UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MAURICE CLARETT, **Plaintiff,** **v.** **NATIONAL FOOTBALL LEAGUE,** **Defendant**	**Case No. 03-CV-7441 (SAS)**

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT NATIONAL FOOTBALL LEAGUE'S MOTION FOR SUMMARY JUDGMENT (ANTITRUST INJURY)

I. INTRODUCTION

The complaint alleges that an NFL Rule, adopted outside the Collective Bargaining Agreement, codifies a concerted refusal to deal with a defined class of football players which operates to prevent Maurice Clarett from practicing his calling in violation of the antitrust laws.[1] The NFL's summary judgment motion does not even address, much less refute, this claim, which constitutes a quintessential violation of the antitrust laws.

The NFL's summary judgment motion rests entirely upon a contrived requirement: in order to demonstrate antitrust injury, plaintiff supposedly must show the Rule's adverse effect on the number of players in the league or the aggregate salaries paid to players in a given season. This is simply not the law.

[1] The only literal reading of the Rule itself, however, does not preclude Clarett from entering the February 2004 "combines" and the April 2004 draft because three NFL seasons will have elapsed since his high school graduation. The NFL, however, does not accept a literal, plain English, reading of the Rule it drafted. Indeed, in its brief, the NFL describes a rule that is contrary to the Rule actually included in its bylaws. *See* Defendant's Memorandum in Support of Motion Summary Judgment (hereafter "Def. Br.") at 1.

By virtue of the Rule, the NFL teams have excluded a broad class of sellers from the market for player services. Even if the NFL has fixed total salary and the total number of players, a competitive market is one in which those who sell in the market are determined by a competitive process. Here, the challenge is not about competitors complaining of having lost in competition, such as eligible players passed over in favor of more talented players. Instead, it is about those players who are unlawfully excluded from the competitive process altogether. The door to the market is closed to over half of the college players, causing the type of harm to competition that the antitrust laws were intended to prevent. That fact alone establishes antitrust injury. The weight of long established antitrust jurisprudence and common sense support this result.

The NFL confines its analysis to a discussion of the salary cap and total player limitation, *i.e.*, the NFL's definition of price and output. As described in its memorandum, the NFL has already fixed the aggregate salary and number of players in a given season. Thus, according to the NFL, price and output, in the short run, will not be affected by the operation of the Rule or any other behavior. Even assuming, *arguendo*, that the salary cap is sheltered from antitrust scrutiny under the labor exemption, a position not conceded here, it does not follow that the NFL is entitled to *total* immunity from the antitrust laws, including immunity for anticompetitive acts falling outside of the labor exemption, namely, the Rule. But that is exactly what defendant seeks.

Moreover, the NFL's narrow definition of price as "compensation for player services" ignores the realities of its business. Player salaries are but a subset of the player development costs for professional sports teams in a competitive market. Here, the NFL teams, the universe of buyers which monopolize the market, have artificially reduced these costs by colluding not to compete for players deemed ineligible by the Rule. Among other things, the teams' agreement perpetuates and maintains the NCAA as its free minor league system. As such, "price," when properly defined to include, *inter alia*, player development costs, has indeed been adversely affected by the Rule.

II. ARGUMENT

A. Antitrust Injury Is Established Even Under The NFL's Definition Of Price And Output.

The cornerstone of the NFL's argument is the false premise that antitrust injury cannot be established absent proof that the challenged conduct reduces output or adversely affects price. *See* Def. Br. at 7. In this case, concerted action resulting in total exclusion from the marketplace constitutes antitrust injury.

While the NFL cites to the decision in *Brunswick Corp v. Peublo Bowl-O-Matic, Inc.*, 429 U.S. 477 (1977), the leading case on antitrust injury, it fails to address the significance of the Supreme Court's holding. In *Brunswick*, an operator of bowling centers brought an action against a manufacturer of bowling equipment after the manufacturer acquired other failing bowling centers. Plaintiff contended that the profit it would have earned had the competing centers failed and left the market constituted antitrust injury. Plaintiff argued that, but for the acquisition, it would have been the sole seller in the market and able to raise its prices.

The Supreme Court disagreed. Significantly, the Court focused not on whether there was upward or downward pressure on prices, but on whether the alleged injury flowed from an activity that the antitrust laws were "intended to prevent." 429 U.S. at 489. Because the antitrust laws were not intended to prevent market movement away from concentration, plaintiff suffered no antitrust injury. The Court stated that antitrust injury “should reflect the anticompetitive effect either of the violations or of anticompetitive acts made possible by the violations. It should, in short, be ‘the type of loss that the claimed violations … would be likely to cause.’” *Id., quoting Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125 (1969).

While an adverse effect on price or output often results from anticompetitive conduct, *Brunswick* teaches that the proper focus of any antitrust injury analysis is on the challenged activity itself and whether the conduct is of the type that the antitrust laws were “intended to prevent.” As two leading antitrust authorities have noted: “The [*Brunswick*] Court found no antitrust injury, not because the plaintiff preferred an interpretation of the antitrust laws that would permit it to raise prices, but because the activity of which the plaintiff complained had increased rather than decreased competition.” Roger D. Blair and Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 Cornell L.Rev. 297, 338 (1991).

An agreement to exclude sellers from competing in the market is an activity that decreases, and thereby harms, competition. It is a paradigm of the type of behavior that the antitrust laws were “intended to prevent.” Accordingly, proof of such an agreement and the harm that logically flows from it establishes the requisite antitrust injury. This is true without a showing of an effect on price or output.

Indeed, that is the holding in *Intellective, Inc. v. Massachusetts Mutual Life Insurance Co.*, 190 F.Supp.2d 600 (S.D.N.Y. 2002). Relying on *Brunswick*, this Court held that the act of excluding firms from the market decreased competition and caused antitrust injury, even though the challenged conduct did not appear to affect price or output.

In *Intellective*, a consulting firm alleged that five major life insurance company defendants had monopolized the market for studies of investment performance by life insurance companies. Defendants, acting together as the "Working Group," had spearheaded an annual study of performance in the life insurance industry. To do so, the Working Group collected proprietary investment performance information, which it provided to a third party to analyze and issue a report. By agreement of the participating companies, the Working Group had "perpetual control over all participants' historical data." 190 F.Supp.2d at 605. In essence, the terms of the agreement insured that a participating company could never give the same historical investment performance data to any other consultant. The court stated, "in other words, through the Letter Agreement, the Working Group has locked up the information necessary to perform competing studies." *Id.*

Intellective performed the analysis for a number of years, until its contract was terminated. The Working Group then awarded the contract to another entity (one of the defendants). Intellective sued, claiming that defendants refused to deal with it and that it had been injured in its capacity as a potential producer of a competing study.

Defendants moved to dismiss for lack of standing, arguing, like the NFL here, that plaintiff had not suffered "antitrust injury." Defendant contended that the harm was to plaintiff alone and not to competition as a whole. The focus of defendants' arguments was on the allegation that Intellective had been replaced by another entity.

This Court disagreed, stating in language particularly appropriate here:

> However, Defendants mistake Intellective's primary complaint. Although Intellective does complain of the Insurance Company Defendants' decision not to award the contract to Intellective, Intellective's principal claim stems

> from the Working Group's attempt to monopolize the information necessary to compete in the relevant market. Intellective adequately states an antitrust injury in this regard. Intellective alleges that it, and all others, are prevented from competing in the relevant market by the Working Group's control of the data necessary to perform a competing study. *The prevention of this type of marketwide competition is an "injury of the type the antitrust laws were designed to prevent."* *Brunswick Corp*., 429 U.S. at 489, 97 S.Ct. 690. Further, Intellective's own injury – its inability to compete in this market – stems from defendants' activities, as required under *Atlantic Richfield*.

Id. at 613. (emphasis added) (footnote omitted).

In this case, the Rule's purposes and effects are precisely those which the antitrust laws condemn. As stated in our initial submission, quoting Judge Learned Hand, "whatever other conduct the Acts may forbid, they certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids any one to practice his calling."[2] The NFL, in its brief, does not address this important principle, relegating its response to a footnote and asserting, without support, that it is "far off the mark." Def. Br. at 15, n. 9.

In short, the Rule's prevention of marketwide competition in the market for player services is an "injury of the type the antitrust laws were designed to prevent." *Brusnwick*, 429 U.S. at 489. In addition, the harm suffered by the excluded players flows directly from the NFL's collusive activity. The long line of professional player restraint cases have explicitly or implicitly recognized that exclusion of players from the market damages competition and establishes antitrust injury. *See, e.g., Smith v. Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976); *Boris v. USFL,* 1984 WL 894 (C.D. Cal. 1984); *Linseman v. WHA*, 439 F.Supp. 1315 (D. Conn.

[2] Pl.'s Mem. In Supp. of Summ. J., p. 16, *citing Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949).

1977); *Bowman v. NFL*, 402 F.Supp. 754 (D. Minn. 1975); *Kapp v. NFL,* 390 F.Supp. 73 (D. Cal. 1974), aff'd 586 F.2d 644 (9th Cir. 1978), *cert. den*. 441 U.S. 907 (1979); *Blalock v. LPGA*, 359 F.Supp. 1260 (N.D. Ga. 1973); *Denver Rockets v. All-Pro Management, Inc*., 325 F.Supp. 1049 (C.D. Cal. 1971). In contrast, the cases in which plaintiffs have failed to meet the threshold requirement of antitrust standing involved either those allowed to enter the market who lost to their competitors, or those whose injury did not flow directly from the anticompetitive conduct. *See e.g., Balaklaw v. Lovell*, 14 F.3d 793 (2d Cir. 1994)(anesthesiologist lost competitive bid for exclusive contract with hospital); *Mathias v. Daily News, L.P*., 152 F.Supp. 2d 465 (S.D.N.Y. 2001)(newspaper carriers complaining about losses as a result of direct competition from newspaper publisher); *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983)(Impact of alleged violative practice would fall directly on union members as opposed to plaintiff union).

B. The Rule Adversely Affects "Price" and Causes "Antitrust Injury."

In the market for professional football player services, the NFL teams are the buyers and the players are the sellers. Acting together, the teams enjoy a buying monopoly. They have what is referred to as "monopsony" power. One of the risks in a monopsony market is that powerful buyers will collude to restrain prices or costs.

The NFL defines "price" as "compensation for player services" and argues that its salary cap prevents the Rule from having an impact on price. *See* Def. Br. at 1. Therefore, according to defendant, there can be no antitrust injury. *Id*. at 10. But salaries are not "price" here. They are only part of the story.

Professional sports teams in a competitive market incur a number of costs related to obtaining players for their rosters – "player development costs." Teams must utilize scouts to gather as much information as possible about prospective players. Some players may be considered to have great potential, but are not as far along in their development as other players. Such players are a riskier investment for teams, albeit one which teams will take if the potential upside is deemed to be worthwhile. Some leagues (*e.g.*, major league baseball) have a minor league system where players gain experience, develop their talents and learn the professional game. All of the various expenses related to the foregoing, along with the actual compensation to the players, comprise the bulk of the player development costs that teams must pay.

The NFL teams, however, have colluded in order to use their monopsony power to substantially reduce their player development costs. Indeed, by agreeing to exclude more than half the college players from the market, member teams have significantly reduced the number of potential players to scout and the risks inherent in drafting unproven players. In addition, the Rule, which has been in force for over fifty years, has eliminated the enormous expense of creating and running a minor league. Stated differently, by using their monopsony power to exclude players from the market, the NFL forces players into the free "farm system" of college football, where players gain experience at a high level of athletic competition, but work for nothing. Further, the Rule acts to reduce the financial risks teams have to take by avoiding investments in players while they develop for free in college. Absent the Rule, in an open market, teams would compete for and invest in players currently deemed ineligible. Moreover, the member teams would absorb the risks that such players might suffer an injury or simply not pan out.

Thus, salaries are but one component of overall player-related costs for NFL teams. It is clear that the NFL member teams significantly reduce these overall costs by virtue of the eligibility Rule. Not surprisingly, and notwithstanding that plaintiff has emphasized the foregoing non-salary costs,[3] the NFL's brief completely ignores this aspect of its business and its relationship to antitrust law.

The NFL argues that plaintiff cannot demonstrate antitrust injury when focusing on price. This argument is dependent on a narrow and self-serving definition of price, artificially limited to player compensation and nothing more. Such a myopic definition ignores the economic reality of the business of professional football. The NFL has fixed aggregate compensation in a given season as part of the Collective Bargaining Agreement ("CBA") with the NFL players union. As such, the reason the Rule has little or no impact on "price" (as defined by the NFL) is because the NFL has fixed "price" and, thus, no behavior – anticompetitive or otherwise – will influence it.

However, even if the salary cap rules are exempt from antitrust examination, it is only by virtue of the limited, narrowly construed non-statutory labor exemption to the antitrust laws. Such an exemption cannot, in turn, shelter other anticompetitive conduct such as the eligibility Rule, which was not negotiated and is not part of the CBA. To do so would expand the labor exemption beyond anything recognizable from the Supreme Court's holdings and would run counter to the principle that exemptions from the

[3] *See* Pl.'s Letter Br. of Oct. 10, 2003 at 2-3.

antitrust laws are to be narrowly construed.[4] *See, e.g., Abbott Laboratories v. Portland Retail Druggists Assn*., 425 U.S. 1 (1976); *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975); *FMC v. Seatrain Lines, Inc*. 411 U.S. 726 (1973); *Orthopedics Studio, Inc., v. Health Ins. Plan of Greater New York, Inc*., 1996 WL 84503 (E.D.N.Y. 1996).

C. The "Supplier Substitution" Cases Cited By The NFL Are Distinguishable Or Support Plaintiff.

Defendant asserts that the substitution of one supplier of services for another does not constitute antitrust injury. We agree. A very different rule applies, however, when potential suppliers are excluded from the competitive process that determines who those suppliers will be. For example, the players affected by the Rule have not been replaced by others as a result of competition in an unimpaired marketplace. Clarett and the other "ineligible" players have been foreclosed from entering the market altogether. They are not losers in a competitive marketplace; they are not even allowed in the game.

Defendant cites four cases, *Balaklaw*, *Mathias*, *NHLPA*, and *Les Shockley*, which purport to support its argument that the challenged conduct does not "adversely affect[ ] competition in any relevant market."[5] Def. Br. at 15. However, none of these cases is applicable to the facts here.

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[4] Indeed, such a determination would transform the exemption into something contrary to those holdings. It would, in short, enable the NFL to indirectly shelter from antitrust review agreements which the Supreme Court has said the labor exemption does not shelter, namely rules that have *not* been the subject of bargaining, regarding matters *other than* wages, hours and other terms and conditions of employment, which affect *primarily*, and in this case *exclusively*, strangers to the collective bargaining relationship.

[5] *Balaklaw v. Lovell*, 14 F.3d 793 (2d Cir. 1994); *Mathias v. Daily News, L.P*., 152 F.Supp. 2d 465 (S.D.N.Y. 2001); *National Hockey League Players' Association v. Plymouth Whalers Hockey Club*, 325 F.3d 712 (6th Cir. 2003); *Les Shockley Racing, Inc. v. National Hot Rod Association*, 884 F.2d 504 (9th Cir. 1989).

Both *Balaklaw* and *Mathias* involved plaintiffs who suffered injuries as a result of competition, not because competition had been restrained. The plaintiff in *Balaklaw* was an anesthesiologist whose proposal for an exclusive services contract was not accepted by the defendant hospital after a competitive bidding process. The Second Circuit noted, *inter alia*, that, in contrast to the situation here, there was "no evidence to suggest that the contract caused Dr. Balaklaw (or other anesthesiologists) to be excluded from, or substantially limited in, the broader market for employment." *Balaklaw*, 14 F.3d at 799 (citation omitted). In *Mathias*, news carriers alleged antitrust violations after a newspaper publisher implemented a program to sell its papers directly to customers, in direct competition with the carriers. Not surprisingly, the court found that the carriers failed to allege "more than individual loss or exclusion resulting from fair and vigorous competition." *Mathias*, 152 F.Supp.2d at 480.

Likewise, *NHLPA* involved a Canadian amateur hockey league for players between the ages of sixteen and twenty. In order to maintain a desired level of athletic competition, the league rules limited the number of twenty-year old players, presumably more skilled players, on each team to three, and, further, did not permit players who had elected to play college hockey in the United States to participate. The objective was to maintain parity and limit the number of highly skilled players in this instructional league. Plaintiff was a twenty-year old player who had been drafted by a team in the league, but chose to play U.S. college hockey instead. Later, plaintiff challenged the Rule and sought to play in the league.

The court held for defendant, noting that the market for player services "is not a market that involves economic competition." 325 F.3d at 719. The court found for defendant because “[t]he application of the [Van Ryn] rule does not result in any economic injury to the ‘market for competition among OHL and CHL teams for player services,’ but merely substitutes one arguably less skilled player for another arguably more skilled player.” *Id*. While the NFL highlights this phrase, it is obvious that *NHLPA* is readily distinguishable from the situation here. Indeed, the *NHLPA* market was not closed to a broadly defined class of sellers as it is here. In addition, the rule there was not the of type the antitrust laws forbid. In contrast, the NFL is anything but an amateur league; it is instead the most profitable of all sports leagues. And the effect of the Rule at issue is not to maintain an instructional league devoid of highly skilled players, but to exclude players like Clarett from the highest level of competition.

Finally, in *Les Shockley*, plaintiffs were exhibitors of jet-powered motorcycles and other vehicles who challenged the association representing owners of various drag racing tracks as a result of its decision to not allow jet-powered vehicles at ownerships’ venues. The NFL glosses over these facts, which are akin to dog owners challenging horse racing track operators for not allowing dog races at their venues. In other words, plaintiffs were not excluded from the jet powered vehicle market in favor of other similar sellers. Instead, they were excluded because they offered a fundamentally different service.

Moreover, the Ninth Circuit’s discussion of antitrust injury in *Les Shockley* supports plaintiff. The court stated that only “when the restraining force of an agreement or other arrangement affecting trade becomes unreasonably disruptive of market functions … is a violation of the Sherman Act threatened.” 884 F.2d at 508.

Significantly, although not present in that case, the court identified the disruption of "market entry" as among those functions threatening antitrust violation. *Id.*

III. <u>CONCLUSION</u>

The undisputed facts establish that the NFL's eligibility Rule causes antitrust injury in the relevant market. Accordingly, the NFL's motion for summary judgment should be denied.

Respectfully submitted,

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