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NFL FREE AGENCY: A MODEST PROPOSAL*

BURTON F. BRODY**

I. INTRODUCTION

The National Football League's ("NFL" or "League") First Refusal/Compensation system governing team rights to the services of experienced players is under legal attack by the players.¹ The players are attacking the system because it seriously inhibits the ability of players to put their services up for competitive bidding among the teams and thereby prevents players from being paid what they are worth.² They are attacking the system in court because they were unable to eliminate it through collective bargaining.³

The First Refusal/Compensation system permits teams to retain the services of veteran free agent players, a player who has completed the term of his contract, by matching any offer the player may receive from any other team in the league. On the other hand, if a team chooses not to meet a competing offer for one of its free agent players, it will receive compensation from the team signing that player. The compensation will be draft choices in the league's annual allocation of the services of college trained players seeking entry to the league.⁴ There can be no doubt that this system combining the right of first refusal and compensation has been effective to prevent players from changing teams and also effective to keep salaries depressed by discouraging competitive bidding for player services within the league.⁵

* The following proposal is the view solely of the author and not that of the National Football League or the National League Football Players Association.

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1. *Powell v. NFL*, 678 F. Supp. 777 (D. Minn. 1988), *rev'd*, 888 F.2d 559 (8th Cir. 1989).

2. NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, GAME PLAN '87, A COMMITMENT TO NFL PLAYERS PAST, PRESENT, FUTURE 9 (1987) [hereinafter GAME PLAN].

3. *Powell*, 678 F. Supp. at 781 n.9. ("[t]he Court begins its analysis with the sense that plaintiffs (the players) are seeking to gain through the courts what they could not win at the bargaining table.").

4. See generally *Powell v. NFL*, 888 F.2d 559 (8th Cir. 1989).

5. In *Powell*, the Court points out:

Notwithstanding the significant liberalization of the traditional free agency system, during the five-year period covered by the 1977 Collective Bargaining Agreement, fewer than 50 out of 600 players received offers from other NFL clubs after becoming free agents. Plaintiffs allege that the only time players moved was when, in effect, a trade was arranged between two NFL clubs. That practice occurred on fewer than 20 occasions and only *one* player actually moved from one NFL club to another in a transaction in which draft choice compensation was payable.

Powell, 678 F. Supp. at 780 (emphasis added).

The *Powell* court also points out that the compensation requirements were again liberalized by the 1982 Collective Bargaining Agreement in which the salary levels at which draft choice compensation would be triggered were raised. However, the court goes on to

II. THE CURRENT SITUATION

Presently the parties are operating without a collective bargaining agreement. The 1982 Agreement terminated in 1987 and the negotiations between the players and the league have not been fruitful. There was a twenty-four day strike during the 1987 season, but the players returned to work without a new contract. The sticking point in negotiations is clearly free agency. The players demand it while the owners, recognizing they have a good thing going, are adamant about retaining First Refusal/Compensation Rights.⁶ The litigation is an attempt by the players to establish free agency by denying to the owners the benefits of the labor exemption to the antitrust laws for the First Refusal/Compensation system.⁷ However, the Eighth Circuit Court of Appeals has decided that although the parties may have reached an impasse in negotiations and certainly are at impasse as to free agency, it would not end the labor exemption for the First Refusal/Compensation system.⁸ Thus, for the time being, the situation remains fixed in concrete.

The players remain committed to unrestricted free agency because they want freedom of choice.⁹ That freedom will allow each player to pursue his career with teams, coaching staffs and playing systems of his choosing. It will also allow each player to choose where he will live and maximize his ability to create a better life for himself after football. The players also want free agency because they know that competitive bidding for their services will get them salaries more reflective of their contribution to the production of income.¹⁰

The irony is that the players once had the free agency they now seek and bargained it away.¹¹ Having bargained it away, they cloaked the First Refusal/Compensation system with the labor exemption.

The owners remain equally committed to maintaining restrictions on free agency. All their justifications flow from the unique nature of sports league competition and the need to maintain a high level of competitiveness within the league in order to sustain spectator interest and thus revenues.¹² Without restrictions, teams in the more attractive cities

say, "[t]he modifications incorporated in the Agreement did not increase player movement in the NFL and, in fact, during the five-year period covered by the Agreement, not a single veteran player moved from one NFL club to another under the Right of First Refusal/Compensation system." *Id.* at 781.

The court also pointed out the chilling effect the system has on bidding when it stated, "[o]f the 1,415 players who became veteran free agents during the term of the 1982 agreement . . . apparently only *one* player even received an offer from another club." *Id.* n.6 (emphasis added).

6. *Powell*, 678 F. Supp. at 781.

7. *Id.*

8. See generally *Powell*, 888 F.2d 559 (8th Cir. 1989).

9. See *GAME PLAN*, *supra* note 2.

10. *Id.*

11. Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 359 (1989).

12. *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). It seems incongruous that the owners are able to justify reducing financial competition among themselves by saying that restraint is necessary to maintain athletic competitiveness

within the league would have an overwhelming advantage in the competition for players and would eventually dominate the on-field competition, thereby destroying the essential appeal of league competition.

Other reasons for restricting player movement to other teams flow more directly from the commercial nature of professional leagues. There is a need to maintain the integrity of the game by convincing followers that the players are loyal to the team.¹³ One of the ways professional teams create interest and thereby sell tickets is to get fans to identify with certain popular players and through them, with the team. Without a means of controlling player movement, a team's substantial investment in the marketing of a particular player would be destroyed. Additionally, if there were not some assurance that the athletic talent within the league would be equitably distributed among the teams, fewer cities would be able to support teams.¹⁴ Fewer cities translates into lost income from franchise fees and television revenues. However, the major reason owners do not want free agency is that it would increase player salaries.¹⁵ So the owners, wealthy business men, competing among themselves with lucrative, valuable toys, are determined to keep the First Refusal/Compensation system because they view it as an integral element in maintaining and enhancing the value of their franchises.

III. REALITY

It seems apparent that free agency will have to be bargained. The trial court, in *Powell v. National Football League*, after finding that the parties were at impasse on the free agency issue, but nonetheless finding that the labor exemption survived the expiration of the 1982 Collective Bargaining Agreement, said:

The Norris-LaGuardia Act and substantive national labor laws establish that federal labor policy favors resolution of labor disputes through collective bargaining accompanied, if necessary, by economic sanctions. If the Court intervened at this time with preliminary injunctive relief, it would reverse the bargaining leverage of the parties and completely disrupt the bargaining process. The strong public interest in protecting and promoting the bargaining process merits considerable weight in the Court's analysis.¹⁶

The appellate court expressed the same commitment to bargaining in its decision, when it said:

among their teams. It becomes doubly incongruous when one realizes that the reduction in financial competition is achieved, not by restricting the owners, but by limiting the players.

13. Canes, *The Social Benefits of Restrictions on Team Quality*, GOVERNMENT AND THE SPORTS BUSINESS 82 n.2 (R. Noll ed. 1974).

14. *Id.*

15. "Defendants (owners) contend that the players' insistence upon obtaining free agency is, in fact, little more than an attempt to increase player salaries by inducing bidding among the NFL clubs." *Powell*, 678 F. Supp. at 781 n.7.

16. *Powell*, 690 F. Supp. at 818.

The labor arena is one with well established rules which are intended to foster negotiated settlements rather than intervention by the courts. The League and the Players have accepted this "level playing field" as the basis for their often tempestuous relationship, and we believe that there is substantial justification for requiring the parties to continue to fight on it, so that bargaining and the exertion of economic force may be used to bring about legitimate compromise.¹⁷

The difficulty with bargaining on this issue, at least from the players' perspective, is that the players have a relatively weak position.¹⁸ This results from many factors. The disparity of skills of the players, superstar to marginal, and the resulting undermining of union solidarity, the teams' discretion to determine who shall be on the team and the resulting lack of job security for most players, coupled with the short average career of four years, seriously undermine the commitment individuals can make to union objectives. The fact that the players conducted an unsuccessful strike during the 1987 season, combined with the above disadvantages, put the players in a difficult position to bargain effectively.¹⁹ The owners, on the other hand, have a very strong bargaining position enhanced by revenue sharing.²⁰ Such is the disparity that Professor Lock suggests that the goal of the labor exemption to the antitrust laws, reconciling the competing antitrust and labor policies, may not be met through bargaining because whatever compromise emerges will not be the product of good faith, arm's-length negotiations.²¹

To correct the situation and establish the proper scope of the labor exemption in professional sports generally and professional football in particular, Professor Lock suggests a combination of legislative and judicial action.²² He suggests that Congress amend the National Labor Relations Act to accommodate the unique nature of professional sports and that Congress either convince the NFL to establish economic incentives for teams to win so they will compete for players or repeal the league's present statutory antitrust exemptions. On the judicial side, Professor Lock recommends that the Minnesota district court hearing *Powell* should outline what limitations on free agency it finds acceptable. Without question these steps would work to resolve the current deadlock, but can these changes be made in the near future?

The Minnesota court could, if it so chose, respond in relatively quick fashion. But given the commitment to resolving the dispute through bargaining set forth earlier, can such action reasonably be expected? Further, the legislative process, required to address the questions at the basic level Professor Lock suggests, would be prolonged.

17. *Powell*, 888 F.2d at 567.

18. Lock, *supra*, note 11, at 354.

19. *Id.*

20. *Id.* at 357-58.

21. *Id.* at 397-98.

22. *Id.* at 414.

Moreover, there is question whether the players, for exactly the same reasons, would be any more effective in lobbying, than they are in bargaining. Furthermore, because of the high turnover in the player ranks, extending the time it takes to resolve the problem means that fewer current players share whatever benefits would result.

On the other hand, the owners also have an interest in resolving the question expeditiously. Obviously, if their bargaining position is what it is believed to be, they will get as favorable terms as they can expect.²³ More importantly, the league is at the threshold of another period of growth. Cities clamor for teams and television's appetite for NFL football seems almost insatiable. Opportunities in cable television and "pay per view" beckon. And on top of all this, there is growing international interest in the game. The key to maximizing this potential is the stability only a collective bargaining agreement will bring. The owners want and need the dispute to be resolved.

The answer is of course good faith, arm's-length negotiation recognizing the legitimate interests on each side. Obviously, neither unrestricted free agency, as the players demand, nor the current First Refusal/Compensation system is acceptable. Somewhere between these extremes must lie a point where the owners can have the continuity and competitiveness that makes for a viable professional league, and the players can have the freedom they need to control their careers and lives and be more justly compensated. It is in the interest of both sides to find a compromise. What follows is an attempt to establish that point by outlining a free agency system that addresses the legitimate interests of the players and the teams.

IV. A PROPOSAL

The major components of a free agency system must be: (1) determining which players shall be eligible; (2) deciding whether the team losing a player shall have the right of first refusal; and (3) establishing the compensation, if any, the signing team must give the team losing the player.

A. Eligibility

Veteran players whose contracts have expired and who have been in the league for four years should be eligible to make their services avail-

23. What the players have to consider is whether, without judicial intervention, their bargaining position will improve or further deteriorate with the passing of time. The players are so determined to deny the owners the benefits of the labor exemption for the First Refusal/Compensation system that they have filed to decertify their current association as their bargaining representative. *Starting Move to Decertify Leaves NFL Union in 'Uncharted Area'*, Wash. Post, Nov. 9, 1989, at C10, col. 1. Even if decertification is successful, the issue of free agency will eventually be bargained with the current association's successor. It seems the best that can occur will be that some current players will gain the benefits of unrestricted free agency unless the owners decided to face antitrust liability for whatever restrictions they may unilaterally place on player movement in the hope that those restrictions will be upheld under antitrust law's rule of reason.

able to all teams in the league. Four years seems appropriate because that is the "average" career length and thus, making this the eligibility point would mean that all players who were above the norm would be able to have the benefits of free agency. An effort should be made to set the time limit for eligibility so that at least fifty percent of the players become eligible. Certainly, given the short working careers of professional football players, setting a longer term would render the right without meaning.

Four years is also fair to the teams. It seems long enough to permit the team to recoup its "investment" in the player. Teams coach players in conditioning, skills, techniques and the team's own system of play. Four years would be time enough for the player to learn and put that learning to use for the team. Further, within four years a team can and should determine, with some precision, the value of a particular player to the team. This determination will enable the team, should it so decide, to attempt to sign the player to contracts covering seasons beyond the fourth. In other words, teams could attempt to get players to bargain away their forthcoming free agency in exchange for, one would assume, a higher salary than might otherwise be offered, some sort of guaranteed contract or other benefit. Regardless of the form of the benefit given in exchange for foregoing free agency, the availability of this opportunity can only result in the player being compensated more proportionately with his contribution to productivity.

B. *First Refusal*

The right of a team to match any offer made by another team, and thereby retain the rights to a free agent attempting to leave its team, should be eliminated because it has too chilling an effect on the exercise of free agency.²⁴ It has such an effect because teams are not willing to bargain with a free agent knowing that if they offer him anywhere near his true worth, his current team will retain his services simply by meeting the offer. If free agency is to be in any way effective to meet the legitimate interests of the players, there cannot be any right of first refusal.

However, the "losing" team should be allowed to enter the bidding for a player attempting to exercise his free agency right by negotiating with another team. This would require teams to accurately assess a player's value to them, their resulting interest in him and place a dollar value on that interest. One would think that their offer would reflect his value to the team as a player, his value in maintaining fan loyalty to the team and the value to the league generally in keeping the player on his present team in order to maintain competitiveness throughout the league. This, however, may be exactly what the owners are trying to avoid.

Another benefit of denying teams an absolute right of first refusal but permitting them to enter the bidding for one of their players exer-

24. *Powell*, 678 F. Supp. at 777.

cising his right to negotiate with other teams, is that it provides an incentive to teams to treat players well while they are under contract to the team. This goes beyond paying the player appropriately to include helping him adjust to the city in which he is contractually bound to play and live, helping build a future in that city and giving him the belief that he has the opportunity to play with a winning team.

C. *Compensation*

The compensation for signing an eligible veteran free agent should be a draft choice equal to the draft choice used to acquire the player. For example, if a team signs a player who was a first round draft choice, then it owes the losing team a first round draft choice. Or if a team signs a player who was acquired in a trade for a second round draft choice, then it owes the losing team a second round draft choice. Draft choices are a medium of exchange professional football understands and with which it is comfortable.

The major benefit of this system, as distinct from the current one, is that the player does not become less attractive as a free agent because his salary is high. Compensation being set by acquisition cost, rather than salary, allows a player's salary to reflect his productive value to his team without it having a chilling effect on his free market value should his present team undervalue his services. Although the current compensation system gives teams an incentive to pay slightly higher salaries in order to drive up potential free agency compensation they may receive, the chilling effect of high free agency compensation has kept player movement at a minimum and thus kept overall salaries at a lower level. Removing salary as a criterion in setting free agency compensation levels will result in each player being paid more in relation to his productive value both by the team currently employing him and by those teams that may covet his services.

Another benefit of this "same round" draft choice compensation is that it works to the advantage of lower draft choices who perform better than anticipated. For example, suppose a player is drafted in the tenth round but becomes a first team starter and a league all-star. Under current practices such a player is "slotted" for salary purposes, meaning he has great difficulty getting his salary to a level equal to comparable players who entered the league as highly coveted draft choices. Under the system proposed, there would be incentive for teams that have such players to pay them appropriately in order to keep them from seeking their true value from another team. Undrafted players who become superstars or even journeymen would also have their salaries quickly raised to reflect their true worth to the teams employing them.

Thus "same round" draft choice compensation would help create a free agency system that not only would benefit first round draft choice superstars, it would benefit players throughout the ranks. It would result in more just compensation for all, and would reduce the impact of the disparity of skills among the players which weakens the National

Football League Players Association ("Players Association" or "Association") as a bargaining representative. At the same time, "same round" compensation free agency requires a number of limitations that serve the owners' legitimate interest in maintaining competitive balance throughout the league.

First, in order for a team to sign a veteran free agent it would have to have an appropriate choice available in order to make compensation. This has a number of effects. It prevents one team from attempting to sign all the available superstars; typically, no team would have enough choices in the high rounds to enter the bidding for more than a few of available players. Thus it prevents a team from becoming a free agent predator. It also prevents teams, in what are believed to be the more attractive cities, from dominating the league because they would not have enough draft choices to meet the compensation requirements for all the players that might be attracted to them. The net result is that the chaos the owners fear would be avoided. Rather, there would be a sufficient number of bidders, especially for the under-valued players, to insure a competitive market so that players would be more justly compensated.

Second, if the signing team's draft choice in the forthcoming draft is lower in the round than the choice used by the losing team to acquire the free agent being signed, the signing team should be required to also give its draft choice in the next round. The reason for this limitation is so that successful teams will not have an incentive to, in effect, "trade up" in the draft by signing a veteran free agent from a weaker team that used a higher draft choice with which to acquire that player. For example, suppose the current year's Super Bowl champion with the last choice in each round of the draft, sought to sign a veteran free agent who was selected with the very first choice in the first round of the draft. It would be more tempting for the champion to sign established players, known performers, if all it was required to give as compensation was a relatively lesser chance to draft a younger player with potential. This limitation reinforces the underlying theory of the draft by giving the less successful teams with higher draft choices an advantage in the bidding for veteran free agents. It also serves to maintain competitive balance because it makes the compensation price higher for traditionally successful teams. Yet it does not diminish the number of bidders; it merely shifts bidding power among the bidders in a fashion the league has favored.

One additional benefit to competitiveness results from "same round" compensation free agency. The less successful teams with high draft choices will be encouraged to retain those draft choices rather than trade them. These choices would become more valuable because they would represent two ways of improving a team rather than one. They could be used in the customary way to select entering players or they could be used to sign established veteran free agents. Increasing the

value of the higher draft choices held by the less successful teams also reinforces the underlying theory of the draft.

“Same round” compensation free agency requires one more limitation that prevents chaos but does not diminish competitive bidding for player services. The period during which negotiations with, and signings of, veteran free agents could occur would have to be restricted to a time between the end of the season and the next draft. It is convenient to set this time as beginning after the Super Bowl and ending a week before the draft. That allows enough time for active bidding and negotiation and also permits time to plan for the changes in teams’ drafting plans that will occur.

A modification in “same round” compensation is needed for veteran free agents in the latter stages of their careers. “Same round” compensation would have too chilling an effect on the ability of high draft choices who are in their eighth or ninth season of play to provide the freedom of choice such players deserve. The physical toll of professional football is so great that it is only in the rarest of circumstances that a team would surrender a high draft choice to sign a player who had been playing eight years, regardless of that player’s ability. But players who have been in the league that long and who are capable of contributing to a team so that they may become a coveted free agent, have earned greater freedom rather than less. Thus, the draft choice compensation owed by the signing team to the losing team should be adjusted downward. The adjustment could be on a sliding scale geared to the number of years the player has been in the league, that is the draft choice compensation could be one round lower than that in which the player was selected for each year beyond six the player has played in the league. Alternatively, the compensation could be set at a “flat rate,” that is, an eighth round choice for a player signed after his eighth year. However this modification is made, the point is that it should be made so that whatever free agency system emerges from negotiation, it meets the interests of these players who have made an extraordinary contribution to the league.

There is one additional area of compensation that ought to be considered. That deals with extraordinary medical costs. Suppose a player is severely injured and the team pays all the medical costs to repair the injury and also pays the player’s salary, as it should, while the player recovers. Suppose the player returns to competition the following year, plays well and becomes eligible for free agency. Should a team that signs such a player be required to somehow share those costs, including the salary that was paid while the player recovered, but did not play? In *Mackey v. National Football League*,²⁵ the court held the teams were not entitled to compensation for their investment in player development costs because those expenses were similar to those incurred by other businesses.²⁶ However, the extraordinary medical costs that often occur

25. *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

26. The reasoning seems akin to the reasoning that essential reliance, as distinct from

in professional football go beyond and are not similar to those incurred in other businesses, and some thought should be given to them. While on the one hand, it is not in the players' interest to raise the required free agency compensation, it certainly is not in the players' interest to discourage teams from providing the best medical care and rehabilitation available.

V. CONCLUSION

It would be beneficial to both the players and the league to resolve the current dispute over free agency. The quickest way to resolve it is through bargaining. However, the only bargaining that has any chance of succeeding is bargaining that recognizes the legitimate interests of each side.

incidental reliance, is not recoverable in contracts. See Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936).