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NFL Players Association  
Case 2-CB-12117

1450-7000	530-6033-0100	554-
1467-0100	530-6050-0140	554-
1467-0180	530-6050-1668	554-
1467-1800	530-6067-2020	554-
1467-2400	554-1443-1700	554-
1467-3600	554-1433-5050	554-
1467-5400	554-1450-0100	554-
1467-6000	554-1450-0140	554-

This Section 8(b)(3) case was submitted for advice on the issue of whether the Union unlawfully insisted upon permissive subjects of bargaining and/or engaged in surface bargaining with the intent to avoid reaching an agreement. <sup>1</sup>

FACTS<sup>2</sup>

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<sup>1</sup> This memorandum covers the original charge. A second memorandum, issued this date, covers the amended charge alleging a refusal to meet since January 29, 1988 and unilateral changes.

<sup>2</sup> The general background facts and bargaining history are set forth here; the specific facts relevant to each Employer allegation are set forth infra in the discussion of the respective allegations.

This 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"). The most recent collective-bargaining agreement (the "1982 agreement") expired on August 31, 1987.<sup>3</sup> At least one preliminary meeting between the parties' chief negotiators, Management Council Executive Director Jack Donlan and Player's Association Executive Director Gene Upshaw, was held in February. Thereafter, the parties met at least 35 times, commencing on April 20 with the exchange of opening contract proposals.<sup>4</sup> The parties next met on May 26, and sixteen further sessions were held between May 26 and August 14. No sessions were held during the two weeks preceding the August 31 contract expiration. Negotiations reconvened on September 2, and four sessions were held prior to the commencement of the strike on September 22. During this period, the Employer presented a comprehensive proposal to the Union on September 7, and the Union submitted a written counterproposal on September 15. The parties met 14 more times as of the strike's end on October 15. Meetings were also held on November 23, December 22 and March 7-11, 1988.

There is no serious dispute that one subject, free agency, dominated the negotiations. Thus, the Employer sought to retain the existing right of first refusal/compensation system ("the system") that gave member teams certain retention rights over veteran players whose contracts have expired, and required any new team signing such a player to compensate the old team for the player's value. The Union, on the other hand, opposed the right of first refusal/compensation concept and sought "unfettered" free agency at some point in a player's career.

The Employer filed the instant charge on September 16, the day after the Union submitted its counterproposal. The charge alleges that the Union bargained in bad faith by, inter alia, refusing to meet

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<sup>3</sup> All subsequent dates are in 1987 unless otherwise noted.

<sup>4</sup> The exact number of bargaining sessions is not entirely certain. Thus, the evidence reveals that the parties met on 30 separate dates, but had multiple sessions on several days. Upshaw and Donlan also had an undetermined number of private meetings and/or telephone conversations.

at reasonable times, failing to confer in good faith with regard to wages, hours and other terms and conditions of employment or making proposals and engaging in other conduct evidencing a desire not to reach agreement.

The Union has sued the National Football League and its member clubs for various antitrust violations and sought injunctive relief to prevent the NFL from continuing the right of first refusal/compensation system contained in the 1982 agreement. The District Court has stayed further proceedings in the Union's antitrust suit pending the disposition of the instant bad faith bargaining allegation against the Union.<sup>5</sup>

### ACTION

We conclude that the instant charge should be dismissed, absent withdrawal, for the reasons set forth below.

#### A. Insistence Upon Non-mandatory Subjects of Bargaining

The Employer alleges that the Union unlawfully insisted upon certain non-mandatory subjects of bargaining.<sup>6</sup> A bargaining subject is mandatory if it settles or relates to an aspect of the employer-employee relationship.<sup>7</sup> Some subjects that would otherwise fall outside this test may become mandatory because they are inextricably connected to a mandatory subject of bargaining.<sup>8</sup>

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<sup>5</sup> Powell, et al. v. National Football League, et al., Civil No. 4-87-917, slip op. at 30-31 (D. Minn. January 29, 1988).

<sup>6</sup> The alleged non-mandatory subjects are: the merger of the voluntary benefits plan implemented by the Employer on behalf of players who retired before 1959 into the contractual pension plan (the "Bell Plan"); the demand for immediate payment of some \$18 million in disputed fund contributions; the "Club Incentive" portion of the Union's April 20 free agency proposal (Article XV, Sec. 3); and the proposal according the Union or individual players the exclusive licensing rights to players' likenesses, names, etc.

<sup>7</sup> Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1971).

<sup>8</sup> See, e.g., Sea Bay Manor Home, 253 NLRB 739 (1980).

Although it is well settled that one party cannot force the other to bargain about permissive subjects,<sup>9</sup> it is equally true that merely proposing bargaining over non-mandatory subjects does not violate the Act.<sup>10</sup> A Section 8(b)(3) or 8(a)(5) violation will be found where, despite the other party's clear demonstration of unwillingness to negotiate in that area, the proposing party continues to insist upon the permissive subject.<sup>11</sup> Such insistence can take the form of: insisting to impasse on the permissive subject; conditioning agreement to any contract on the inclusion of the permissive proposal; and/or conditioning further bargaining on acquiescence to the permissive subject.<sup>12</sup> All three are referred to herein as "insistence."

The mere fact that a strike accompanies a permissive proposal does not necessarily establish unlawful insistence. Rather, where there a strike is deemed unlawful, the Board will find an unlawful insistence on the non-mandatory subject, and then go on to condemn the strike as being in support of the unlawful insistence.<sup>13</sup>

Applying these principles to the instant allegations, we conclude as follows:

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<sup>9</sup> See, e.g., NLRB v. Wooster Div. of Borg Warner Corp., 356 U.S. 342 (1958).

<sup>10</sup> Pittsburgh Plate Glass, supra.

<sup>11</sup> See, e.g., Taft Broadcasting Company, 274 NLRB 260, 261 (1985); Natl. Fresh Fruit & Vegetable Co., 227 NLRB 2014, 2015 (1977), enf. denied 565 F.2d. 1331 (5th Cir. 1978).

<sup>12</sup> See, e.g., Taft Broadcasting, supra, 274 NLRB at 261; Natl. Fresh Fruit & Vegetable, supra, 227 NLRB at 2015; Local 964, Carpenters (Contractors & Suppliers Assn. of Rockland County, N.Y.), 181 NLRB 948, 952 (1970).

<sup>13</sup> See e.g., Operating Engineers, Local No. 12 (Associated General Contractors of America, Inc.), 187 NLRB 430, 431-432 (1970) (strike in furtherance of proposal which union had insisted upon as precondition to any contract violated 8(b)(3); Local 164, Painters A.D. Cheatham Painting Co.), 126 NLRB 997, 1001-1003 (1960) (strike to compel inclusion of non-mandatory clauses in contract unlawful where union first insisted on clauses as a precondition to entering into a contract). Cf. International Association of Bridge Etc. Ironworkers (Virginia Association of Contractors, Inc.), 219 NLRB 957, 960-962 (1975) (strike did not violate 8(b)(3) where, even assuming certain union proposals were non-mandatory bargaining subjects, there was no evidence that they were conditions precedent to any contract, were insisted upon to impasse or precipitated the union's strike.

1. The Merger of the "Pre-59ers" into the Bell Plan

Initially, we note that this Union proposal entails bargaining over pension benefits of nonemployees and is therefore a permissive subject of bargaining. Pittsburgh Plate Glass, supra. Further, the Employer never agreed to bargain on this subject. On May 26, at the first bargaining session after the initial exchange of proposals, Donlan rejected the Union's demand on this subject because it was a non-mandatory subject over which the Employer was not required to bargain. After this initial rejection, the subject does not appear to have been discussed again until August 4, when Donlan reiterated that the Employer was voluntarily providing benefits to the pre-Bell Plan retirees and would not bargain in this permissive area. The Union then repeated the merger demand in its September 15 proposal. The Employer does not appear to have reiterated its refusal to bargain over the non-mandatory subject after September 15. However, in view of its earlier statements, it is clear that the Employer never consented to bargain over the inclusion of the pre-1959 retirees into the Bell Plan.

Moreover, discussions between the parties on other subjects do not establish Employer consent to bargain over the "pre-59er" merger issue. Admittedly, on July 30, the Employer proposed applying some of the savings from its rookie wage scale proposal to veteran players' benefits, and on September 18, the Employer stated that the Union could choose, at the expense of current players, to apply an Employer-proposed increase in past service credits to already retired players. However, neither of these Employer proposals establishes Employer consent to bargain over the extension of the Bell Plan to cover pre-1959 retirees.

Even though the "pre-59er" merger question is not a mandatory subject of bargaining and the Employer did not consent to bargain over the matter, we nevertheless conclude that the Union did not unlawfully "insist" on its demand in violation of Section 8(b)(3). Thus, after the Employer initially declined to bargain on the issue, the subject was brought up only twice. At the August 4 session, the discussion of the "pre-59er" merger question arose when the Union asked for the Employer's response to its pension proposal. The Employer declined to discuss the merger demand because it was not a mandatory

bargaining subject, whereupon the parties went on to discuss other aspects of the pension plan. Thereafter, the Union expressly restated its merger demand in its September 15 proposal, but the parties never addressed the issue again in the more than 17 meetings thereafter.

In sum, the Union did not condition further bargaining on the issue. Nor did it make the proposal a condition to reaching any contract. Moreover, negotiations on the subject were at such a preliminary stage that one cannot say that it was explored in such a way, or that the Union's intention was so fixed, as to satisfy any of the Board's tests for insistence to impasse.<sup>14</sup>

Finally, we conclude that the mere inclusion of the merger proposal among the Union's unmet demands at the time of the strike does not warrant a contrary result. It is clear that the major bone of contention in the 1987 negotiations and in the strike was the free agency issue. In these circumstances, the mere fact that other issues (e.g., merger of the "pre-59ers") remained unresolved at the time of the strike does not mean that the strike itself constituted an insistence upon the merger proposal.

## 2. The Disputed \$18 Million Fund Contributions

We further conclude that the Union's demand for payment of the delinquent fund contributions owed under the 1982 collective-bargaining agreement is a mandatory subject of bargaining and that withdrawal of the lawsuit is merely incidental<sup>15</sup> to the Union's lawful demand concerning this issue.<sup>16</sup> Furthermore, even assuming that the Union's demand was not in the area of mandatory subjects, there is insufficient evidence of an insistence on the demand as a condition of further bargaining or on

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<sup>14</sup> See, e.g., Taft Broadcasting Company, 163 NLRB 475 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968).

<sup>15</sup> Contributions to a pension fund are clearly a mandatory subject of bargaining. See, e.g., Abbey Medical/Abbey Rents, Inc., 264 NLRB 969, 974-975 (1982).

<sup>16</sup> In January 1987, the Employer trustees of the Bell Plan (the contractual pension plan) filed suit seeking a declaratory judgment that the Employer was not required to make certain contributions scheduled under the 1982 collective-bargaining agreement because those contributions were not tax deductible.

its inclusion in any contract. Nor is there sufficient evidence of an insistence to impasse.

### 3. The "Club Incentives" Aspect of the Union's Free Agency Proposal

We also conclude that the club incentive proposal is a mandatory subject of bargaining. Thus, the parties are in agreement that free agency and the existing right of first refusal/compensation system ("the system") are mandatory subjects of bargaining. The parties also agree that the compensation portion of the system also is subject to mandatory bargaining.<sup>17</sup> During negotiations, the Employer explained to the Union that "the system" was necessary to maintain competitive balance among the teams, but agreed to "liberalize" compensation by enlarging the number of players who could be picked up without compensation or for less costly draft picks. On the other hand, the Union's April 20 free agency proposal contained a planned incentive for clubs to improve their teams through the acquisition and/or retention of veteran players, as described in the "Game Plan 1987" booklet, a Union publication. In the Union's view, its proposal was designed to provide the NFL clubs with a real incentive to improve their chances for additional income by competing for talented players. Such competition clearly would have a direct effect on player movement and salaries. Accordingly, the Club Incentive proposal is a mandatory subject of bargaining because it is inextricably connected to the mandatory subject of free agency.<sup>18</sup>

In any event, even assuming that the Club Incentive proposal is a non-mandatory subject of bargaining, it is clear that it was not insisted upon in violation of Section 8(b)(3). In this regard, we note that the proposal was never mentioned in bargaining after the Employer's initial rejection of it on May 26.

### 4. Player Licensing

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<sup>17</sup> See Mackey v. NFL, 543 F.2d 606 (8th Cir. 1975) (then-existing NFL system of first refusal and compensation for players a mandatory subject of bargaining because it restricts player movement among teams and depresses player salaries).

<sup>18</sup> See Sea Bay Manor Home, supra.

This matter concerns the Union's demand that the Employer, the member clubs or any related NFL entity deal with the Union concerning the use of a player in a commercial or other promotion. We conclude that this subject is a mandatory subject of bargaining because the monies paid to the players for such uses are an emolument of the employment relationship. Hence, the Union cannot be bypassed from dealings on this subject. In the prior contract, the Union had waived its representational rights in this area. The Union's proposal was essentially an effort to retrieve representational rights. As such, it did not violate the Act.

B. Bad Faith and Surface Bargaining Allegations

The Employer also argues that, even assuming the Union did not unlawfully insist upon the foregoing subjects of bargaining, the Union violated Section 8(b)(3) by its overall conduct, which the Employer contends clearly establishes that the Union bargained in bad faith with no intention of reaching an agreement. Specifically, the Employer alleges that the Union refused to meet at reasonable times, that the Union engaged in surface bargaining with respect to two contract issues by raising new demands or objections to tentative agreements on these issues at the last minute, that the Union presented regressive proposals on the issue of free agency, and that the Union's September 15 written proposal was unreasonable on its face and in the timing of its presentation to the Employer. For the reasons set forth below, we conclude that these allegations of the charge also should be dismissed, absent withdrawal.

Before addressing each of these allegations, we note generally that the determination whether a party has bargained in good faith turns on the totality of the party's conduct and requires a determination whether the party is engaged in hard bargaining to obtain a desirable contract or is seeking to frustrate the possibility of any agreement. <sup>19</sup>

1. Failure to Meet at Reasonable Times and Intervals

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<sup>19</sup> See, e.g., J.D. Lunsford Plumbing, 254 NLRB 1360 (1981); Sunbeam Plastics Corp., 144 NLRB 1010 (1963).

It is clear that either party violates Section 8(a)(5)/8(b)(3) by failing to meet and bargain at reasonable times. In support of the instant charge, the Employer contends generally that the Union violated Section 8(b)(3) by refusing to meet at reasonable intervals and by refusing to stay at meetings for a reasonable time. The Employer has cited the following illustrations of the Union's bad faith: (1) the Union refused to set up the first bargaining session after the initial April 20 exchange of proposals until May 26, two weeks after the May 11 date proposed by the Employer; (2) Union President Marvin Powell declared, at the May 26 session, that there was no reason for frequent bargaining sessions before the expiration of the 1982 agreement; (3) the Union rejected Donlan's proposal to meet during the first week of June and agreed to meet only in the third week; (4) after only 3 short, unproductive meetings during the week of June 15, the Employer had to "chase" the Union to schedule meetings; on June 26, when the Employer finally reached the Union after several attempts, the Union agreed to meet, but only on its own timetable; and (5) the Union refused to meet at all in the critical last two weeks prior to the expiration of the collective-bargaining agreement on August 31. The Employer further describes a pattern of the Union's being 1/2 to 1 1/2 hours late for about 7 of the 17 meetings held prior to the expiration of the contract, and several occasions when the Union called off bargaining sessions after only a few hours.

After considering these allegations, we have determined that, in the totality of the circumstances, there is insufficient evidence of unlawful conduct. As to the failure to meet for two weeks after the May 11 date proposed by the Employer, we note that the Employer initially suggested that the parties meet on May 11 and the parties ultimately agreed to meet on May 14. However, the Union canceled the meeting on the morning of May 14 because of the birth of Upshaw's son. As to the alleged statement by Powell, the evidence establishes that Powell said only that the Union did not see any reason for any expenditure of time and effort if the Employer did not intend to be serious about negotiating before the expiration date of the collective-bargaining agreement. This statement is nothing more than bargaining table rhetoric, a challenge to the Employer to be serious about bargaining. It does not evidence an intent to stall negotiations.

With respect to the allegation that the Union refused to meet during the first two weeks of June, the Union told the Employer that it had scheduling conflicts for the first week and that Upshaw had personal conflicts for the second. Moreover, the Employer allegation that the meetings during the week of June 15 were short and unproductive does not itself establish bad faith, absent some evidence that the Union purposely made them short and unproductive. With respect to the Union's insistence on its own timetable, the evidence indicates only that the Union had dates which, for business reasons, were unavailable for purposes of bargaining. The Union did agree to three sets of dates in July and early August, and seven bargaining sessions, ranging from approximately 2 to 3 1/2 hours in length, were held on these dates. On balance, we conclude that the available evidence does not establish a refusal to meet unlawful or "foot-dragging" on the Union's part.

We do not believe that the Union's failure to meet with the Employer during the last two weeks of August establishes bad faith. Thus, Upshaw told the Employer that he had meetings with the AFL-CIO Executive Council during that time.<sup>20</sup> Moreover, Upshaw spent much of his time during those weeks meeting with players and player representatives. These activities, in anticipation of an economic dispute, are reasonable explanations for the Union's inability to meet during the last two weeks before the contract expired.

Finally, although Upshaw was late for several meetings, there is no suggestion that this was the result of anything other than a busy person with a busy schedule. And, although several meetings were brief, there is no indication that this was the result of anything other than the fact that the players believed that little progress was being made.

## 2. Surface Bargaining Allegations

The Employer also alleges that the Union bargained in bad faith by reneging on tentative agreements or injecting new demands after the parties reached tentative

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<sup>20</sup> Donlan states that Upshaw referred to a meeting with the Union's executive committee, but the difference is inconsequential to the legal question.

agreement on a given contract provision. In support of this allegation, the Employer points to negotiations on the subject of notice for Union meetings and on the subject of commissioner discipline.

We conclude that the evidence is insufficient to establish that the Union's conduct with regard to the "meeting notice" issue was in bad faith. The Union's proposal to change the 7 day notice for Union meetings provision to a "reasonable notice" provision was discussed without agreement on June 17 and again on July 9. On the latter date, the Employer stated that it could accept the Union's concept of less than 7 days' notice in emergency situations, but had difficulty with the proposed language. The Employer argues that the Union engaged in bad faith bargaining because, on July 29, when the Union returned with the draft of the proposed agreement on the notice provision, the Union's language brought up a new demand regarding the location of unit meetings. Contrary to the Employer's contention, we do not see this as evidence of bad faith bargaining. The July 9 session did not result in any agreement, tentative or otherwise. Moreover, even if there were a tentative agreement, it was confined to timeliness of notice. The Union was free to later bring up a separate issue, locus of meetings.

The Employer alleges that the Union added a new demand after the parties had concluded an agreement on the commissioner discipline article. That new demand was that fines could go into a "dire needs" fund. The bargaining history shows that the parties had discussed uses for fine moneys and had agreed to the Employer's proposal to add a particular fund. Arguably, the Union's proposal to add still another fund was a retraction from a tentative accord. However, we do not believe that this Union conduct, standing alone, establishes a course of bad faith bargaining.

The Employer further alleges that, on September 15, the Union submitted a regressive bargaining proposal on the subject of free agency. We conclude that the allegation is not supported by the evidence. To the contrary, we believe that, even under the Employer's account of the bargaining history, the Union made a substantial movement toward the Employer's right of first refusal/compensation "framework." The September 15 proposal offered to retain the existing system for

players until their fourth year. The Employer contends that the September 15 free agency proposal is illusory. We disagree the evidence indicates otherwise. Analyses of average contract length over the past several years demonstrate that there are many players whose initial contracts expire after 1, 2 or 3 years. Accordingly, the Union's offer to retain the existing system for all players whose contracts expire prior to their fourth year in the league would be substantial in application. The Employer may be correct that no player "of any caliber" would sign an initial contract for less than four years and, hence, be subject to the first refusal/compensation system. However, the fact that the Employer would not get everything it wanted under the Union's revised free agency proposal does not contradict the point that the Union made a significant move. Further, we note that, in assessing a bad faith bargaining allegation, the other party's position also is relevant. There is ample evidence in this case that the Employer's resolve to retain "the system" was at least as strong as, if not stronger than, the Union's position that players must be free to move at some time. In our view, the parties' adherence to their respective positions amounted to no more than lawful hard bargaining. Accordingly, we do not find that the Union's free agency proposals and pattern of bargaining as to free agency constituted surface bargaining.

### 3. The September 15 Proposal

We also do not consider the September 15 proposal to manifest the Union's bad faith on its face or by its timing. The Employer alleges that the Union waited until that date, which was shortly before the strike, to submit specific figures for approximately 15 economic items. The Employer also asserts that the large size of these figures, the "hidden costs" of the free agency proposal, and the minimal amount of change made from the Union's proposal of April 20, all indicate that the Union's position of September 15 was predictably unacceptable.

We find no merit to the allegation. The Union's proposals occurred just before the September 21 strike, at a time when the Union contemplated that its strike would be successful. Thus, the Union viewed its bargaining position as strong, and its proposals reflect that perception. Accordingly, the Union's demands on

September 15 establish only hard bargaining and do not establish bad faith bargaining.

C. Conclusion

As set forth above, there is insufficient evidence to establish that the Union bargained in bad faith, and for all the foregoing reasons, the allegations of the instant charge should be dismissed, absent withdrawal.

H.J.D.