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NFL Players Association
Case 2-CB-12117 (as amended)

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530-6033-7001-5000 554-1433-6717
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This Section 8(b)(3) case was submitted for advice as to whether the Union unlawfully refused to bargain unless the Employer first presented new written proposals and whether the Union unilaterally abrogated the existing system of right of first refusal/compensation in the absence of a good faith impasse.

FACTS

The present case arises out of the 1987 contract negotiations between the National Football League Management Council ("Management Council" or the "Employer") and the National Football League Players Association ("Players" or the "Union"). It is based on the Employer's March 2, 1988 [1] amendment of its earlier Section 8(b)(3) charge against the Union.[2] The amended

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[1] All dates from April-December are in 1987 and from January-March in 1988, unless otherwise noted.

[2] The original charge, Case 2-CB-12117, was filed on September 16, 1987 and alleged that the Union had violated Section 8(b)(3) by insisting upon certain permissive bargaining subjects and by engaging in bad faith and surface bargaining. By memorandum dated April , 1988, we

charge alleges that since January 29, the Union has violated Section 8(b)(3) by refusing to bargain for a new collective-bargaining agreement unless the Employer presented written proposals in advance of any meetings. The charge as amended also alleges that the Union violated the Act by unilaterally abrogating the system of right of first refusal/compensation.

The general background facts concerning the parties' unsuccessful efforts to reach agreement between April and October 1987 are set forth in the separate Advice Memorandum dated April , 1988. We supplement those facts as follows: The parties suspended contract negotiations on October 11 when the Employer rejected the free agency aspect of the Union's last proposal (hereafter the "October 11" or "Tysons Corner" proposal). In that proposal, the Union proposed the retention of the existing right of first refusal/compensation system with two modifications, i.e., that in order to exercise first refusal rights a club would have to make a "qualifying offer" of a guaranteed contract at 120% of the players' old salaries and that the compensation owed by new clubs employing "free agents" would be based upon the value of the players' expired contracts with their old clubs. In the Employer's view, that proposal effectively subverted the first refusal aspect of the system by providing guaranteed contracts at increased salaries and, consequently, would undercut a player's willingness to sign a contract of more than one year's duration. The Employer also contended that the Union's October 11 proposal would virtually destroy the draft choice compensation component of the system and would undercut the competitive balance in the League by using a player's old salary as the measure of his market value. The Employer specifically told the Union that, in conjunction with the Employer's proposed rookie wage scale, the Tysons Corner proposal would totally eliminate draft choice compensation.

On October 15, the Union ended its strike and filed an antitrust lawsuit. [3] There were no further meetings for bargaining until November 23, when Jack Donlan representing the Management Council and Gene Upshaw of

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authorized the Region to dismiss the original allegations of the charge, absent withdrawal.

[3] Powell, et al. v. National Football League, et al., Civil No. 4-87-917 (D. Minn.).

the Players met at Fordham Law School. At this meeting, Donlan brought up the "West Coast Plan," an alternate free agency system that had been discussed in the 1987 negotiations. [4] He asked questions about it, voiced problems with it and clearly did not propose it. As to one of his expressed problems with the West Coast Plan, Donlan contends that he asked Upshaw whether and how long the Union would agree to extend the West Coast Plan beyond the term of the parties' eventual collective-bargaining agreement. [5] According to Donlan, Upshaw only indicated that he might agree to an unspecified longer duration. [6] Donlan did not pursue the issue any further. Following this discussion of the West Coast Plan, Donlan also reiterated the above-noted deficiencies of the Union's October 11 proposal. The discussion of the free agency issue ended after Donlan unsuccessfully attempted to persuade Upshaw that a large percentage of players would actually be free to move, subject only to first refusal rights and less than third round draft choice compensation, under the Employer's last "liberalized" proposal. Donlan states that he further offered to improve that Employer proposal by updating the dollar values to reflect 1988 salary levels and indexing compensation levels thereafter to reflect increases in player contracts or other economic factors. The Union denies any change in the Employer's proposal, most specifically the indexing. The November 23 meeting ended after a short discussion of the pension issue in which Donlan continued to insist on the Employer's last proposal calling for negotiation of benefits only, while Upshaw insisted that the parties negotiate contribution levels as well as benefits.

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[4] The parties agree that the general parameters of the Plan called for the League's entry-level wage scale, followed by the existing first refusal/compensation system for a period of years, a right of first refusal but no compensation for some years, and total free agency thereafter. Neither party, however, claims to have proferred the West Coast Plan as a bargaining proposal and, in fact, disagree as to who originated the concept.

[5] Upshaw denies this part of the conversation.

[6] Donlan questioned Upshaw as to the duration of a potential West Coast plan because of the Employer's need for a period of "labor peace" following the costly strike. Thus, Donlan told Upshaw that the Employer was concerned about duration because the Union would try to reduce the periods of first refusal and compensation and of first refusal alone as soon as any new free agency agreement expired.

After the November 23 meeting, the parties discussed various issues in at least one telephone call and in an exchange of letters dated December 9, 14 and 17, 1987. The letters were aimed, in part, at setting up another meeting. Thus, in the December 9 letter, Donlan told Upshaw he was willing to meet at any time. On December 14, Upshaw, inter alia, suggested meeting the next week and asked Donlan to provide him with any new written proposals for his review prior to the meeting. In the December 17 letter, Donlan took issue with Upshaw's version of their difficulties in scheduling another session. He also corrected Upshaw's statement that the Employer was unwilling ever to change the free agency system and argued that the Employer had offered substantial changes in the system, but "simply rejected any changes which would scrap the essential components of [the system]: the draft, first refusal and compensation." Finally, Donlan again characterized the Union's October 11 proposal as "even worse" than the September 15 proposal and as "a step away from us."

The parties next met on December 22, 1987, at which time Upshaw and Donlan were joined by other members of their bargaining committees. Both parties agree that the discussion of the free agency issue, including the West Coast Plan, reiterated much of the November 23 discussion concerning the Employer's problems with the West Coast Plan [7] as well as the Employer's willingness to further improve, in some unspecified way, on its system proposal. In addition, the parties also briefly discussed, but did not depart from, their prior positions on the pension issue.

At the end of the December 22 meeting, Upshaw indicated to Donlan that he would be able to meet after the holidays. Donlan telephoned Upshaw, without success, on several occasions in January and early February to arrange a meeting. [8] On January 29, the District Court stayed further proceedings in the Union's antitrust suit pending the disposition of the bad faith bargaining

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[7] Donlan contends that he repeated his questions and concerns regarding the nature and duration of the West Coast Plan, and that no one from the Union responded to his inquiry as to duration.

[8] Donlan hoped Upshaw would attend the Pro Bowl in Honolulu in February, and repeatedly questioned Upshaw as to his plans in that regard. Neither party asserts that any specific suggestion was made that they meet in Hawaii to continue bargaining.

allegation in the original charge, and held that the nonstatutory labor antitrust exemption would continue to insulate the right of first refusal/compensation system until the parties reach impasse.

Thereafter, between February 11 and March 2, the parties exchanged a series of letters setting forth, inter alia, their views on the free agency issue and the prospects for further bargaining. In each of his letters, Upshaw demanded that Donlan submit, prior to meeting, written proposals showing that the Employer intended to depart from its proposals to maintain the first refusal/compensation system. Donlan, on the other hand, asserted without specificity the Employer's willingness to liberalize its proposal and noted that improvements in other economic areas were linked to an agreement on a first refusal/compensation system. He urged the Union to return to the bargaining table to discuss all of the interrelated issues.

Concurrent with this exchange of letters and following Judge Doty's decision, the Union's antitrust counsel notified the Management Council on February 1 that, based upon its belief that the parties were at impasse, the Union would be pursuing its antitrust remedies to seek relief from the right of first refusal/compensation system. The Union also notified its player agents on February 7 that they should consider their clients whose contracts expired on February 1 to be free to sign with any NFL club without first refusal or compensation restrictions.

The parties next met in March in Maui, Hawaii, while attending meetings of the joint competition committee. On March 7, Donlan says he contradicted Upshaw's assertion that the Employer's position on the system had not changed. Upshaw says that Donlan admitted that neither side had changed. In any event, the parties briefly reviewed the previously discussed approaches to the free agency issue including the West Coast Plan. Donlan insisted that the Employer's position on the system was not final, but still no specific proposals were made. At the end of the conversation, Upshaw again asked the Employer to put any proposals it had in writing. Donlan and Upshaw discussed the system by telephone the next day. Donlan again criticized Upshaw for saying that the Employer's position had not changed, and insisted that its proposal was not a final one,

whereupon they briefly discussed the West Coast Plan. This discussion apparently tracked the discussion of the Plan at the November 23 and December 22 meetings. Thus, Donlan again expressed his objections to its substantive provisions, and explained his need to know how long the Union would "lock in" such a plan to prevent another costly strike in a few years over Union attempts to shorten the duration of the first refusal/compensation components. Following the discussion of the West Coast Plan, Donlan addressed the Union's October 11 proposal and asserted that it had not included unfettered free agency at some point in a player's career. Upshaw responded "that was then; this is now" and explained that the players had suffered financial setbacks since that time and players had to be free to move at some point in their careers.

The parties met for the last time on March 11. It appears that Upshaw initiated the discussion of free agency by questioning whether there was any point in meeting since the parties' positions had not changed. Most of this session focused on other subjects, including the status of the antitrust suit, and on Donlan's contention that the parties were not at impasse. Thus, Donlan reiterated his view that the Employer's position on free agency was not final, but that the issue was essentially an economic one, so that "if the system costs more, we've got to get it from other places." The Employer did not present any new proposals or modify its existing proposal at this meeting.

ACTION

We conclude that the instant charge should be dismissed, absent withdrawal.

The Board has defined impasse as "a state of bargaining at which the party asserting its existence is warranted in assuming that further bargaining would be futile." [9] Further, the Board has found that where, after extensive bargaining, the parties are deadlocked on an issue of overriding importance, there may be a bargaining impasse notwithstanding the fact that there is

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[9] E. I. Dupont & Co., 268 NLRB 1075, 1075 (1984). See generally Taft Broadcasting Company, 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968).

a possibility of movement on other issues. [10] Although the parties' characterization of the status of negotiations is relevant to an impasse determination, the absence of a claim of impasse will not preclude such a determination where other factors demonstrate that either or both sides' positions are not open to compromise.[11]

In light of these principles, we conclude that the parties reached a bargaining impasse at their October 11 session when the Employer adhered to its proposal for the current system, as liberalized, and rejected the Union's last proposal on free agency. It is clear that the free agency issue was the dominant issue in the negotiations for a new collective-bargaining agreement. Indeed, at the outset of negotiations in April 1987, the Employer characterized the subject as "the major bone of contention." And, by September 7, the Employer took the position that the value of the Employer's economic benefit package was inextricably linked to the Union's agreement on retention of the extant system, albeit as "liberalized."

Throughout the negotiations it was plain that the Employer would liberalize the existing system but would not eliminate the existing first refusal and compensation components. ,,By contrast, the Union consistently took the position that players had to be free to move without the system's restrictions at some point in their careers. The Union made a series of concessions on this subject but never yielded from its demand that players be free at some point. More specifically, the Union's initial demand was for the immediate elimination of the existing system in favor of "total" free agency. On September 15, the Union offered to retain the existing system for players up through their fourth year, and finally on October 11, proposed to retain the existing system if old clubs were required to tender guaranteed increased

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[10] E. I. Dupont & Co., 268 NLRB at 1076. Compare Bell Transit Co., 271 NLRB 1271, 1273 (1984)(overriding importance of wage issue strong support for impasse finding) with Henry Miller Spring Co., 273 NLRB 472, 472 (1984)(impasse finding not warranted where no issue of paramount importance identified and negotiations ongoing). See also Presto Casting Co., 262 NLRB 346 (1982); Taylor-Winfield Corp., 225 NLRB 457 (1976).

[11] See, e.g., Western Publishing Co., 269 NLRB 355, 360-361 (1984); Carpenter Sprinkler Corp., 238 NLRB 974 (1978); Taylor-Winfield Corp., supra; Times-Herald Printing Co., 221 NLRB 225 (1975).

contracts, in lieu of the existing nonguaranteed minimum qualifying offers, in order to trigger the right of first refusal and compensation. This provision for guaranteed contracts clearly would continue to restrict the movement of some players, but would permit unrestricted movement for others. The Employer rejected the Union's proposal precisely because the proposal would, in application, undermine and potentially destroy the compensation and first refusal components of the existing system. Thus, the Employer rejected the Tysons Corner proposal because it promoted the Union's principal objective: uncompensated movement for some free agent players at some point in their careers.

In our view, the Employer's rejection of the October 11 proposal, and concomitant failure to make any compromise proposal of its own, establish that the parties were at impasse on free agency on October 11. In essence, the Employer always wanted to retain the right of first refusal and compensation components of the system and the Union always wanted to be rid of such restraints. The Employer was willing to liberalize the current system, and the Union was willing to delay its goal of eliminating that system and to alter the avenue by which such elimination was obtained, but neither party was willing to give up its ultimate objective. Since the ultimate objectives were fundamentally opposed and because of the dominant importance of that subject, we conclude that the parties were at a bona fide impasse in negotiations on October 11.

While we conclude the parties were at impasse on October 11, we recognize that the impasse could have been broken by subsequent events if "the circumstances which led to the impasse no longer remain in status quo." [12] In this regard, the Employer asserts that the termination of the strike and the filing of the antitrust suit on October 15 could have broken the bargaining impasse. Assuming, arguendo, that such changed circumstances could break a pre-existing impasse, the meetings and correspondence between the parties in November and December clearly show that they did not or that, if

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[12] Kit Manufacturing Co., 138 NLRB 1290, 1294 (1962)(quoting Boeing Airplane Co., 80 NLRB 447, 454 (1948)). See also Transport Company of Texas, 175 NLRB 763, 763, n.1 (1969)(impasse broken where totality of circumstances establishes that conditions surrounding original impasse materially changed).

broken, the impasse immediately was established again. Thus, despite assertions that its position was not fixed and that "other options" for free agency had been discussed, the Employer does not claim to have made a single new proposal that would alter the fundamental components of the existing system. Furthermore, the Employer voiced strong reservations about the West Coast Plan at both meetings. In this regard, we conclude that the November 23 and December 22 discussions of the West Coast Plan did not break the deadlock on free agency. Thus, the Employer does not claim to have initiated the discussion of the West Coast Plan as a bargaining proposal. Nor does the evidence support a conclusion that the Plan was floated as a "trial balloon" which arguably could have broken the impasse and required further bargaining. Thus, in each discussion of the West Coast Plan, the Employer emphasized the unacceptable aspects of the Plan. To the extent that the Employer questioned the Union as to how long it would "lock in" the West Coast Plan, its own evidence indicates those inquiries were vague and did not seek to engage the Union in a more substantive discussion of the Plan. In these circumstances, we believe that the discussions of the West Coast Plan were hypothetical and indefinite and did not break the impasse. The Employer also reiterated its original objections to the Union's October 11 proposal. In addition, the Employer's asserted openness to other options is contradicted by its December 17 letter in two respects: the letter reasserts the Employer's refusal to accept any change in the system's "essential components" and reaffirms the Employer's rejection of the October 11 proposal. Based upon these factors, and the failure of either party to change its position, we conclude that the parties remained at impasse on free agency in November and December. [13] Accordingly, we conclude that the end of the strike and the filing of the lawsuit did not in fact break the impasse that had previously existed.

Finally, assuming, without deciding, that Judge Doty's January 29 decision could have broken the impasse, the parties' subsequent exchange of letters in February

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[13] In this regard, we also note that the Union was not amenable to the Employer's offers to factor in 1988 salary levels and/or to bargain over other adjustments in the first refusal/compensation system. Indeed, the Employer acknowledges that Upshaw disputed the impact of the Employer's liberalized proposal on the number of players who would be subject to third round or lower draft choice compensation.

and March and their March 7, 8 and 11 discussions reconfirm that the parties continued to be at impasse over the free agency issue. Thus, although Donlan asserted in the February 11 letter that the parties were in a position to make progress at the bargaining table, he merely reiterated his previously unsuccessful argument that the Employer's liberalized system proposal would result in substantial numbers of players being eligible to move subject to lower levels of compensation and in some players being able to move without first refusal. When Upshaw responded by letter dated February 19, he again rejected the Employer's liberalized system proposal, and explained the Union's continued objection that, under the system, even as liberalized, clubs could still subject players with low salaries and seniority to first refusal rights by making a minimum qualifying offer. On February 24, Donlan again wrote Upshaw, urging him to return to the table to discuss all of the closely interrelated issues and stressing as well that the owners would likely be unwilling to continue to fund the economic benefits previously guaranteed under the 1982 agreement if a fundamental change in the system occurred. By letter dated February 29, Upshaw repeated the Union's opposition to the Employer's "liberalized" proposal and reaffirmed the Union's position on player movement without first refusal/compensation restrictions. Upshaw also asked Donlan to submit any new Employer proposals for his review and noted that the Employer had yet to make a new proposal. Donlan replied on March 2, and, with respect to the free agency issue, merely repeated the Employer's willingness to further liberalize and improve the existing system. No new offer was made.

Despite the absence of any new proposals from the Employer, the Union met with Donlan in Hawaii the following week. However, neither party claims to have made a new proposal on free agency during any of these conversations. Instead, the parties briefly reviewed the prior proposals on the free agency and pension issues and generally restated their respective objections to the other's proposals. [14] Based upon all of the evidence recounted above, and especially upon the absence of any indication that either party was willing to depart from

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[14] Upshaw's statement on March 9 that "that was then; this is now" shows, if anything, that the parties were even farther apart at that time.

its fundamental objective, we concluded that the parties remained at impasse even after January 29. [15]

Finally, we note the Employer's contention that the Union did not mention the word "impasse" or any synonym until after Judge Doty's opinion. However, as discussed supra, the parties' characterization of the bargaining is not critical; what is critical is whether, in fact, the negotiations have reached a point where, given the current positions of the parties, there is no reasonable prospect for agreement. In addition, the Union credibly asserts that it feared that a proclamation of impasse would lead to detrimental unilateral changes by the Employer.

For the foregoing reasons, the allegations of the amended charge should be dismissed, absent withdrawal, on the basis that the parties were and continue to be at impasse. Thus, even if the Union insisted on a written proposal before it would consider scheduling additional meetings, and even if there was a unilateral abrogation of the free agency system after January 29, such conduct was privileged by the existence of a good faith impasse. [16]

H.J.D.

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[15] See Transport Company of Texas, supra, at 767-768.

[16] In light of this result, we need not pass on whether there such conduct occurred. Additionally, in light of our decision on the free agency issue, we need not address whether the parties are at impasse on the issue of pension contributions.