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No. 08-661

IN THE
Supreme Court of the United States

AMERICAN NEEDLE, INC.,

Petitioner,

v.

NATIONAL FOOTBALL LEAGUE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS BRIEF OF THE NATIONAL FOOTBALL LEAGUE COACHES ASSOCIATION IN SUPPORT OF PETITIONER

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I. Statement of Interest

The National Football League Coaches Association ("NFLCA") is a voluntary non-union association that represents the over six hundred coaches and assistant coaches currently employed by the thirty-two individual National Football League ("NFL") teams, as well as many retired coaches formerly employed by the NFL teams. The individuals represented by the NFLCA negotiate employment contracts and receive wages and pensions from the individual NFL teams. These individuals would be significantly affected by the outcome of this litigation because their compensation is determined by market competition between the NFL member teams. A ruling that diminishes competition between NFL teams will directly harm the NFL coaches and assistant coaches.[1]

II. Summary of Argument

The rule of reason under section 1 of the Sherman Act, 15 U.S.C. § 1 (2006), permits procompetitive collaborations and prohibits anticompetitive collaborations. Accordingly, current law prohibits the thirty-two teams that comprise the NFL from engaging in anticompetitive collusion but places no restriction on their many procompetitive collaborations, including the

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission. Counsel of Record for all parties have consented to this brief's filing. The letters of consent have been filed with the Clerk.

joint-production of football games. Permitting a single entity defense, and thus removing the NFL and its member teams from section 1 scrutiny, would enable the teams to engage in anticompetitive collusion where there now is robust competition. One arena in which the NFL teams now compete is the labor market for football coaches, and thus a single entity defense would end competition in that currently robust market.

III. Rejecting The Single Entity Defense Would Not Prohibit Procompetitive Collaborations.

Section 1 case law appropriately grants sports teams in a professional league wide latitude to collaborate. This latitude extends most paradigmatically to developing rules and the other cooperative frameworks required to jointly produce live entertainment in professional sports. *NCAA v. Bd. of Regents*, 468 U.S. 85, 101 (1984) ("[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."). Judge Bork famously noted that "some activities can only be carried out jointly. Perhaps the leading example is league sports." Robert Bork, *The Antitrust Paradox* 278 (1978).

Section 1 also gives a league's teams, like the NFL teams, significant leeway to collaborate in economic endeavors even though teams are "separate economic actors pursuing separate economic interests" and do not fall squarely under the exemption laid out in *Copperweld Corp. v. Independence Tube Corp*, 467 U.S. 752 (1984). Courts, applying the rule of reason, have permitted league teams to collaborate in marketing common television broadcast rights, *Chi. Prof'l Sports Ltd. v.*

NBA (*Bulls II*), 95 F.3d 593, 598 (7th Cir. 1996) ("[A]ntitrust law permits, indeed encourages, cooperation inside a business organization the better to facilitate competition between that organization and other producers."); to jointly issue licenses for marketing intellectual property, *Major League Baseball Props. v. Salvino*, 542 F.3d 290, 327, 330 (2d Cir. 2008) (ruling that "centralization of the licensing and protection of MLB Intellectual Property has produced many cost-savings and efficiencies" in part because "MLBP lacked power in the relevant market . . . for the licensing of intellectual property related to sports and certain entertainment products"); and to jointly promote safety and other procompetitive objectives, *Neeld v. NHL*, 594 F.2d 1297, 1300 (9th Cir. 1979) (permitting rule excluding one-eyed player because "any anticompetitive effect is at most [d]e minimis and incidental to the primary purpose of promoting safety") (internal citation omitted).

Common in all these cases is that professional sports teams compete economically in an output market for fan attention and consumer dollars. Such competition, to varying degrees, spans across sports leagues and extends into other sources of live entertainment. This view was summarized by then-Justice Rehnquist when he accurately characterized the NFL teams as "joint venturers" when he observed, "[t]he NFL owners are joint ventures who produce a product, professional football, which competes with other sports and other forms of entertainment in the entertainment market. Although individual NFL teams compete with one another on the playing field, they rarely compete in the

market place." *NFL v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from a denial of certiorari).

However, NFL teams also compete against each other in various input markets in which other sports leagues and sources of live entertainment do not compete. One example is in the market for hiring coaches and assistant coaches. NFL coaches cannot leverage their skills to seek employment from other professional sports leagues. Although perhaps there is some competition from collegiate teams and non-NFL football (e.g. the Arena League) teams, non-NFL possibilities rarely offer professional opportunities that compare to those in the NFL. Although market definition is ultimately an empirical question, the market for NFL coaches appears quite distinct, and any collaboration among the NFL teams that impedes competition in this market, unlike the collaborations described above, should be presumptively anticompetitive.

Accordingly, treatment of collaborations among professional sports teams under section 1 depends heavily on the market in which an alleged restraint takes place. Critically, the teams' ability to join in procompetitive collaborations does not mean that all their collaborations are procompetitive. *Bulls II*, 95 F.3d at 600 ("Just as the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of sports teams to agree on a TV contract need not imply an ability to set wages for players."). To the contrary, many possible collaborations

are anticompetitive, and the rule of reason is designed to identify and prohibit such collusion. Permitting the single entity defense would permit all collaborations, including anticompetitive collusion, whereas rejecting the single entity defense would not preclude any procompetitive collaborations.

IV. Permitting the Single Entity Defense Would Stifle Competition in the Currently Competitive Market for Hiring Coaches

The NFL teams compete vigorously as separate economic units in the hiring market for professional football coaches. Treating the NFL and its member teams as a single entity would eliminate meaningful competition in this (and potentially other) markets. *See* Brief for the United States as Amicus Curiae at *5, *Am. Needle, Inc. v. NFL*, (U.S. May 28, 2009) (No. 08-661), 2009 WL 1497823. Specifically, NFL teams could agree on wage schedules for coaches—conduct that would normally constitute a naked horizontal restraint—and yet would be beyond the reach of section 1. Such a plan to constrain the wages of coaches, especially assistant coaches, was attempted by the NCAA, *see Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998), and the specter of such efforts is of great concern to current coaches represented by the NFLCA.

A. There is Current Competition among Teams for Individual Coaches

The individual NFL teams currently compete for individual coaches. As in all well-working markets, high quality coaches attract interest from multiple employers

and consequently receive compensation commensurate with the demand they attract. There is substantial evidence that there currently is robust competition in this market.

For example, recent media reports indicate that NFL teams offer attractive compensation packages to attract talented coordinators from rival teams. *See, e.g.*, Mike Freeman, *Lewis Deal Ups Ante for Other Assistants*, N.Y. Times, Feb. 17, 2002, § 8, at 5 (detailing the Redskins' aggressive bid to lure Marvin Lewis from the Ravens); *Lewis Gets a Lucrative Consolation Prize*, News Service Reports, Feb. 12, 2002 (quoting Steve Spurrier, then-Redskins coach, "don't you think the best defensive coordinator in the country is worth one-seventieth of what you're paying the team? The defensive coordinator is one of the most valuable players on your team").

Teams also increase compensation packages for current coaches to match offers made by competing teams. *See, e.g.*, Jason La Canfora, *Spagnuolo Will Stay Put; Giants Assistant No Longer a Candidate for Redskins Job*, N.Y. Times, Feb. 8, 2008, at E01 (reporting that the Giants offered its defensive coordinator a more lucrative contract after he received offers from competing teams); Jean-Jacques Taylor & Matt Mosley, *Payton Rejects Raiders, Will Stay with Cowboys*, Dallas Morning News, Jan. 22, 2004, at 1C (reporting Cowboys' similar efforts to retain offensive coordinator).

Under a single entity defense, teams could collude over offers for individual coaches, limiting their freedom to seek fair compensation and to command the value they would obtain in a competitive market.

B. There is Current Wage Competition among Teams

Competition in the labor market for professional football coaches is not limited to competition for specific individuals. Competition also includes wage competition among teams for their own coaches, in which competing NFL teams pay their coaches in response to market rates. *See, e.g.*, NFL Coaches Association, Coaches Use Salary Survey to Negotiate Contracts (Sep. 22, 2008), http://www.nflcoaches.com (reporting that, to reward a long-time offensive line coach, the Indianapolis Colts promised a new salary "among the top five in his position"); Nancy Gay, *Coach Pool Getting Deeper; Raiders Considering Four Candidates for Job*, S.F. Chron., Jan. 12, 2004, at C1 (reporting that the Kansas City Chiefs planned to make its offensive coordinator "the highest paid coordinator in the NFL' in order to retain him); Michael Smith, *Pro Football Notes*, Boston Globe, Feb. 15, 2004, at C2 (reporting that the Oakland Raiders sought to attract New England's defensive backs coach by making him "the highest-paid first year defensive coordinator ever").

Under a single entity defense, NFL teams could institute a league-wide pay scale for coaches. NFL coaches, who are at the pinnacle of their profession, would be unable to seek non-NFL employment that would put market pressure on such a wage scale, preventing coaches from obtaining compensation commensurate with the value they create. This would put a particular burden on the many assistant coaches who rely on their wages to support their families. These coaches earn modest incomes, do not have independent

bargaining power against teams, and do not have retirement or alternative employment as possible alternatives to coaching (as many head coaches do). These assistant coaches are of particular concern to the NFLCA, rely on the NFLCA for representation, and would be especially vulnerable if a single entity defense were permitted. If labor law does not permit the NFL's assistant coaches, because of their supervisory duties, to form a union of their own (although the NFLCA reserves the right to contend that it does), then a single entity defense would remove the coaches' lone protection against collusive wage restraints.

C. Recent Variation in Team Compensation is Desirable Only in a Competitive Market

Some NFL teams have recently opted out of league-wide compensation packages for coaches, particularly in their offerings of pensions and health insurance. Specifically, the NFL teams approved a resolution permitting each team to opt out of a uniform pension plan, which had previously been an important part of coaches' compensation. Chris Mortensen, *Colts Coaches Among Those Retiring*, ESPN, May 8, 2009, http://sports.espn.go.com/nfl/news/story?id=4147407. Other departures from league-wide compensation plans are also possible, such as teams opting out of the league-wide health insurance plan and instead choosing low-cost health insurance plans for their coaches and other non-playing employees.

In a competitive labor market, such variation in compensation packages would be interpreted as competitive attempts to create mutual value for

employers and employees. Deviations from league-wide norms would be met with competitive pressures, such that reductions in benefits would be countered by corresponding increases in wages. Under a single entity defense, however, no competitive pressures would counter these reductions in benefits, and current efforts by some teams to reduce pensions and other benefits for coaches would likely be followed by other teams in lock-step fashion. Such reductions in compensation would not be disciplined by market forces.

In sum, coaches' salaries and compensation are currently the products of market pressures, but a single entity defense would eliminate wage competition between teams and permit them to impose on the NFL's coaches anticompetitive wage restrictions.

V. Coordination Between Parent Companies and Their Subsidiaries Deserves Different Treatment Under Section 1 from Coordination Between NFL Teams

The single entity defense rests on the purported extension of *Copperweld*, which held that a parent company and a wholly owned subsidiary "are incapable of conspiring with each other for purposes of § 1." *Copperweld*, 467 U.S. 752 at 777. Extending the *Copperweld* doctrine to the NFL teams, however, is mistaken because the parent-subsidiary relationship is economically different from the relationship among the NFL and its member teams.

While there is robust competition among NFL teams for coaches, discussed above, parent companies and their subsidiaries have a collaborative approach to hiring

and assigning executives. Business news reports are replete with accounts of executives from subsidiaries being promoted to positions in a parent company, *see, e.g.*, Barbara Ballman, *KeyCorp Exec Sent Packing for Promotion in Northwest*, Capital District Bus. Rev., Jul. 05, 1993, at 5 (documenting promotions of banking executives from subsidiary companies to parent companies), as well as assignments of executives in parent companies to lead important subsidiaries. *See, e.g.*, David Hubler, *Sun Federal Shuffles Key Employees*, Fed. Computer Wk., Aug. 7, 2006, at 14 (reporting assignments of Sun Microsystems executives to a Sun wholly owned subsidiary); Linda Kephart, *Executive Shuffle: Turnover at the Top*, Haw. Bus., Aug. 1985, at 93 (announcing the Hawaiian Electric Company's new president, a former vice president of the parent company). Additionally, there are often personnel changes occurring among subsidiaries at the behest of a parent company. *See, e.g.*, Mary Morgan, *Lightnin Executive Named to Energize Kayex*, Rochester Business Journal, Sep. 16, 1994, at 1 (reporting General Signal Corporation's moving an executive from one of its subsidiaries to another). Significantly, these cooperative personnel strategies predated the *Copperweld* ruling, suggesting that the cooperative approach reflects an underlying common economic interest. *See, e.g.*, Walter L. Lingle Jr., *The Development of Managers for Overseas Operations*, Int'l Executive, Winter 1963, at 13 (documenting the Proctor and Gamble Company's successful strategy of appointing current executives to lead the company's overseas subsidiaries and promoting effective subsidiary managers to top executive positions in the United States).

Neither the collaborative approach on personnel matters between parents and subsidiaries nor the competitive market for coaches between NFL teams are accidental. Both are explained by market forces and the unfolding of the competitive process. *Copperweld* itself explains that "[c]oordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition." *See also Bulls II*, 95 F.3d at 598 ("Like a single firm, the parent-subsidiary combination cooperates internally to increase efficiency."). Thus, the reason a parent and subsidiary are treated as a single economic entity is because there is greater efficiency in permitting cooperation than in requiring competition. In contrast, teams in a sports league are independent profit centers precisely because their economic independence fuels efficient competition. *See Bulls II*, 95 F.3d at 597-98 ("Separate ownership of the clubs promotes local boosterism, which increases interest; each ownership group also has a powerful incentive to field a better team, which makes the contests more exciting and thus more attractive."); *see also* Barak D. Richman, *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal*, 95 Va. L. Rev. 325, 374 (2009) ("[O]wnership arrangements are efficient responses to transaction costs and other market forces."). It is for these reasons that Judge Easterbrook points a sharp contrast between GM and the NBA. *See Bulls II*, 95 F.3d at 599 ("Yet the 29 clubs, unlike GM's plants, have the right to secede (wouldn't a plant manager relish that!), and rearrange into two or three leagues.").

Antirust law should therefore continue to treat the parent-subsidiary relationship very differently from the

relationship among NFL teams. Applying the *Copperweld* doctrine to the former enhances efficient collaboration within an integrated economic entity, whereas extending it to the latter would enable anticompetitive collusion and undermine the efficiencies of separate ownership.

VI. Conclusion

For the forgoing reasons, the NFLCA urges the Court to rule that the NFL and its member teams are not a single entity, at least with respect to employee and labor markets. NFL teams should remain subject to section 1, thus enabling antitrust law to continue permitting procompetitive collaborations while prohibiting attempts at anticompetitive collusion.

Respectfully submitted,

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