteed contracts granted to notorious, free agent veterans acquired as the "missing link" to a championship. However, with their salary guaranteed, the performance of some of these players happened to be missing. Over the years, these contracts have caused average salaries to rise. For example, the average salary in the NFL has risen about 272% from $198,000 in 1986 to $737,000 in 1993; in the NBA, the average salary has risen 252% from $395,000 in 1986 to $1,390,000 in 1993; the average salary in major league baseball has risen about 223% from $371,157 in 1985 to $1,200,000 in 1994.[13]

It must be noted that average salaries can be skewed by the relatively few large salaries at the high end of the range and do not reflect the distribution of compensation to the players union membership as a whole. With the top 10% of players claiming 50% of the salary money, a two-tiered salary system is created pitting players against players.[14] The bifurcated system of salary negotiation has left players unions powerless in combating this wage competition and has left them on the sidelines in the contest with management to equitably distribute players' compensation.

In addition, a lack of job security can be seen in professional sports under the bifurcated salary negotiation system in that often an athlete's most lucrative contract is his first contract. Players may not be around for a second contract after falling victim to subjective judgments about

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12. *See* Chemical Workers v. Pittsburgh Glass, 404 U.S. 157, 179-182 (1971) (the Supreme Court held that a union can legitimately bargain for non-bargaining unit employees with interests that vitally affect bargaining unit employees).

13. Jarrett Bell, *NFL Players: Salary Cap Not Perfect Fit*, USA TODAY, July 13, 1994, at 1C; *The High Price Of NFL Free Agency*, USA TODAY, July 13, 1994, at 10C; PAUL D. STAUDOHAR, THE SPORTS INDUSTRY AND COLLECTIVE BARGAINING 29, 100, tbls. 2.3 and 4.2 (1986); Richard Justice, *Baseball Faces Strike, Again*, WASH. POST, June 12, 1994, at A1, A25. In comparison, the percentage increase in minimum salaries has not been as dramatic. For example, in the NFL, the minimum salary for rookies on a team's active roster has only risen 100% from $50,000 in 1986 to $100,000 in 1993. *See* 1982 NFL Collective Bargaining Agreement, Art. XXII, at 32; NFL Collective Bargaining Agreement 1993-2000, Art. XXXVIII, at 116.

14. *See The High Price Of NFL Free Agency, supra* note 13, at 11C.

performance which leave the athletes unemployed. As a consequence of salary caps proposed by management in recent years, some of these judgments have begun to be made based upon money, as well as age, injuries and skill.[15]

In 1983 with losses averaging $700,000 per club in the NBA, the owners went on the offense and demanded a salary cap on each team. The players union resisted a cap and demanded a share in the percentage of future cable television revenues and guarantees on all contracts.[16] The union failed to demand a league-wide wage scale, but under the threat of a strike, the owners on March 31, 1983, agreed to give the players a 53% guarantee of the league's gross revenues. However, the players capitulated to the owners in their demand for a salary cap and have performed under a provision for a cap on team salaries for over 11 years.[17]

Similarly, ten years later, the NFL Players Association agreed with the owners to a cap on team salaries in exchange for a guaranteed percentage of league revenues.[18] By not demanding or securing a league-wide salary scale by position, the union gave up an opportunity to help in the equitable distribution of this guaranteed compensation. Presently, the baseball owners are seeking a salary cap similar to that imposed in the NFL and NBA, and labor strife and instability threaten to disrupt an exciting baseball season.[19]

II. Step Up To the Scale and Do Your Duty

A. Labor Exemption

Over the years, unions have tried to reduce competition among their members and, in the process, raise standards and benefits for all of their members. This is in obvious conflict with the founding principle of the United States economy, competition, a notion which has been protected through legislation. As a result, the announced public policy of favoring collective employee action in order to balance employer power and to prevent employee exploitation must be balanced against the antitrust policy of prohibiting restraints upon competition.

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15. Bell, *supra* note 13, at 2C.

16. Staudohar, *supra* note 13, at 109.

17. *Id.* at 111.

18. *See* NFL Collective Bargaining Agreement 1993-2000, art. XXIV, at 77-78.

19. *See* Justice, *supra* note 13. In fact, at the time this article went to print, the 1994 baseball season was disrupted by a season ending strike that began in mid-August.

Accommodating antitrust policy and labor policy takes effort. Douglas L. Leslie, however, has described the proper balance between labor and antitrust statutes:

> Because the labor statutes do not regulate union restraints on commercial competition, subjecting such restraints to antitrust liability does not interfere with national labor policy. However, using the antitrust statutes to limit union restraints on the labor market on the ground that those restraints affect the efficient functioning of business markets does interfere with national labor policy. Such limitations on union power are properly found, if they are found at all, in the labor statutes.[20]

Noticing this balance, the Supreme Court has recognized a labor exemption from antitrust laws since 1941. In order to redress a labor-management bargaining imbalance, the labor exemption was created by construing the Clayton and the Norris-LaGuardia Acts.[21] The relevant antitrust law with which this exemption for labor organizations deals is section 1 of the Sherman Act which prohibits every contract or combination in the form of a trust or otherwise or conspiracy which restrains trade or commerce among the several states.[22] Section 6 of the Clayton Act, however, declares that human labor is not a commodity or article of commerce and immunizes from antitrust liability labor organizations and their members lawfully carrying out their legitimate objectives.[23] Further, section 20 of the Clayton Act protects acts taken in the self-interest of employees and that occur in the course of disputes concerning terms or conditions of employment.[24] Thus, a players union may place restraints upon its members to eliminate wage competition and to prevent exploitation.

The Norris-LaGuardia Act emphasizes that union regulations imposed upon its members are only protected if they occur in the context of a labor dispute or any controversy concerning the terms or conditions of employment.[25] With this stipulation, the statutory labor exemption created by the Supreme Court does not apply if an agreement is made between a union and any non-labor group or persons who are not parties

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20. Douglas L. Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1197 (1980).

21. Case Note, *Labor Exemption to Antitrust Laws, Shielding an Anticompetitive Provision Devised by an Employer Group in its Own Interest*: McCourt v. California Sports, Inc., 21 B.C. L. REV. 680 (1980).

22. 15 U.S.C. § 1 (1988).

23. 15 U.S.C. § 17 (1988).

24. 29 U.S.C. § 52 (1988).

25. 29 U.S.C. §§ 101-115 (1988).

to a labor dispute.[26] Consequently, in determining whether the statutory exemption applies, a court must consider whether a labor group is being unilaterally restrained by the union. A group is classified as a labor group if the group restrained takes actions that affect a job or wage competition or that have some other economic interrelationship that affect legitimate union interests.[27]

Under the analysis developed above, player agents are a labor group in the sports industry. A union's exercise of its ability to negotiate player salaries would fall within the labor exemption since it may be argued that this step is necessary to assure that players receive quality representation and fair, stable salaries. Since agents hold a powerful position in the current bifurcated sports bargaining process and could undermine the unions' wage scales through fees charged to clients, the institution of a league-wide wage scale negotiated by the union would "embody . . . a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure . . . ."[28] Thus, the proliferation of wage competition by agents versus a players union effort to establish a wage scale would be considered a labor dispute[29] between player agents and the union. Accordingly, a league-wide wage scale established by the union covering maximum and minimum player salaries by position would be exempted from an antitrust challenge brought by player agents.

As conveyed above, unilateral actions by a union to eliminate wage competition perpetuated by player agents would be protected from antitrust liability by the statutory labor exemption. However, if the union includes these actions as part of a collective-bargaining agreement with a non-labor group such as the sports league, the statutory labor exemption would not apply. On the other hand, this collective-bargaining agreement would be protected by a nonstatutory labor exemption if the agreement is intimately related to the union's vital concerns of wages, hours and working conditions.[30] This need to protect collectively bargained

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26. H.A. Artists & Associates. v. Actors' Equity Ass'n, 451 U.S. 704, 712 (1981); *see also* United States v. Hutcheson, 312 U.S. 219, 232 (1941).

27. *H.A. Artists*, 451 U.S. at 712; *see also* Am. Fed'n of Musicians v. Carroll, 391 U.S. 99, 106 (1968).

28. Teamsters Union v. Oliver, 358 U.S. 283, 294 (1959).

29. Under the Norris-LaGuardia Act, 29 U.S.C. § 113(c) (1988), a labor dispute covers a "*controversy . . . concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment*, regardless of whether or not the disputants stand in the proximate relation of employer and employee." (Emphasis added).

30. Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616, 622 (1975).

agreements is commented upon by the Supreme Court in the following passage:

> [A] proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.
>
> The nonstatutory exemption has its source in the strong labor policy of favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws.[31]

This nonstatutory labor exemption not only protects the union engaged in the agreement, but also the employer acting in accordance with the agreement. Accordingly, team management may be exempt from antitrust challenges if it refuses to deal with agents to negotiate individual player salaries. However, this exemption for employers or non-labor groups is only valid if the agreement meets the following three-prong test:

1. the restraint on trade primarily affects only the parties to the collective bargaining relationship;
2. the restraint concerns a mandatory subject of collective bargaining; and
3. the restraint is a product of an arms-length negotiation, and it furthers the policy favoring collective bargaining to the degree necessary to override the antitrust laws.[32]

In considering the existence of a bona-fide arm's-length negotiation, the courts typically have required something more than just bargaining.[33] The exemption usually is granted if the bargaining produces contract provisions which were initiated by and advanced by a union pursuing the heart of its members' interests.[34] Thus, the collectively bargained restraint will not protect an employer group from antitrust challenges if

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31. *Id.* (citations omitted); *see also H.A. Artists*, 451 U.S. at 716 n. 19.

32. Mackey v. National Football League, 543 F.2d 606, 614-615 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *see also* McCourt v. California Sports, Inc., 600 F.2d 1193, 1197-98 (6th Cir. 1979), *rev'g* 460 F. Supp. 904 (E.D. Mich. 1978); Meat Cutters v. Jewel Tea, 381 U.S. 676, 689-90 (1965).

33. Karen A. Marencik, Comment, *The National Football League Eligibility Rule and Antitrust Law: Illegal Procedure*, 19 VAL. U. L. REV. 729, 749 (1985).

34. Closius, *supra* note 2, at 358.

the restraint is not in the union's self-interest and is initiated and advanced by the employer group.[35] Accordingly, if a bargaining impasse has occurred, an employer's unilateral implementation of a restraint, close to that acceptable to the union but specifically rejected when other benefits were not included, would not receive the nonstatutory exemption from antitrust challenges.[36]

On the whole, a league-wide wage scale collectively bargained by a players union depends upon protection from antitrust liability. Effective maintenance of the salary scale dictates that club management refuse to negotiate individual salary contracts with agents. Since the entire league would uphold the salary scale, agents can not easily avoid it. Also, under the collective agreement, the union can enforce its scale by filing grievances against a club that negotiates individual salary contracts with agents. Support for a collectively bargained wage scale initiated and advanced by players unions is enhanced by the importance of the role of labor law in settling labor disputes, which is conveyed in the following passage:

> Mature labor-management relations should be primarily governed by federal labor law. Collective negotiations, unfair labor practice hearings and arbitration proceedings - the traditional incidents of labor law - will therefore replace the court system as the primary focus for future disputes between [the sports leagues, players, union and agents].
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> . . . Disputes between labor entities - players, agents or unions - should be characterized as a labor dispute. Antitrust concepts therefore should have no role in the resolution of such disagreements.[37]

The application of the labor exemption to the sports bargaining context is based on the holdings found in *H.A. Artists & Associates v. Actors' Equity Association*,[38] a 1981 United States Supreme Court decision. In this case, Actors' Equity Association (Equity), a union which represents most of the stage actors and actresses in the United States, had entered into collective-bargaining agreements with virtually all major theatrical producers, fixing minimum wages and other conditions of employment for Equity's members. As a result of abuses on the part of theatrical agents who negotiated employment contracts for actors and

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35. Smith v. Pro Football, 420 F. Supp. 738, 742 (D.D.C. 1976).

36. Michael S. Hobel, Note, *Application of the Labor Exemption After the Expiration of Collective Bargaining Agreements in Professional Sports*, 57 N.Y.U. L. REV. 164, 201 (1982).

37. Closius, *supra* note 2, at 399-400.

38. 451 U.S. 704 (1981).

actresses with producers, the union unilaterally established a licensing system for the regulation of agents. The license regulations included a limitation on commissions charged, the avoidance of conflict of interests, and the preservation of the actor's ability to terminate the agency relationship.[39]

This system was particularly needed in light of the extraction of high commissions which tended to undermine collectively bargained rates of compensation. Since the system was not negotiated as part of any collective-bargaining agreement, the union prohibited its members, instead of the producers, from dealing with agents who had not obtained a license from the union.[40]

In response to this regulation, agents who refused to obtain union licenses filed suit contending that the union's regulations violated sections 1 and 2 of the Sherman Act. The district court dismissed the complaint, holding that the union's licensing system was protected from antitrust liability by the statutory exemption. The court of appeals affirmed the decision. The Supreme Court also affirmed the decision; however, it held that the fees the union charged the agents to obtain the license must be justified as necessary to promote the union's legitimate self-interest in order to avoid antitrust liability.[41]

This opinion is important because it designated the theatrical agents as a labor group in dispute with the actors' union. The designation is motivated by the special structure of the theater industry which makes it "customary if not essential for union members to secure employment through agents" whose fees are calculated as a percentage of the member's wage.[42] Similarly, the labor group designation can be applied to sports agents who benefit from the bifurcated negotiation process in sports leagues. This process also makes it customary, if not prudential, for athletes to obtain playing contracts through the use of agents. Thus, the union's legitimate concern for the elimination of wage competition and for the maintenance of union wage standards serves as a foundation to support the shelter of wage scales from an antitrust challenge by agents.

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39. Closius, *supra* note 2, at 392-393.

40. *H.A. Artists*, 451 U.S. at 707.

41. *Id.* at 722-23.

42. *Id.* at 720.

B. Let's Be Fair About This

With the elimination of the bifurcated system of bargaining, athletes would continue to be able to obtain agents to help them assess educational and job options, market their status as sports figures, prepare them for retirement, and invest their money. It must be made clear that the wage scale would not be instituted simply to "rob" agents of the handsome fees derived through individual salary negotiation, nor to necessarily restrain individual players from making as much money as they can. Conversely, the league-wide wage scale would be instituted as a "team approach" to maximizing wages, benefits and job security for all union members in the professional team sports industry. Since league games cannot be played without the players, the solidarity of star players with their actual or potential teammates enhances bargaining power and union leverage on group issues such as pensions and disability insurance.

In addition, union security provisions of collective agreements mandate that players pay initiation fees, union dues or agency fees. In fact, under the 1993 collective-bargaining agreement between the NFL and the NFL Players Association (NFLPA), each player is responsible for $5000 in annual dues.[43] Thus, players are paying for their union representation and are entitled to expect quality representation. In this light, in December 1993, twenty-six members of the Washington Redskins refused to pay dues, and the NFLPA demanded their suspension. A suit challenging the suspension was subsequently pursued by the players. Tight end Terry Orr led the court battle stating that the suit was brought in part as "a means of players expressing an unwillingness to financially support a union they felt didn't best serve their needs."[44]

Moreover, adequate and fair representation is a duty imposed by the U.S. Supreme Court in a series of labor law decisions upon the union designated under Section 9(a) of the National Labor Relations Act as the exclusive bargaining representative of bargaining unit employees. In *Steele v. Louisville & Nashville Railroad Co.*,[45] the Court likened the authority of the exclusive bargaining representative to that of a legislative body which could restrict the rights of those it represents, but which

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43. *See* David Elfin, *Orr, Ex-teammates Win Another Round in Union Dues Suit*, WASH. TIMES, June 9, 1994, at B3; *see also* NFL COLLECTIVE BARGAINING AGREEMENT 1993-2000, Art. V, §§ 1 and 2, at 11.

44. Bell, *supra* note 13, at 2C. The players contend in the suit that they were not required to pay the dues since they worked in Virginia, a right-to-work state. *Id.*

45. 323 U.S. 192 (1944).

also had a duty to carry out its representation fairly and without hostile discrimination.[46]

In *Ford Motor Co. v. Huffman*,[47] the Court realized that the representative is entitled to discretion as to how it should best serve its members. The Court held that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."[48] While the two previous cases dealt with the union's duty in contract negotiation, the Court's decision in *Vaca v. Sipes*[49] addresses the union's duty in administering a contract, mainly concerning the processing of grievances under the contract. The union's motive behind its decisions regarding the grievance must not be hostility or bad faith, and its conduct must not be arbitrary, invidious, capricious or perfunctory.[50]

Although the players union has a wide range of discretion in negotiating on behalf of its members, "[t]he test of its duty of fair representation is how well all players do under an agreement, not just whether a few at the top of the salary range do well."[51] Thus, boasting that the average salary of players has risen may not represent an adequate representation of the membership if the average is raised by the increasing salaries of a few "young" free agents or of athletes in "glamour" positions such as that of a quarterback.

Along this line of argument, the push for free agency, without the elimination of bifurcated salary negotiation, and the institution of a salary cap in the NFL has resulted in the elimination of employment opportunities for proven veterans who were participants in the 1994 Pro Bowl.[52] Further, other experienced veterans have had to accept reductions in pay despite stellar performance.[53] The negotiation of a league-wide wage scale by position would give the union control over wage competition and enhance its representation of its members in areas such as job security, maximization of pension, severance, and disability bene-

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46. Martin Wagner, *Have the Courts Extended a Sound Doctrine Too Far?*, 33 LAB. L.J. 487, 488 (1982).

47. 345 U.S. 330 (1953).

48. *Id.* at 338.

49. 386 U.S. 171 (1967).

50. Wagner, *supra* note 46, at 489-491.

51. Garvey, *supra* note 1, at 335 (citing R. GORMAN, BASIC TEXT ON LABOR LAW 381, 695-98 (1976)).

52. *See* Bell, *supra* note 13, at 2C.

53. *See The High Price Of NFL Free Agency*, *supra* note 13, at 11C; *see also* Jarrett Bell, *Union Boss Says Free Agency, Cap Doing Their Jobs*, USA TODAY, June 6, 1994, at 13C.

fits. With the elimination of exorbitant contracts for rookies or other young prospects with "potential," more money would be available to compensate veterans who have successfully endured the rigors of professional team sports and continue to perform at an acceptable level. In the absence of the league-wide wage scale, these union goals that benefit the majority, if not all of the membership, can be undermined through individual salary negotiation and the increased use of deferred compensation.[54]

Further, a league-wide wage scale by position serves the union's interest in more stable player contracts. This stability alleviates perhaps the greatest problem for players unions - constantly shifting membership due to the professional athlete's relatively short career span.[55] The average professional career for athletes in the NFL and NBA is about four years, about five years in the NHL, and only slightly longer in major league baseball.[56] In addition, many professional athletes in team sports have little to no job security due to the fact that they can be "cut" at any time or to the fact that player movement restrictions and salary proliferation for entry level players have actually depressed available opportunities.[57]

In addition, the idea of instituting a wage scale by position for professional employees with unique or specialized skills in order to eliminate wage competition and to maximize productivity/teamwork is not novel. The concept is used for government attorneys and for physicians employed by hospitals. In each of these industries, teamwork is vital to the service rendered and overrides the interest of the individual to "maximize" his salary. Similarly, professional athletes in team sports are not individual entertainers who put on their own show. Every star quarterback needs blockers, running backs and receivers. Every star center needs a point guard, and every star pitcher needs a catcher, infielders and outfielders.

In sum, the performance is rendered as a team, and accordingly the benefits derived should be distributed to the team. As the exclusive bargaining representative, the union is in the unique position of being able to negotiate these benefits based upon information on the contributions by a player's position, level of skill and experience. The league-wide wage scale would be formulated based upon this information. Further,

54. Berry & Gould, *supra* note 3, at 801-02.
55. *Id.* at 708-709.
56. STAUDOHAR, *supra* note 13, at 147.
57. *See* Garvey, *supra* note 1, at 338.

the scale at each position should also reflect a range or steps within a salary level to compensate "starting" players at a greater level than reserve players that have the same level of years in the league. The scale should also encompass a cost of living factor to compensate for the varying costs in the cities bearing franchises. Further, in order to provide incentive for performance and to award productivity, a fund for performance bonuses should be negotiated based upon objective criteria. This fund would be tied to a percentage of league revenues.

A league-wide wage scale is not only an appropriate function of the union's duty of fair representation, but also has been advocated by the NFLPA in the past. In 1982, after initially seeking 55% of the NFL's revenues to be distributed in a fund for salaries and pensions, the players modified their demand and sought a wage scale that would base compensation on seniority and objective merit criteria.[58] During negotiations for the 1982 agreement, the union informed the NFL that it rejected the bifurcated salary negotiation system in favor of the system prescribed by the National Labor Relations Act.[59] The NFL's management committee resisted this demand because its "right of first refusal" restrictions on player movement incorporated individual salary negotiations under the bifurcated system.[60]

Recognizing that the purpose of collective-bargaining is to supersede the terms of separate agreements with individual employees in favor of terms that reflect the interests of the group, the NFLPA filed a charge with the National Labor Relations Board alleging that the NFL refused to bargain with the player's exclusive bargaining representative over wages, a mandatory subject of bargaining.[61] The Board found merit in the charge and included the allegations in a consolidated complaint against the NFL on October 29, 1982. The Board, however, failed to set a hearing date.[62] Unfortunately, the Board did not get to rule on the issue since the charge was withdrawn under the terms of the 1982 collective-bargaining agreement that authorized individual player-team salary negotiations.[63]

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58. *See* STAUDOHAR, *supra* note 13, at 71-72; *see also* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 366.

59. Lock, *supra* note 58, at 366.

60. *Id.*

61. *See id.* (citing J.I. Case Co. v. NLRB, 312 U.S. 332, 338 (1944); NLRB Case No. 2-CA-19104-2).

62. *See* Lock, *supra* note 58, at 366-367 (citing Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, NLRB Cases Nos. 2-CA-18923, 2-CA-18995, 2-CA-19104, 2-CA-19104-2 (Oct. 29, 1982)).

63. Lock, *supra* note 58, at 367.

III. CONCLUSION: STEP ON THE SCALE

This article advocates the negotiation of a league-wide wage scale for professional team sports. This endeavor would greatly help sports unions in their duty to fairly represent their members and increase bargaining power for issues dear to the group membership, such as pensions, severance pay, injury benefits and job security. Moreover, the scale would eliminate wage competition and enhance quality representation for all union members. The unions, unlike agents, have a statutory duty to fairly represent all players in the bargaining unit.

Although this article has not focused upon the related issue of free agency, it may be argued by agents that the issue of free agency would be moot if individual salary negotiations were eliminated. However, this argument assumes that the desire for free agency only involves the maximization of an individual's salary. On the contrary, players seek to move to other teams to play in their hometown city; to find the right mix of their talent and experience with teammates and team style, philosophy or orientation; to obtain the chance to "start;" and to play for a contender for the championship. Further, the league-wide wage scale should actually enhance player movement as it would allow management to know its labor costs and to open opportunities for free agents that would help produce a winner. Also, management would not be burdened by long-term, guaranteed contracts laden with deferred compensation, or by haggling agents unconcerned with team goals, but focused upon making their client the highest paid player at his position.

Further, the sports world has recently seen that the labor law principles of collective bargaining, arbitration, and grievance processing is the preferred method to resolve labor disputes in professional team sports, especially in light of the short careers of players and the longevity of the legal process under antitrust litigation.[64] For instance, in 1993, the NFLPA recertified itself and negotiated a seven-year collective bargaining agreement in resolution of a long antitrust legal battle over free agency. On July 18, 1994, a federal judge denied an antitrust challenge by the NBA Players Association against the NBA salary cap leaving them to settle their differences with the NBA at the bargaining table.[65]

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64. In light of relatively short careers of players and the low level of job security in professional team sports, the increased use of section 10(j) injunctions under the National Labor Relations Act pending resolution of a Labor Board Complaint would enhance the usefulness of the Labor Board in redressing unfair labor practices committed in the administration of the wage scale. *See* Lock, *supra* note 58, at 409-10.

65. *See* Oscar Dixon, *Judge's Ruling Opens Door for NBA Signings*, USA TODAY, July 19, 1994, at 9C.

Accordingly, the league-wide salary scale would be settled at the bargaining table between parties that must reach an arms-length agreement in order to avoid meddlesome antitrust suits. The league-wide salary scale, unlike the salary cap, would be researched, formulated and proposed by the union seeking to enhance wages and other benefits for all players in the league. So what are you waiting for players unions? Step up on the scale and do your duty.