ESSAYS

BROWN v. PRO FOOTBALL

*Douglas L. Leslie**

PLAYERS in the National Football League are represented by a union. In 1989, the collective bargaining agreement between the union and the team owners, bargaining jointly through their multiemployer bargaining unit—the League—had expired. Negotiations were underway, but relations between the union and the League were strained. While this was happening, the owners agreed among themselves to form player Developmental Squads. Under this plan, each team was entitled to employ six first-year players, in addition to the 47-player roster limit. Developmental Squad members would be allowed to practice with the team, but could only play in a game in the event of an injury to a regular player. The owners proposed to the union that all Developmental Squad members be paid a set salary: $1000 per week. The union, on the other hand, insisted that each team owner bargain with individual players to determine salary. Both sides held fast, and an impasse was reached.[1] The League implemented its proposal and applied it to 235 Developmental Squad players. Eventually the League and the union reached a new bargaining agreement, but the Developmental Squad players sued the teams under the antitrust laws. Their theory was that employers cannot agree with one another in these circumstances on what wages they will pay.

A district court issued summary judgment against the teams.[2] Damages, trebled under the antitrust laws, exceeded $30 million

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[1] "Impasse" is a specialty word in labor law. It means that the parties had explored the issue, and that agreement any time soon was unlikely.

[2] Brown v. Pro Football, 782 F. Supp. 125 (D.D.C., 1991).

dollars.[3] Attorney fees for the plaintiffs added another $1.7 million.[4] The teams appealed to the United States Court of Appeals for the District of Columbia Circuit. That court, in an opinion authored by Chief Judge Harry Edwards, himself a former teacher of labor law, reversed the lower court, holding that plaintiffs' antitrust suit was barred by a labor immunity to the antitrust laws.[5] In December, the Supreme Court granted certiorari[6] and an opinion this term is probable. The name of the case is *Brown v. Pro Football* (*Brown*).

The trial and circuit courts decided *Brown* by applying what is known as the "nonstatutory immunity" from the antitrust laws, and the case will undoubtedly be argued to the Court in these terms. I contend in this Essay that the nonstatutory immunity, as currently constituted, has no application to the facts of *Brown* because the immunity is premised on a labor market/product market distinction that does not apply to *Brown*. To support this claim, I first work through the Court's development of antitrust immunity for union activity, and argue its inapplicability to *Brown*. I then show that the *Brown* facts raise a conflict between regulation of the labor market by the National Labor Relations Act ("NLRA")[7] and regulation of that market by the antitrust laws. Exploring the NLRA rules applied to multiemployer bargaining, I argue that if antitrust liability is applied in *Brown*, either multiemployer bargaining in general will be undermined, or else the Court must be prepared to treat professional sports teams as unique entities under the labor laws, applying to them rules that will not be applied to other employers.

I. THE NONSTATUTORY EXEMPTION

In the first thirty or so years of this century, the antitrust laws were often applied to union activity.[8] On the one hand, this

[3] The exact figure was $30,349,642. Brown v. Pro Football, 821 F. Supp. 20, 21 (D.D.C., 1993).

[4] Brown v. Pro Football, 846 F. Supp. 108, 112 (D.D.C., 1994).

[5] Brown v. Pro Football, 50 F.3d 1041 (1995).

[6] 116 S. Ct. 593, 64 U.S.L.W. 3414 (1995).

[7] 29 U.S.C. §§ 151-169 (1994).

[8] See generally, Douglas L. Leslie, Principles of Labor Antitrust, 66 Va. L. Rev. 1183, 1192-95 (1980) (discussing application of antitrust law to two early twentieth century labor

seems unsurprising since unions are cartels of workers coercing employers to agree to wage and benefit packages that are higher than the workers would obtain if they competed with one another. On the other hand, when Congress passed the NLRA in 1935, it intended to foster and support union activity. And when unions were thought to have engaged in abusive activity—such as secondary boycotts—Congress corrected the problem by amending the NLRA, not by using the antitrust laws.

This statutory structure creates issues of considerable difficulty. It is tempting to divide the production of goods and services into two markets: labor and product.[9] The labor market consists of employees; the product market of the goods and services themselves. As a matter of economics, this is, of course, simplistic. Employees are one of many competing inputs. They compete with machines that can do their work, and with other sets of workers (e.g., those employed by subcontractors), who also could do their work.

Moreover, the labor and product markets are linked. Successful union activity increases labor costs, which in turn drives prices up or unionized employers out of business. Product market competition puts pressure on employers to minimize labor costs, and severe product market competition puts severe pressure on employers to minimize labor costs.

The antitrust laws cannot be applied to labor market activity without regard to unionization, unless we are prepared to abolish unions entirely; but neither can the antitrust laws be withdrawn merely because a union is involved in challenged activity. Otherwise, a group of employers wishing to fix product prices will simply add the price schedule to a collective bargaining agreement with a union.

Therefore, if we are prepared to tolerate, or even applaud, labor market effects occasioned by unionization, but are unwilling to embrace some product market effects, a line separating lawful from unlawful conduct must rely on, or at least take account of, a distinction between product and labor

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cases).

[9] A capital market could be a third, but it does not affect the analysis.

markets. Over a period of years, this is what the Supreme Court has done.

In a Supreme Court case in 1940,[10] a union had prevented the finished product of a struck manufacturer from reaching the marketplace. The manufacturer/employer contended that this was an anticompetitive interference with interstate commerce, occasioning antitrust liability. The Court disagreed, holding that in this context the antitrust laws were designed only to reach restraints on "commercial competition." The precise contours of commercial competition were not clear, but the implication was that a distinction would be drawn between restraints of the product market and restraints of the labor market. The former would include attempts to set product prices or outputs, the latter would encompass efforts to unionize workers and drive up wage packages.[11]

Whether the commercial competition test would have proven workable was mooted the following year, in a case captioned *United States v. Hutcheson*.[12] There two unions had engaged in a jurisdictional dispute over work, leaving hapless employers caught in the middle. The Department of Justice brought an antitrust suit. The Supreme Court held there was no liability. Justice Felix Frankfurter authored the opinion. He consulted the Sherman and Clayton antitrust statutes, and the Norris-LaGuardia anti-injunction act, and concluded that "[s]o long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under Section 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."[13]

Unions and their supporters hailed this language. Because the Justice had referred to the statutes "immunizing" union conduct from the antitrust laws, courts and commentators thereafter described union activity as enjoying an antitrust "immunity."[14]

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[10] Apex Hosiery Co. v. Leader, 310 U.S. 469, 494-95 (1940).

[11] See Leslie, supra note 8, at 1196-97.

[12] 312 U.S. 219 (1941).

[13] Id. at 232.

[14] Sometimes it is called an "exemption." The terms are used interchangeably.

In hindsight, though, it is clear that Justice Frankfurter's opinion masks an important ambiguity: how and when do unions act without "combin(ing) with non-labor groups"? While a strike over a union demand would be construed as a union "acting alone," would a resulting collective bargaining agreement be exposed to antitrust scrutiny because it was jointly agreed to by a union and an employer?

Only four years later, another union found itself trying to fend off antitrust liability in the Supreme Court.[15] A New York City union had assisted electrical contractors and suppliers to fix prices and rig bids. The union punished defectors from the agreement and barred entry from would-be competitors. The union apparently secured high wages and job security for its members from the scheme. The Court found an antitrust violation, reasoning that this was an unlawful business cartel, and that a union was not immune when it "aided and abetted" such a business conspiracy.[16] The Court used the language of immunity in ruling against the union, and a labor market/product market distinction was at the core of the case.

It was twenty years before the next Supreme Court development. In the mid-1960s, the Court granted certiorari in two cases, each presenting labor/antitrust issues, but in very different contexts. In *United Mine Workers v. Pennington*,[17] it was alleged that the mine workers union had agreed with one set of mining companies to impose a wage rate on smaller, competing mine companies without regard to the smaller companies' ability to pay. The reason may have been to standardize wages in the coal industry, or to concentrate the coal market by driving out the small companies. The small mine companies sued. In a companion case, *Meat Cutters v. Jewel Tea Company*,[18] a union of butchers agreed with a group of some 300 grocery stores in the greater Chicago area that food store meat departments would only be open from 9 a.m. to 6 p.m., Monday through Saturday. The stores would not sell meat at other times. When Jewel Tea, a major chain, refused to agree, the

[15] Allen Bradley Co. v. Local No. 3, IBEW, 325 U.S. 797 (1945).
[16] Id. at 810.
[17] 381 U.S. 657 (1965).
[18] 381 U.S. 676 (1965).

union struck it. Jewel Tea then signed the agreement and sued, alleging the union had committed an antitrust violation.

Some observers predicted that a straightforward labor market/product market distinction would carry the day.[19] Wages, they reasoned, were at the core of the labor market and thus an agreement (between the large mine operators and the union) would be immunized from antitrust liability. A restraint on market hours, by contrast, was a product market restraint, pure and simple.

Those same observers were astonished[20] when the Court found liability in the mining case, and not in the grocery case. There was no agreement among the Justices on rationale—the Court split into three groups of three Justices each. Justice White's reasoning in the two cases has received the greatest attention. Justice White wrote that a union can reach a wage agreement with one employer and vigorously seek the same agreement from other employers, notwithstanding their ability to pay. But the labor laws do not protect a union when it agrees with one set of employers to impose a wage scale on another set of employers. In that situation, the union loses its antitrust immunity.

Justice White wrote that a limitation on the hours during which a grocery store may sell meat is immune if it is "intimately related to wages, hours and working conditions,"[21] and is obtained through arm's-length bargaining.[22] The critical determinant, he explained, is not whether the restraint is cast in the form of a product market restraint or a labor market restraint, "but its relative impact on the product market and the interests of the union members."[23]

These cases presented the backdrop for the 1975 case, *Connell Construction Co. v. Plumbers Local 100*,[24] discussed at length by both the majority and the dissent in *Brown* in the circuit court. In *Connell*, a union whose members worked for pipefitting

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[19] See, e.g., Bernard Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659 (1965).

[20] Id. at 715.

[21] 381 U.S. at 689.

[22] Id. at 690.

[23] Id. at 690 n.5.

[24] 421 U.S. 616 (1975).

subcontractors on construction job sites picketed a general contractor for an agreement that in the future the general would only subcontract to unionized firms. The general contractor, protesting all the while, signed the agreement, and then sued to have it declared an antitrust violation.

One can imagine the task facing Justice Powell, assigned to author an opinion favoring the general contractor. How can the test for antitrust liability be an immunity test that turns on whether the union is acting alone and in its best interest, and at the same time permit, indeed, require, a weighing of the relative impact on the product market and the labor market interest of union members? And if it is a weighing test, how can it be other than subjective?

Faced with these problems, Justice Powell improvised. He put the *Hutcheson* test in a back closet by labeling it the "statutory" exemption and declaring that it is lost whenever a union and an employer sign an agreement. He then announced a second immunity: the "nonstatutory" immunity. The source of the nonstatutory immunity, he wrote, is the congressional policy of freeing unions to remove the competitive elements of wages and working conditions from business competition. While the union can promote this limited interest, it cannot directly restrain competition in the "business market." The nonstatutory immunity stems from "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets . . . ."[25] Applying this immunity test to the facts of *Connell*, Justice Powell described the anticompetitive effects that the "union-only subcontracting" clause was bound to have, and the anticompetitive effects that it might have. He concluded:

> 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

[25] Id. at 622.

> policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.[26]

Thus Justice Powell harmonized the cases by creating two separate immunities. Until *Connell*, no case had suggested that there were two immunities, no lawyer had made such an argument. So, the law of the nonstatutory immunity is born in *Connell*.[27] It is under the rubric of this second immunity that subsequent labor/antitrust battles are fought.

Several principles emerge from these cases. First, the effects on prices and outputs that are the result of activity in the labor market occasioned by unionization simply will not be treated, for antitrust purposes, as a product market effect. Second, other kinds of effects that are felt by third parties—that is, by parties not privy to the restraint, such as *Connell*'s purchasers of construction services and ousted nonunion specialty contractors—will occasion antitrust scrutiny if those effects "would not follow naturally from the elimination of competition over wages and working conditions." Thus *Connell*, according to Justice Powell, is a case of labor market activity that enjoys little, if any, privileged status under the labor laws,[28] and that has serious third-party product market effects (e.g., the ouster of efficient nonunion specialty contractors).

Brown, by contrast, is a pure labor market case. The activity challenged is the setting of a wage rate by employers in a multiemployer bargaining unit. The effect of the challenged activity is limited to the labor market.[29] No amount of squeezing can force the facts of *Brown* into a *Connell* pigeonhole, comparing labor's interest with the actual and potential effects on the business market. The Court must look beyond the nonstatutory immunity test for a resolution of *Brown*.

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[26] Id. at 625.

[27] Since the term "nonstatutory immunity" was unknown before *Connell*, it is an (uninteresting) metaphysical question whether to call the earlier cases—e.g., *Allen Bradley*, *Pennington*, *Jewel Tea*—applications of the nonstatutory immunity test.

[28] The picketing union did not seek to represent the general contractors' employees, nor to sign a true collective bargaining agreement.

[29] Except to the extent, discussed above, in which all labor market activity has effects on prices and outputs.

II. EMPLOYER LABOR MARKET RESTRAINTS

Consider opposing approaches under the antitrust laws to *employer*-imposed restraints (all the prior cases involved union-imposed restraints) in the *labor* market: no immunity and blanket immunity. Under a no-immunity approach, an employer would enjoy no special treatment under the antitrust laws for labor market restraints; the immunity would be applicable only to unions. This must be rejected. It would not make sense to say that the union's actions in the Chicago meat department case are exempt, but the actions of the grocery stores in agreeing to the union's demands are antitrust violations. Indeed, under a no-immunity approach an appropriate plaintiff could invalidate any multiemployer bargaining agreement under the antitrust laws by suing the employers without joining the union as a defendant.

A blanket immunity for employers is also defective. In my view, it would be an antitrust violation for a partner from each firm of 150 attorneys or more in New York City to meet at dinner and mutnally agree to a starting salary for next year's first-year associates.[30] Oddly, at least in the short-run, consumers (clients) should applaud the agreement. Reducing the salary of first year associates will result in lower costs to the

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[30] See Radovich v. National Football League, 352 U.S. 445 (1957). In fact, cases involving employer cartel agreements in the labor market are apparently quite rare. The leading single-volume treatise, Herbert Hovencamp, Federal Antitrust Policy (1994), does not even raise the issue. They may be rare because it is widely assumed that such conduct violates the antitrust laws, or because in markets not involving "stars" employees will find jobs with employers not in the cartel (perhaps requiring a move to a new community), or will change occupations, thus undercutting the effectiveness of the agreement.

In the circuit court in *Brown*, Judge Wald, dissenting, wrote that "a few commentators have suggested that antitrust laws should not apply to restraints on labor markets." *Brown*, 50 F.3d at 1060. The first of the cited commentators, Archibald Cox, was referring only to union-imposed restraints on the labor market. See Archibald Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252, 254-55 (1955). The second cited commentator, Milton Handler, does not address the point. See Milton Handler, Labor and Antitrust: A Bit of History, 40 Antitrust L.J. 233, 235 (1971). The third cited commentator, Theodore J. St. Antoine, reads the *Apex* case as so indicating, but he does not unambiguously endorse the argument. See Theodore J. St. Antoine, Connell: Antitrust Law at the Expense of Labor Law, 62 Va. L. Rev. 603, 606-07 (1976) ("Further refinement of the *Apex Hosiery* doctrine might have been the soundest course for the Court to follow in dealing with labor and antitrust laws."). Of course, Judge Wald does not endorse the argument either. In my view, the thought that a group of employers commit no violation when they engage in a horizontal wage fix cannot be seriously entertained.

firms, some of which may be enjoyed by the clients. But, over the long run, artificially low associate salaries will, at the margin, cause some law graduates to avoid the large New York firms or, Heaven forfend, eschew a law career. This misallocation harms consumers. Thus are monopsonies condemned.[31]

So, employers enjoy no blanket immunity from the antitrust laws when they act in the labor market, but a no-immunity rule cannot be applied to employers either. I now develop an intermediate position, one which views an immunity in *Brown* as a necessary implication of the existence of the labor laws, not as a result of antitrust policy.

When Congress passed the NLRA, and later the NLRA's companion labor statutes, it created a complex apparatus for ordering labor-management relations. This apparatus was created against a background of federal and state laws, of which the federal antitrust laws are one set. The central issue with respect to an immunity in *Brown* ought to be whether application of the antitrust laws to employer conduct that involves only a labor market restraint would unduly conflict with the NLRA regulatory apparatus.[32]

Consider the categories of employer behavior in a context of unionization. Employers confront unions in organizing campaigns. Unionized employers make bargaining agreement proposals, agree to and reject union proposals. They sign and administer collective bargaining agreements. During negotiations, employers may lock out their employees and sometimes they unilaterally (that is, without the union's consent) implement employment terms. They may react to a union strike by hiring replacements, including permanent replacements.[33]

When a union and employers sign a collective bargaining agreement that passes the test of *Connell*, both the union and

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[31] In professional sports, one wonders if labor market misallocations are very likely. Does a high school athlete turn away from football because he knows that NFL salaries are "suppressed"?

[32] Neither the majority nor the dissent in *Brown* considered the case from the perspective of what *labor law* effects a ruling for the plaintiffs would have.

[33] I put to one side the question of antitrust liability for employer actions during union organizing campaigns. This is not raised in *Brown*, and is best left for discussion elsewhere. So too, I set aside any argument that the hiring of replacement workers might, in some context, be an antitrust violation.

the signatory employers enjoy antitrust immunity notwithstanding labor market effects. Regulation of the process of collective bargaining is central to the NLRA, as is the statute's hands-off approach to bargaining outcomes. It is one thing to interfere, through antitrust regulation, with collective agreements that overly restrain the business market, but quite another to interfere with collective bargaining agreements on the ground that the labor market effects are, on some standard, intolerable. This, I take it, is the rationale of the many cases upholding, against antitrust attack, collective bargaining agreements between unions and sports leagues that restrain competition for player services.[34] Had the union in *Brown* agreed to the League's proposed salary scale, there would have been no plausible antitrust case.

In *Brown*, the question is what actions the employers may take following expiration of the collective bargaining agreement. The plaintiff's most expansive claim is that following the agreement's expiration, the same legal background rules apply to employer behavior as would apply if employees were not represented by a union. Antitrust rules thus condemn the joint employer setting of salaries for Developmental Squad members because this is an agreement among competing firms/teams to set wages. A somewhat less expansive claim is that antitrust rules apply to joint employer wage-setting where the wage term was not contained in the expired bargaining agreement. A final position is that the antitrust laws apply after the agreement expires and a bargaining impasse is reached. My contention is that the antitrust laws ought not to apply to actions by a multiemployer bargaining unit where those actions are explicitly permitted by the NLRA regulatory apparatus and have no third-party effects. This means that so long as the employees choose to have the protection of unionization, they forgo the protection of the antitrust laws.

[34] See, e.g., Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

III. NLRA MULTIEMPLOYER AND IMPASSE RULES

Several NLRA rules apply to employer and union actions in a multiemployer bargaining context,[35] the structure chosen by professional sports teams and the players' unions. In multiemployer bargaining, firms that would ordinarily compete against one another in the labor market bargain as a single entity with a union. Multiemployer bargaining is permitted under the NLRA. It is consensual on both sides: Neither the union nor an employer may insist that the other engage in multiemployer bargaining. Even though a union and a group of employers have agreed to multiemployer bargaiming, either side may withdraw, subject to certain timing constraints.

A multiemployer bargaining unit, like a single employer, does not commit an NLRA unfair labor practice when it locks-out employees in order to bring pressure on the union to agree to a bargaining agreement that is favorable to the employers.[36] Last, a multiemployer unit, again like a single employer, during bargaining for a new agreement may implement a bargaining proposal without the consent of the union so long as the multiemployer group has bargained to impasse over the proposal.[37]

It is not the case that regulation of conduct by the NLRA apparatus necessarily supplants regulation of that same conduct by other laws, whether federal or state. The short answer is that sometimes it does and sometimes it does not. An assault occurring on a picket line may be an unfair labor practice, but it also is a tort and a crime under state law without regard to its NLRA liability. On the other hand, a state law prohibition of picketing in all labor disputes on the ground that nonstrikers need to be able to get to work would be preempted by the NLRA apparatus.

The Court has addressed questions of preemption of state laws many times. There are hard questions and easy questions. In

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[35] See generally, Douglas L. Leslie, Multiemployer Bargaining Rules, 75 Va. L. Rev. 241, 242-43 (1989) (discussing section 8(a)(5) of the NLRA as it applies to the multiemployer-union bargaining context).

[36] NLRB v. Brown, 380 U.S. 278, 286 (1965).

[37] See, e.g., Food Employers Council, Inc., 131 L.R.R.M. (BNA) 1778 (1989).

Brown, which is not a preemption case,[38] there is the same kind of statutory conflict that is found in the preemption cases. Viewed from this perspective, however, *Brown* ought to be an easy case for two reasons. First, the disruption of the NLRA rules regulating multiemployer bargaining outside the sports context may be substantial if the Court rules that there is no antitrust immunity in *Brown*. Second, the interests sought to be protected by the plaintiffs' antitrust challenge in *Brown* are the interests of the employees in the labor market: the same interests being protected by the labor laws.

IV. EFFECT OF *BROWN* ON MULTIEMPLOYER BARGAINING AND IMPASSE IMPLEMENTATION

How would a finding for the plaintiffs in *Brown* affect conduct in collective bargaining contexts? I do not see how employers in a multiemployer bargaining unit can implement a bargaining proposal without risking antitrust liability. And if implementation is at risk, so too is a multiemployer lockout after impasse to bring pressure on a union[39] because, like a unilateral implementation, a multiemployer lockout is concerted action by labor market competitors to affect the labor market.[40]

These risks increase the costs to employers of agreeing to engage in multiemployer bargaining. How much it increases the costs cannot be determined, for we have no data on the frequency of bargaining proposal implementation in a multiemployer bargaining context, nor even on the frequency of

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[38] This is because the antitrust law applied in *Brown* is not a state law.

[39] Ironically, a multiemployer lockout prior to impasse may be unlawful under the NLRA. See Darling and Co and Lewis Lane, 171 NLRB 801 (1968), *enforced sub nom.* Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969) (holding that absence of impasse one factor in deciding the legality of a lockout under the NLRA).

[40] The dissent in the circuit court argued that lockouts could be distinguished from implementation by calling the former "tactics" and the latter "terms." *Brown*, 50 F.3d at 1066 (Wald, dissenting). The distinction is foreign to labor law. Moreover, it cuts in odd directions. Is the unilateral implementation of an employer's last offer a term or a tactic? The answer is that sometimes it is one, sometimes the other, and often it is both. Implementation allows the employer to operate the business in accordance with its proposal, and it also puts pressure on the union to come to agreement. Second, if implementation is used by the employer solely as a tactic against the union, that makes it *less* protected under the NLRA. See NLRB v. Katz, 369 U.S 736 (1962) (unilateral implementation is an unfair labor practice where the employer has not first bargained to impasse).

multiemployer lockouts. But so long as the costs are increased at the margin, it seems to me that unions and employers alike will be worse off if there is no immunity in the *Brown* context. Employers will be, and ought to be, more reluctant to agree to multiemployer bargaining.[41]

Because employers will resist multiemployer bargaining if antitrust exposure results from implementation, unions are harmed as well if there is no immunity in the *Brown* context. The circuit court treated a potential antitrust suit in this situation as a weapon accorded the union.[42] The majority and dissent disagreed only on whether it ought to be accorded the union. But an antitrust suit in this situation is not a *union* weapon, it belongs to the employees. After a unilateral implementation by a multiemployer unit, any employee can file the antitrust action. There is no obvious way how the union could prevent the suit;[43] therefore the union cannot guarantee the employers, ex ante, that there will be no antitrust exposure for actions taken in multiemployer bargaining.[44]

Would workers in general be better off after a ruling for the plaintiffs in *Brown*? Nonunionized workers will be unaffected for, absent a union, employers cannot act in concert. Workers who are better off with a union and multiemployer bargaining will be worse off, as some employers decline to agree to

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[41] The employers cannot avoid antitrust exposure by withdrawing from the multiemployer unit after impasse but before implementing because impasse does not justify the withdrawal by an employer from a multiemployer unit. See Charles D. Bonanno Linen Service v. NLRB, 454 U.S. 404 (1982).

[42] "Injecting the Sherman Act into the collective bargaining process would disrupt this balance by giving unions a powerful new weapon, one not contemplated by the federal labor laws." *Brown*, 50 F.3d at 1052.

[43] If the immunity expires only after impasse is reached, the union could preclude a suit by trying to avoid a finding of impasse. This manipulation of impasse in order to avoid antitrust liability is unsoimd as a matter of labor and antitrust policy. More importantly, it is risky and thus unlikely to reduce by much the costs of agreeing to multiemployer bargaining. Equally significant, it would prevent multiemployer units from unilaterally implementing at all because impasse is a precondition to implementation under the NLRA. See Patrick Hardin, The Developing Labor Law 696 (Patrick Hardin, James R. LaVaute, Charles J. Morris, Timothy O'Reilly eds., 3d. ed. 1992).

[44] The right to strike is an analogy. The right is enjoyed by the union, not groups of individual workers. Part of the value of the right to strike comes from the ability to sell it to the employer in the form of a no-strike clause. In *Brown*, if there is an antitrust claim after implementation, the union cannot trade it to the employer as part of the agreement to engage in multiemployer bargaining.

multiemployer bargaining that carries with it the choice of risking antitrust exposure or giving up the right to implement and, perhaps, to lock out. Unionized employees who prefer the protection of antitrust to that of the collective bargaining process will be better off. But for employees to prefer antitrust protection, employer competition in the labor market must drive wages up, not down. That may happen only in professional sports and a few other elite professions, where the supply of qualified workers is low, over the long run and the short run, and capital cannot be substituted for labor. Thus are the bulk of unionized employees harmed for the benefit of a handful of professional athletes.

The risk to employers of engaging in multiemployer bargaining is greatest if the immunity expires upon the mere expiration of the agreement, but it is substantial under any of the district court's three timing tests.[45] The question is whether there is a principled way for the Court to cabin antitrust exposure in this context. I think not.[46]

A loss of antitrust immunity does not necessarily occasion antitrust liability. Liability turns on whether after the immunity is lost, courts are to apply a per se test of joint competitor conduct or a rule of reason analysis. A rule of reason analysis will not help employers generally[47] in this context because they cannot justify the coordinated conduct apart from unionization considerations. Perhaps the risk can be lessened if the courts find that antitrust liability attaches only on a finding that the employers have market power, but it is not likely. In the first place, it is hard for a lawyer representing management to guarantee a client that a court will find that its multiemployer unit lacks market power.[48] And the liability risk—trebled lost

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[45] That is, at the expiration of the agreement, at the expiration of the agreement where a term not contained in the agreement is implemented, or at impasse.

[46] I reject as unprincipled any limitation of the case to professional sports leagues and sports bargaining.

[47] It hasn't helped sports leagues, either. See, e.g., Smith v. Pro Football, 593 F.2d 1173 (D.C. Cir., 1978) (holding that pro football rookie draft rules violated antitrust laws); Mackey v. National Football League, 543 F.2d 606, 622 (8th Cir., 1976) (holding that pro football League's "Rozelle Rule" violated antitrust laws).

[48] That technical antitrust term will give little comfort to employers engaged in multiemployer bargaining. It is difficult to apply and uncertain in application. See generally, Herbert Hovencamp, Federal Antitrust Policy 78-139 (1994) (explaining the

wages for the period of the implementation or the lockout—is considerable.

The second way that a ruling for the plaintiffs in *Brown* might be limited is to confine it to unilateral implementation of terms not contained in the expired agreement. That limitation will be troublesome to apply in practice, however. Suppose a unionized employer has in the past given employees a day off with pay on the Monday after any Christmas that falls on Sunday. The recently expired collective agreement did not mention the practice, although it did specify twelve other paid holidays. During negotiations, the employer proposes that employees work the Monday after Christmas, but at double pay. The union rejects the proposal, there is impasse, and the employer implements. There is no unfair labor practice[49] and no antitrust violation (because the employer has not acted jointly). Now change the facts by making the employer a member of a multiemployer bargaining unit. Was the employers' proposal directed at a term contained in the expired agreement? Is the answer yes because of the past practice of giving the paid holiday, or yes because holidays in general are mentioned in the agreement; or is the answer no, because the particular day is nowhere mentioned in the agreement? Other examples are easy to imagine. Suppose a collective bargaining agreement between a union and a multiemployer group is silent on the employers'

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measurement of market power). Would a multiemployer bargaining unit of pipefitting subcontractors in Des Moines, Iowa, have market power? There are a host of relevant questions. How big is the nonunion pipefitting segment of the industry? What barriers are there to the development of nonunion firms? Can other specialty subcontractors (e.g., carpenters) do pipefitting? All of it? How often do pipefitters from Ames, Iowa, come to Des Moines to work? How often do Des Moines pipefitting contractors work outside the Des Moines metropolitan area? The point is that where employers risk trebled antitrust damages and attorney fees, few multiemployer bargaining units are going to expose themselves to antitrust liability on the chance that a court might later, after extensive litigation, find that they lacked bargaining power.

[49] There is no requirement in the unilateral implementation situation that the proposal only contain terms that are found in the expired agreement. But that ought not to matter with respect to antitrust liability. If unilateral implementation of a term not contained in the expired agreement is an unfair labor practice it occasions a cease and desist order and, depending on the circumstances, retroactive restoration of benefits. As with any sanction, an employer deciding to implement in an uncertain situation will weigh the benefits of implementation against the product of the probability that the implementation is a violation times the anticipated sanction. If that same implementation is an antitrust violation, the remedy is three times actual damages plus attorney fees.

right to subcontract work. After expiration, the employers propose language allowing subcontracting. The union rejects the language and impasse is reached. The employers announce that they "are implementing the subcontracting clause." Would this be exposed to antitrust scrutiny on the ground that it was not contained in the expired agreement, or immune because the right to subcontract was an implicit clause of the expired agreement?

The point was made in the circuit court in *Brown* that if an employer group is free from antitrust exposure after a bargaining agreement expires, it will discourage unionization.[50] Employees will reason that they are better off with antitrust protection than they are with the protection of a union. This may be the case for professional sports athletes, but it is unlikely to have such an effect in other industries. In non-sports labor markets, unions feel that wage competition drives wages down; thus the rallying cry, "take the wages out of competition." In sports labor markets, wages go up, it is thought, when teams compete against one another for players. If those suppositions are correct, a ruling in *Brown* for the employers may discourage unionization in professional team sports, but it will not do so in other labor markets. A ruling for the plaintiffs, on the other hand, will discourage and destabilize multiemployer bargaining in all markets, as employers realize that choosing to join a multiemployer unit carries a cost: the risk of antitrust liability for unilateral implementation and for a lockout.

If employees want to use the antitrust laws to constrain employer action, they have two choices: decertify the union or make a timely withdrawal from multiemployer bargaining.[51] Having chosen the advantages of unionization and of multiemployer bargaining,[52] consideration of the interests of non-

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[50] *Brown*, 50 F.3d at 1065 (Wald, J., dissenting).

[51] I leave for a later essay the argument, which I find remarkable, that professional sports teams are a single employer for labor law purposes but separate employers for antitrust purposes, even while unionized. If this were the case, the second option—withdrawal from multiemployer bargaining—would be unavailable. This would not change my conclusions respecting the antitrust immunity.

[52] For instance, the players of a single team cannot decertify the union for that team so long as there is multiemployer bargaining. See Douglas L. Leslie, Labor Bargaining Units, 70 Va. L. Rev. 353, 414-15 (1984).

sports workers suggest that athletes should bear the costs as well.