THE U.S.F.L. ANTITRUST LAWSUIT

[Ed. Note: This is the text of the appellate judge's decision in the antitrust suit brought by the United States Football League against the National Football League in 1984. Only the Summary by Judge Winter is presented here. Among other things, this summary contains an excellent account of the points at issue between the NFL and the USFL, and of the 65-year legal history of the NFL itself. For the entire decision, see United States Football League, et al. v. National Football League, et al., 842 F.2d 1335 (2nd Cir. 1988). Thanks to John Hogrogian for sending us a copy of this decision.]

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UNITED STATES FOOTBALL LEAGUE, Arizona Outlaws, Baltimore Stars Football Associates, Birmingham Stallions, Ltd., Chicago USFL Limited Partnership, Chicago Football Franchise Limited Partnership, Denver Gold Sports, Inc., Houston Gamblers Ltd., IMI Express, Inc., Jax Professionals, Inc., LAEFC, Ltd., Memphis Showboats, Ltd., Football Generals, Inc., Bay Area Football Partners Ltd., Breakers Limited Partnership, South Texas Sports, Inc., and Orlando Football Partners, Inc., Plaintiffs-Appellants, Cross- Appellees,

v.

NATIONAL FOOTBALL LEAGUE, the Five Smiths, Inc., Indianapolis Colts, Inc., Buffalo Bills, Inc., Chicago Bears Football Club, Inc., Cincinnati Bengals, Inc., Cleveland Browns, Inc., Dallas Cowboys Football Club, Inc., Rocky Mountain Empire Sports, Inc., the Detroit Lions, Inc., Green Bay Packers, Inc., Houston Oilers, Inc., Los Angeles Rams Football Company, Minnesota Vikings Football Club, Inc., New England Patriots Football Club, Inc., New Orleans Saints Louisiana Partnership, New York Football Giants, Inc., New York Jets Football Club Inc., the Philadelphia Eagles Football Club, Pittsburgh Steelers Sports, Inc., St. Louis Football Cardinals Co., Chargers Football Company, San Francisco Forty- Niners, Ltd., Tampa Bay Area NFL Football, Inc., Pro- Football Inc., Kansas City Chiefs Football Club, Inc., Miami Dolphins, Ltd., Seattle Professional Football and Alvin R. Rozelle, individually and as Commissioner of the National Football League, Defendants-Appellees, Cross-Appellants.

Before:

CARDAMONE, PIERCE and WINTER, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Peter K. Leisure, Judge), entered after a jury trial, finding that defendants had unlawfully monopolized major-league professional football in the United States and awarding plaintiffs $1.00 in damages to be trebled; from an order denying plaintiffs' motion for judgment notwithstanding the verdict on their other antitrust claims, and for a new trial on damages on the monopolization of professional football claim, or in the alternative for a new trial; and from a judgment denying plaintiffs' request for injunctive relief. Defendants have filed a conditional cross-appeal.

Affirmed.

* * *

WINTER, Circuit Judge:

This appeal follows a highly publicized trial and jury verdict of $1.00. The plaintiff is a now-defunct professional football league that began play in this decade; the defendant is a football league founded nearly seventy years ago. The older of the two leagues, the National Football League, is a highly successful entertainment product. So many Americans watched NFL games between 1982 and 1986 that its twenty-eight teams shared $2.1 billion in rights fees from the three major television networks, and perhaps as much as $1 billion in gate receipts. The newer league, the United States Football League, began play in March 1983 with twelve teams and network and cable television contracts with the

American Broadcasting Company ("ABC") and the Entertainment and Sports Programming Network ("ESPN"). After three seasons and losses in the neighborhood of $200 million, the USFL played its last game in July 1985. Meanwhile, in October, 1984, blaming its older competitor for its difficulties, the USFL instituted this litigation. Plans to play in the fall of 1986 were abandoned after the jury's verdict that is the principal subject of this appeal.

The USFL and certain of its member clubs1 brought this suit in the Southern District of New York against the NFL, its commissioner, Alvin R. "Pete" Rozelle, and twenty-seven of its twenty-eight members clubs.2 Seeking damages of $1.701 billion3 and appropriate injunctive relief, the USFL alleged that the NFL violated Sections 1 and 2 of the Sherman Anti-Trust Act, 15 U.S.C. _GG_ 1 and 2 (1982), and the common law. Forty- eight days of trial before Judge Leisure produced a trial transcript of nearly 7100 pages and thousands of additional pages in exhibits.

After five days of deliberations, the jury found that the NFL had willfully acquired or maintained monopoly power in a market consisting of major-league professional football in the United States. The jury also found that the NFL's unlawful monopolization of professional football had injured the USFL.4 The jury awarded the USFL only $1.00 in damages, however, an amount that, even when trebled, was no consolation for the USFL.

The jury rejected the remainder of the USFL's claims. It found that the NFL had neither monopolized a relevant television submarket nor attempted to do so; that the NFL did not commit any overt act in furtherance of a conspiracy to monopolize; that the NFL did not engage in a conspiracy in restraint of trade; that the NFL's television contracts were not unreasonable restraints of trade; that the NFL did not control access to the three major television networks; and that the NFL did not interfere either with the USFL's ability to obtain a fall television contract or with its spring television contracts. The USFL's common law claims were also rejected.

Judge Leisure denied the USFL's motions for judgment notwithstanding the verdict on its claims of monopolization of the television submarket, attempted monopolization, unreasonable restraint of trade by means of the network television contracts and essential facilities, and for a new trial on damages on the monopolization of professional football claim, or in the alternative for a new trial. United States Football League v. National Football League, 644 F. Supp. 1040 (S.D.N.Y. 1986) ("Opinion No. 16"). The district court also denied the USFL's request for injunctive relief.

On this appeal, the USFL claims that a "litany of erroneous opinions, rulings and instructions" by Judge Leisure resulted in a "verdict of confusion" that "sent one of the most egregious violators in the history of the federal antitrust laws on its way with a pat on the back." Specifically, the USFL contends that the NFL could not legally enter into a pooled-rights agreement with all three networks; that Judge Leisure's jury instructions "destroyed" the effectiveness of the USFL's proof of its television claims and set improperly high standards of liability; that he improperly allowed the NFL to introduce evidence that the USFL was mismanaged; that he excluded other evidence critical to establishing the USFL's claims; and that his incorrect rulings and instructions on damages prevented the USFL from receiving appropriate relief. We affirm.

SUMMARY

We briefly summarize our principal rulings. The jury's finding of illegal monopolization of a market of major-league professional football was based upon evidence of NFL attempts to co-opt USFL owners, an NFL Supplemental Draft of USFL players, and NFL roster increase, and NFL conduct directed at particular USFL franchises. These activities, however, were hardly of sufficient impact to support a large damages verdict or to justify sweeping injunctive relief. For that reason, the USFL candidly admits that "at the heart of this case" are its claims that the NFL, by contracting with the three major networks and by acting coercively toward them, prevented the USFL from acquiring a network television contract indispensable to its survival. The jury expressly rejected the television claims.

The jury was clearly entitled by the evidence to find that the NFL's fall contracts with the three networks were not an anticompetitive barrier to the USFL's bidding against the NFL to acquire a network contract. Moreover, there was ample evidence that the USFL failed because it did not make the painstaking investment and patient efforts that bring credibility, stability and public recognition to a sports league. In particular, there was evidence that the USFL abandoned its original strategy of patiently building up fan loyalty and public recognition by playing in the spring. The original plan to contain costs by adherence to team salary guidelines was discarded from the start. Faced with rising costs and some new team owners impatient for immediate parity with the NFL, the idea of spring play itself was abandoned even though network and cable contracts were available. Plans for a fall season were therefore announced, thereby making 1985 spring play a "lame-duck" season. These actions were taken in the hope of forcing a merger with the NFL through the threat of competition and this litigation. The merger strategy, however, required that USFL franchises move out of large television markets and into likely NFL expansion cities. Because these moves further eroded fan loyalty and reduced the value of USFL games to television, the USFL thereby ended by its own hand any chance of a network contract.

Notwithstanding the jury's evident conclusions that the USFL's product was not appealing largely for reasons of the USFL's own doing and that the networks chose freely not to purchase it, the USFL asks us to grant sweeping injunctive relief that will reward its impatience and self-destructive conduct with a fall network contract. It thus seeks through court decree the success it failed to achieve among football fans. Absent a showing of some unlawful harm to competition, we cannot prevent a network from showing NFL games, in the hope that the network and fans will turn to the USFL. The Sherman Act does not outlaw an industry structure simply because it prevents competitors from achieving immediate parity. This is particularly so in the case of major-league professional football because Congress authorized a merger of the two leagues existing in 1966 and thus created the industry structure in question.

THE TRIAL

1. The Parties' Contentions

The USFL contended at trial that the NFL maintained a monopoly in the market for major league professional football and in a submarket for the network broadcasting rights to such football by the following allegedly predatory tactics:

a. Signing multiyear contracts with the three major television networks;

b. Pressuring the major networks to abstain from televising USFL games in the spring or fall, and successfully preventing any network telecasts of the USFL in the fall, by threatening not to renew NFL contracts or by assigning unattractive NFL games under existing contracts;

c. Establishing contracts with the networks for artificially high rights fees that, because of the so-called "dilution effect" on demand for advertising during NFL games, precluded network broadcasts of the USFL;

d. Seeking to prevent any of the three major networks from signing a contract for the USFL's initial 1983 spring playing season;

e. Rotating the Super Bowl among the three networks and not submitting the Super Bowl, playoff and even regular-season television rights to competitive bidding;

f. Pursuing a strategy outlined in the so-called "Porter Presentation" to "conquer" and bankrupt the USFL, including: co-opting powerful USFL owners, such as Donald Trump and alfred Taubman, by offering them NFL franchises; encouraging ABC not to continue USFL broadcasts; pressuring ABC by giving it an unattractive schedule for its Monday Night Football program in 1984; targeting important USFL players for signing with the NFL through means such as the NFL's Supplemental Draft and expanded roster; and attempting to bankrupt the weakest USFL teams by driving up USFL player salaries in order to diminish the USFL's size and credibility;

g. Collaborating with the City of Oakland to destroy the Oakland Invaders of the USFL in order to hurt the credibility and image of the Invaders and the entire USFL;

h. Threatening to move an existing NFL franchise or to create a new NFL franchise solely to injure the USFL franchise in Oakland; and

i. Attempting to preclude the USFL's New Jersey Generals from moving to New York City.

The NFL contended that the relevant television submarket included entertainment broadcasting generally and that it had not monopolized either the market for major league professional football or the television submarket because:

a. Its contracts with the three major networks were not exclusionary;

b. The USFL's failure to secure a fall network contract was the result of the independent judgment of each network that the USFL was an inferior product, and of the USFL's self-destructive strategy of forcing a merger with the NFL;

c. It never pressured a network by threatening nonrenewal or by assigning a schedule of unattractive games;

d. It never undertook the strategy outlined in the Porter Presentation;

e. It never sought to injure the USFL's Oakland franchise or to preclude the New Jersey Generals from playing in New York City; and

f. The losses suffered by the USFL were due to its own mismanagement.

2. The History of Major-League Professional Football

The NFL is an unincorporated association presently consisting of twenty-eight independent, for-profit football clubs. It was founded in 1920 in a Canton, Ohio Hupmobile showroom under the name American Professional Football Association. In 1922, it changed its name to the National Football League. The original teams were the Akron Pros, the Canton Bulldogs, the Cleveland Indians, the Dayton Triangles, the Decatur Staleys, the Hammond Pros, the Massillon Tigers, the Muncie Flyers, the Rock Island Independents and the Rochester Jeffersons, although Massillon and Muncie never played any games. By 1926, the NFL had grown to twenty-two franchises. By 1931, it had shrunk back to ten. The first championship game was not played until 1933. The first NFL draft of college players took place in 1935. All NFL teams played the same number of games for the first time in 1936. As late as 1952, NFL teams encountered bankruptcy. Indeed, NFL Commissioner Rozelle once testified that "41 franchises failed in the first 41 years of the League's existence."

A competing league, the All-America Football Conference ("AAFC") was organized in 1945 and operated for four seasons with teams in Brooklyn, Buffalo, Chicago, Cleveland, Los Angeles, Miami, New York and San Francisco. Baltimore replaced Miami in 1947, and after the 1948 season, the Brooklyn team merged with the New York team. The AAFC ceased operations in 1949 when the Baltimore, Cleveland and San Francisco teams were absorbed by the NFL, raising the number of its teams to thirteen. Shortly thereafter, that number was reduced to twelve, where it remained until 1960. The NFL's twelve teams were the Baltimore Colts, Chicago Bears, Chicago (later St. Louis) Cardinals, Cleveland Browns, Detroit Lions, Green Bay Packers, Los Angeles Rams, New York Giants, Philadelphia Eagles, Pittsburgh Steelers, San Francisco Forty-Niners and Washington Redskins. The Dallas Cowboys, Minnesota Vikings, Atlanta Falcons and New Orleans Saints were added as expansion teams in 1960, 1961, 1966 and 1967, respectively.

The American Football League ("AFL") was founded in late 1959 by Lamar Hunt, a scion of a Texas oil family, and began play in the fall of 1960. The demand for professional football was then sufficiently great to enable the AFL to obtain a contract with ABC for the years 1960-63. The new league was fueled in part by the NFL's cautious approach toward expansion; many of the AFL's original owners had unsuccessfully sought NFL franchises, and the majority of the AFL teams were located in cities without an NFL team. The original eight teams were the Boston Patriots, Buffalo Bills, Dallas Texans, Denver Broncos, Houston Oilers, Los Angeles (San Diego after the 1960 season) Chargers, New York Titans, and Oakland Raiders. The Miami Dolphins joined the AFL in 1960 [they didn't begin play until 1966 -- Ed.], the Cincinnati Bengals in 1968. The AFL brought an unsuccessful antitrust suit against the NFL in 1962.

In 1966, the NFL and the AFL agreed to merge, largely because the competition for players had sharply increased salaries. Congress exempted this merger from the antitrust laws by legislation discussed infra. The merger became fully effective when a twenty-six-team NFL began play in 1970 with two conferences, the National Football Conference and the American Football Conference. The NFL reached its present size of twenty-eight teams when expansion teams began play in Seattle and Tampa in 1976.

In 1974, the World Football League ("WFL") was founded. The WFL lasted for one-and-one-half seasons before disbanding. Its teams were underfinanced and played in mostly smaller markets. The WFL never obtained a television contract with a major network, although its games were televised by a syndicated network. At least one of the league's teams tried unsuccessfully to enter the NFL through litigation.

The USFL was founded in May 1982 by David Dixon as a league that would play spring football. The league began play in March 1983 with teams in Birmingham, Boston, Chicago, Denver, Los Angeles, Michigan, New Jersey, Oakland, Philadelphia, Phoenix, Tampa and Washington. In part because of the location of its teams in major television markets, the USFL was able to obtain multimillion dollar network and cable television contracts with ABC and ESPN. Nevertheless, for reasons explored in detail infra, the USFL demonstrated little stability. Over its three seasons of spring football (one of which was a "lame-duck" season commenced after an announced decision to shift to fall play), the USFL clubs played in twenty-two cities,5 and had thirty-nine principal owners.6 None of the majority owners of an original USFL team was a majority owner by 1986 when a planned fall schedule was aborted by the $1.00 verdict.

3. The NFL's Television Contracts

The growth of the NFL was closely related to the growth of television. Beginning in 1951, the Dumont network televised five regular season games (twelve by 1954), as well as the championship game each year. In the mid-1950's the Columbia Broadcasting System ("CBS") began broadcasting certain NFL regular season games for $1.8 million per year, and the National Broadcasting Company ("NBC") acquired the right to televise the NFL championship game. The broadcast rights to games were controlled by individual teams during the 1950's, however.

In 1961, the NFL teams agreed to sell their collective television rights as a single package and to share broadcast revenues equally among all franchises. This decision was in response to arguments by Commissioner Rozelle that the league's competitive balance on the field would eventually be destroyed if teams in major television markets continued to sell their broadcast rights individually. In the long run, he believed, great differentials in television revenues among teams would lead to a competitive imbalance that would diminish the overall attractiveness of the NFL's product. Rozelle's arguments were bolstered by the policy of the recently organized AFL to pool television rights and revenues in its first broadcast contract with ABC.

Before the NFL could enter a pooled-rights television contract, however, it had to overcome several legal obstacles. An earlier attempt by the NFL to control the sale of television rights by its teams had been deemed a violation of Section 1 of the Sherman Act in United States v. National Football League, 116 F. Suppl. 319 (E.D. Pa. 1953). In that case, the government sought to enjoin the enforcement of Article X of the NFL"s by-laws, which regulated the broadcast of distant games into the home territories of other teams.7 Applying Rule-of-Reason analysis, Judge Grim held that the restriction on the broadcast of outside games when home teams were playing away was an impermissible restraint of trade. The Final Judgment provided that:

The defendants are jointly and severally... enjoined... from directly or indirectly entering into... any contract, agreement or understanding with the league defendant or any member club of the league defendant,... having the purpose or effect of restricting the areas within which broadcasts or telecasts of games... may be made.

In 1961, the NFL brought a pooled-rights agreement with CBS before Judge Grim for a determination as to whether the agreement violated the 1953 Final Judgment. The contract provided that CBS would have the "right to determine, entirely within its own discretion... which games shall be televised and where such games be televised." Judge Grim held that CBS's authority to determine when and where games would be broadcast violated Section V of the Final Judgment. A subsequent motion by the NFL for a modification or suspension of the Final Judgment was denied. Judge Grim accordingly enjoined the execution and performance of the pooled- rights contract between the NFL and CBS, and further enjoined the NFL from entering into "any other contract and agreement having similar purpose or effect."

Specifically intending to alter Judge Grim's order, Congress enacted the Sports Broadcasting Act of 1961, which exempted from the antitrust laws pooled- rights agreements entered into by professional sports leagues. In order to protect college games from competition with pro football telecasts, the exemption did not apply to the broadcast of professional football games on Friday nights and Saturdays during the college football season.

The first NFL pooled-rights contract was with CBS. For the 1962 and 1963 seasons, CBS was the only network permitted to bid for this contract because it had individual rights contracts running through 1963 with nine teams. The NFL received $4,650,000 per season from CBS during these two seasons. For the 1964-65 NFL contract, CBS outbid NBC and ABC with an offer of $14,100,000 per season. In 1964, the AFL, which had had a contract with ABC, entered into a five-year, $36 million contract with NBC.

In 1966, Congress amended the Sports Broadcasting Act specifically to confer antitrust immunity on the NFL-AFL merger. At the same time, the restriction on Friday night and Saturday telecasts was expanded to include protection for high school football. In passing this legislation, Congress was plainly informed that, upon consolidation of the two leagues, the NFL would have broadcast contracts with at least two networks.

In 1970, the NFL entered into a contract with ABC to televise a game nationally on Monday nights. Since then, all three major television networks have broadcast NFL games,8 and the NFL's annual revenues from television have increased by more than 800 percent. The NFL teams received approximately $186 million for the 1970-73 seasons; $268 million for the 1974-77 seasons; $646 million for the 1978-81 seasons; and $2.1 billion over the five-year period 1982-86.

The ABC, CBS and NBC contracts from 1970 onward have given each network rights of first negotiation and first refusal to decide whether to continue its NFL contract for subsequent years. The NFL's 1982-86 contracts were nonexclusive and did not forbid a network from televising another football league's games at any time when it was not broadcasting NFL games. NBC was thus legally free to televise to a particular city another league's games on Sunday afternoons directly opposite NFL games on CBS when there was no NFL game scheduled for NBC to be televised to that city. CBS had a similar option. ABC was legally free to televise another league's games all afternoon each Sunday. All three networks were legally free to telecast another league's games in prime time. Because the NFL was forbidden by its network contracts to televise games on cable, cable television contracts were open to a competing league, although such contracts are less lucrative than network contracts. When the NFL's network contracts expired in 1981 and 1986, the networks were free to contract with a competing league's games for all time slots.

The NFL's three-network "tie-up" was a central issue at trial. The USFL claimed that the NFL intentionally set out to tie up the three networks as a means of excluding competitors. In support of its theory, the USFL introduced a memorandum from NFL general counsel Jay Moyer written during the NFL's 1973 network contract negotiations stating that "an open network may well be an open invitation to formation of a new league." Commissioner Rozelle testified, however, that in 1970, before contacting ABC and signing the Monday night football contract with it, he unsuccessfully approached CBS and NBC, both of which already televised NFL games, about their interest in prime-time football. The USFL also emphasized at trial a June 1984 CBS business study suggesting that the fall broadcast of USFL games on Sundays would reduce the network's advertising revenues from NFL games by $49 million to $53 million over three years. This "dilution effect," the USFL argued, created a $50 million barrier to entry by a new league.

The USFL also sought to show that the NFL had placed unlawful pressure on the networks to prevent the broadcast of USFL games. Much of this evidence consisted of statements by USFL representatives and hearsay and speculation by third parties.9 Officials from the three networks and one cable network testified that the NFL had not exerted any pressure on them regarding the broadcast of USFL games.10 Several network officials did testify, however, that they feared that televising the USFL in the fall might jeopardize their NFL relationships11 -- a fear somewhat at odds with the USFL claim that the NFL needed three network contracts to produce the "dilution effect." Executives from all three major networks also testified that by 1986, after the USFL had left several large television markets and was encountering financial and other difficulties, the USFL was not an attractive entertainment product.12

4. "Conquering the USFL": Predatory Tactics

The USFL also sought to prove monopolization by the NFL through predatory tactics unrelated to television. It thus introduced a memorandum prepared by NFL labor negotiator Jack Donlan entitled "Spending the USFL dollar," which urged NFL owners to bid for USFL players to drive up USFL costs. The USFL's proof of predatory behavior, however, consisted primarily of allegations concerning the recommendations of the so- called "Porter Presentation," and of the so-called Oakland and New York "conspiracies."

The Porter Presentation was a two-and-one-half hour presentation, entitled USFL v. NFL, by Harvard Business School Professor Michael Porter to sixty-five NFL executives attending a multiday seminar on labor negotiations. Porter's presentation, which was not previewed by anyone in the NFL, set out a strategy for the NFL to "conquer the USFL."

The USFL claimed that the NFL implemented a recommendation of the Porter Presentation by attempting to "co-opt" USFL owners with promises of an NFL franchise. Donald Trump, owner of the USFL's New Jersey Generals, testified that he was offered an NFL franchise by Commissioner Rozelle in exchange for his blocking the USFL's proposed move to the fall and his preventing the league from filing the instant action. In addition, hearsay testimony by Al Davis, owner of the NFL's Los Angeles Raiders, a team not sued by the USFL, indicated an attempt to co-opt Alfred Taubman of the Michigan Panthers. Taubman, however, denied that he was offered an NFL team.

The USFL also claimed that the NFL followed Professor Porter's recommendation to "dissuade" ABC from continuing its USFL contract. Supporting evidence consisted largely of hearsay introduced to show the state of mind of the networks. The declarants denied making any such statements. Jim Spence of ABC did testify, however, that the NFL informed him that the NFL owners were "not enamored" with the network's USFL contract. Nevertheless, ABC subsequently offered the USFL a four-year, $175 million contract for spring football beginning in 1986. The USFL also claimed that the NFL used a method recommended by Porter to pressure ABC by offering it unattractive Monday night games that would and did earn low ratings in 1984. In response, NFL officials testified that the 1984 Monday Night Football schedule was settled before the Porter Presentation, that "weak" teams such as Buffalo and Cincinnati appeared on that schedule fewer times than in prior years, and that any change in ABC's ratings was due to economic conditions that affected the entire sports television marketplace.

Finally, the USFL claimed that the NFL followed Porter's recommendations for competing for players. This evidence consisted of the NFL's decision to conduct a supplemental draft of players still under USFL contract in March 1984, an increase in NFL roster size from forty-five to forty-nine, conversations between the Dallas Cowboys and USFL star Herschel Walker, and NFL salary offers to relatively unknown USFL players such as Todd Fowler.

The USFL also contended that the NFL and the City of Oakland conspired to destroy the USFL's Oakland Invaders in return for an NFL promise that Oakland would receive an NFL team. This so-called "Oakland conspiracy" was based on the testimony of Al Davis that he "sensed" that the NFL wanted to "destroy" the Invaders and on Commissioner Rozelle's public statement that Oakland, having lost the Raiders, would be considered for an NFL expansion franchise.

The "New York conspiracy" involved a claim that the NFL and the NFL's New York Jets conspired to mislead New York City and State officials into believing that the Jets were willing to return from New Jersey to New York. The purpose of this conspiracy was to block the USFL's New Jersey team from moving to a new domed stadium in New York. Proof of this conspiracy consisted of testimony by Senator Alphonse D'Amato and Vincent Tese, Chairman and Chief Executive Officer of the New York State Urban Development Corporation, that Leon Hess, owner of the Jets, had promised to return his team to New York. In addition, Al Davis testified that there was an "understanding" reached at a 1983 NFL owners' meeting to keep a USFL team out of New York. Other participants in this meeting denied any such understanding or agreement.

5. Damages

The USFL's evidence of damages consisted of the testimony of economist Nina Cornell, who sought to estimate the league's losses by two methods. Method A was based on the assumption that the gate and television revenues of an unhindered USFL could be estimated by suing the gate receipts and television revenues of the old AFL. Dr. Cornell estimated the USFL's damages under this method at $565 million.

Method B was based on the June 1984 CBS business study examining the fall broadcast of USFL games. She estimated the USFL's damages under this method at $301 million.

Dr. Cornell's damage calculations rested on several other assumptions. First, of course, she assumed that illegal NFL conduct was the cause of the USFL"s failure to obtain a network contract. Second, Dr. Cornell assumed that the NFL could lawfully contract with only one network. Third, her calculations attributed the USFL's damages entirely to illegal NFL conduct and not at all to the USFL's own mismanagement.

Finally, she assumed that there would be no increased player costs to the USFL resulting from the shift to fall play and that salaries would remain stable from 1986 to 1992. Tension existed between her assumption of stable salaries and her projections of large increases in USFL revenues as a result of playing in the fall during the 1986 to 1992 seasons. Player salaries had already increased dramatically because of the two leagues' competition for players, even when they were playing in different seasons. No reason was given to expect a stabilization of wages when the leagues would play in the same season and the USFL would have substantially greater revenues to compete for players. Moreover, a cornerstone of the USFL's television claim was that a network contract was essential so that it could compete for quality players, a position that is hardly consistent with stability in player salaries.

6. Management of the USFL

The USFL was conceived and organized in 1981 to play in the spring rather than the fall. Its founders believed that public demand for football was not satisfied by the NFL's and the colleges' fall seasons; that cable television, which could not televise NFL games under the existing NFL-network contracts, would offer unique opportunities for television revenues and exposure; that a spring football league would face limited competition; that there was a sufficient supply of football players for two leagues; and that a spring league could draft college players and put them on the field even before the NFL draft.

The USFL's founders placed a high priority on the fans' perception of the quality of play. They intended to use major stadiums13 and to hire well-known coaches.14 At the same time, they wanted the league to control costs. For its first season, therefore, the USFL established budget guidelines for player salaries of between $1.3 and $1.5 million per team.

The USFL's founders did not seek to obtain a television contract for fall play. Before fielding a team, however, the USFL received bids for a spring television contract from ABC and NBC and from two cable networks, ESPN and the Turner Broadcasting System. The league entered a four-year contract with ABC, and a two-year contract with ESPN. The ABC agreement provided for ABC to pay the USFL $18 million for the 1983 and 1984 seasons, with options exercisable by ABC at $14 million for 1985 and at $18 million for 1986.15 ESPN contracted to televise USFL games for two years at rights fees of $4 million for 1983 and $7 million for 1984. The USFL began with eight of its twelve teams in the nation's top ten television markets. The ABC contract required the USFL to field teams in the three largest television markets (New York, Los Angeles and Chicago) and in at least four of the five other top-ten television markets in which teams were originally located (Philadelphia, Boston, Detroit, San Francisco/Oakland and Washington).

The USFL's first year of play, 1983, was a mixed success. The league received extensive media exposure when it signed Heisman Trophy winner Herschel Walker to a three-year, $3,250,000 contract. The Nielsen television rating for the first week of games was 14.2, a figure comparable to NFL ratings. As the season went on, however, the USFL's television ratings declined; average television ratings for the year were 6.23 on ABC and 3.28 on ESPN. Average attendance for the year was approximately 25,000. Nevertheless, these figures were consistent with the league's and networks' preseason projections.

On the financial side, the picture was not as bright. The USFL lost a total of almost $40 million, or an average of $3.3 million per team. The league had projected losses of only about $2 million per year for each team over the first three years. The unanticipated financial losses were chiefly the result of the failure to stay within the original salary guidelines. Indeed, in a November 1983 letter to other owners, Tad Taube of the Oakland team warned that "If we are not successful in establishing player [salary] caps I can guarantee you that there will not be a USFL within three years, irrespective of improved revenue [from] television.... We have sighted the enemy and they are us!"

The USFL's second year was marked by change. Four teams shifted locations. For example, the owner of the Chicago franchise exchanged that franchise for the Phoenix franchise, taking his winning Chicago coach and players while the original Phoenix team moved to Chicago under a new owner. The league, over the objection of some owners, expanded from twelve teams to eighteen. Five of the original owners left the league. Some of the new owners, notably Donald Trump of the New Jersey Generals, believed that the USFL ought to play in the fall. Thereafter, the issue of when to play became divisive, and several owners came to believe that Trump was trying to bring about a merger with the NFL that would include only some USFL teams.16

The NFL introduced extensive evidence designed to prove that the USFL followed Trump's merger strategy, and that this strategy ultimately caused the USFL's downfall. The merger strategy, the NFL argued, involved escalating financial competition for players as a means of putting pressure on NFL expenses, playing in the fall to impair NFL television revenues, shifting USFL franchises out of cities where NFL teams played into cities thought to be logical expansion (through merger) cities for the NFL, and, finally, bringing the antitrust litigation now before us.

Throughout the second half of 1983 and early 1984, several USFL owners escalated spending on player salaries. USFL teams, for example, signed established NFL players such as running back Joe Cribbs and defensive back Gary Barbaro. Trump, in particular, signed a number of players who were still under contract with the NFL to future contracts, including superstar Lawrence Taylor of the New York Giants. USFL owners also signed many top players coming out of college, for example, wide receiver Anthony Carter and quarterback Jim Kelly. The USFL's spending on players greatly outpaced its revenues. The owner of the Los Angeles team, for example, committed the team to $13.1 million in salaries and bonuses for just one season. He even entered into a multiyear, $40 million contract with just one player, Steve Young of Brigham Young University.

By the end of the 1984 season, USFL franchises in two of the top three television markets, Chicago and Los Angeles, had failed, and only four of the original owners remained in the league. The league was not a failure as entertainment, however. Despite a decline in the USFL's television ratings to 5.7 on ABC and 2.8 on ESPN, ABC exercised its option to carry the USFL in the spring of 1985 at $14 million and offered a new contract worth $175 million for four years in the spring beginning in 1986. ESPN offered a contract worth $70 million over three years.

Nevertheless, during an August 1984 owners' meeting, the USFL decided to move to the fall in 1986. This decision was made despite: (i) ABC's warning that such a move would breach its contract for the spring of 1985 and 1986; (ii) the contrary recommendations of a management consulting firm, McKinsey & Company, which the USFL had retained for $600,000 to consider the advisability of a fall season; and (iii) the contrary recommendations of the USFL's directors of operations and marketing.

Moreover, Eddie Einhorn, a USFL owner who was to represent the USFL in negotiations to secure a network contract for the fall, warned that moving from large television markets to "merger" cities too quickly might preclude the securing of a network contract. Nevertheless, in the ensuing months, the USFL withdrew from Chicago, Detroit, Philadelphia, Pittsburgh and Washington, D.C. -- each a large television market with an NFL team -- and moved into Baltimore (which had lost its NFL team in 1984) and Orlando (which had no NFL team). Through mergers, the USFL bolstered franchises in Oakland (which had lost the NFL Raiders to Los Angeles) and Phoenix (which had been discussed as a possible NFL expansion city). The decision to move to the fall damaged the USFL's relations with ABC and ESPN. The former withheld a significant portion of the USFL's rights fees for the 1985 season, while the latter demanded a renegotiation of its proposed 1985-87 USFL contract. The following table reflects the USFL's movement from the top television markets:

1983	1984	1985	1986 (Proposed)
New York	New York	New York	New York
Los Angeles	Los Angeles	Los Angeles	
Chicago	Chicago	San Francisco/ Oakland	
Philadelphia	Philadelphia		
San Francisco/ Oakland	San Francisco/ Oakland		

Boston	Detroit
Detroit	Washington
Washington	

In October 1984, the instant litigation was begun. The USFL's 1985 "lame-duck" spring season appears to have been affected adversely by the now publicly announced move to the fall. The league's television ratings declined to 4.1 on ABC and 2.0 on ESPN. By the end of the season, several owners had withdrawn financial support for their teams, and a number of clubs were no longer meeting their payrolls and other bills. The USFL scheduled eight teams for its fall 1986 season, which was ultimately canceled after the verdict in this case. Only one team (New Jersey), was in a top- ten television market. One other team (Tampa Bay), was in a top-twenty market. Three teams were located in Florida (Jacksonville, Orlando and Tampa Bay) but only one was west of the Mississippi River (Phoenix). In three years, USFL teams had left fourteen of the twenty-two cities in which they had played.

7. The Verdict

The jury found the NFL liable on the USFL's claim of actual monopolization, concluding that the older league had willfully acquired or maintained monopoly power in a market consisting of major league professional football in the United States. The jury also found that the NFL's unlawful monopolization had caused injury to the USFL. In ruling on the NFL's motion for judgment notwithstanding the verdict with respect to these findings, the district court held that sufficient evidence existed that the NFL had engaged in predatory conduct. This evidence related to: (1) NFL efforts to co-opt USFL owners and potential owners; (2) the NFL Supplemental Draft of USFL players; (3) the NFL's move to a forty-nine-man roster; and (4) the NFL's activity directed at specific USFL franchises such as the Oakland Invaders.

The USFL was unsuccessful on its remaining claims. The jury found that none of the defendants had violated Section 2 by attempting to monopolize a relevant market, or by conspiring to monopolize. In addition, the jury found that even though "one or more defendants [had] participate[d] in a contract, combination or conspiracy to exclude competition within major league professional football," that combination was not an unreasonable restraint of trade in violation of Section 1. The fatal blow, however, was the complete rejection of the USFL's television claims. The jury found that the NFL had not willfully acquired or maintained a monopoly in a relevant television submarket. It further found that the NFL's contracts with all three television networks for the right to broadcast the league's regular season and championship games through the 1986-87 season were not an unreasonable restraint of trade violative of Section 1. Finally, the jury rejected the USFL's "essential facilities" claim, specifically finding that the "defendants [did not] have the ability to deny actual or potential competitors access to a national broadcast television contract," although it also found that such a contract was "essential to the ability of a major league professional football league to compete successfully in the United States" and "that potential competitors of the NFL, cannot as a practical matter, duplicate the benefits of a network contract."17

* * * * *

NOTES

1. The Tampa Bay franchise withdrew as a plaintiff at the time of the filing of the First Amended Complaint. The Arizona Outlaws have withdrawn their appeal.

2. The Los Angeles Raiders, Ltd., were not named as defendants in this action.

3. The complaint requested that "the Court award the plaintiffs threefold the amount of actual damages, not less than $440,000,000 in the aggregate ($1,320,000,000 when trebled)"; in the joint pretrial order, plaintiffs sought "threefold the amount of actual damages in excess of $567,000,000 in the aggregate (in excess of $1,700,000,000 when trebled)."

4. NFL Commissioner Rozelle was not found personally liable on the USFL's monopolization claim.

5. The USFL teams played in the following cities/states:

1983	1984	1985	1986 (Proposed)

Birmingham	Birmingham	Baltimore	Baltimore
Boston	Chicago	Birmingham	Birmingham
Chicago	Denver	Denver	Jacksonville
Denver	Houston	Houston	Memphis
Los Angeles	Jacksonville	Jacksonville	New Jersey
Michigan	Los Angeles	Los Angeles	Orlando
New Jersey	Memphis	Memphis	Phoenix
Oakland	Michigan	New Jersey	Tampa
Philadelphia	New Jersey	Oakland	
Phoenix	New Orleans	Orlando	
1983	1984	1985	1986 (Proposed)
Tampa	Philadelphia	Phoenix	
Washington, D.C.	Phoenix	Portland	
	Pittsburgh	San Antonio	
	San Antonio	Tampa	
	Tampa		
	Tulsa		
	Washington, D.C.		

6. The principal owners of USFL teams during 1983-85 were as follows:

Team	1983	1984	1986
Arizona	Jim Joseph	Edward Diethrich Bill Harris George Allen	William Tatham, Sr.
Baltimore	NA	NA	Myles Tanenbaum
Birmingham	Marvin Warner	Marvin Warner	Marvin Warner*
Boston	George Matthews Randy Vataha	NA	NA
Chicago	Edward Diethrich Bill Harris George Allen	James Hoffman**	Eddie Einhorn
Denver	Ron Blanding	Doug Spedding	Doug Spedding
Houston	NA	Jerry Argovitz Jay Lerner Alvin Lubetkin Jay Roulier***	Jerry Argovitz Alvin Lubetkin Jay Roulier
Jacksonville	NA	Fred Bullard	Fred Bullard
Los Angeles		Bill Daniels Alan Harmon	William Oldenburg****

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*Mr. Warner surrendered his interest in the Birmingham franchise in April, 1985.

**Dr. Hoffman surrendered his interest in the Chicago franchise in January, 1984. Thereafter, it was operated by a corporation, CPHFC, Inc., until July 2, 1984, when a new franchise for Chicago was granted to Edjer Corp.

***Mr. Roulier became a principal owner in June, 1984, replacing Mr. Lerner.

****Mr. Oldenburg surrendered his interest in the Los Angeles franchise in June, 1984. The franchise was operated by a USFL corporation for the balance of the 1984 season. In November, 1984, a new franchise for the Los Angeles area was acquired by LAEFC, Ltd., a Colorado limited partnership. From November 1984

Team	1983	1984	1986
Memphis	NA	Logan Young William Dunavent	William Dunavent
Michigan	Alfred Taubman Max Fisher Peter Spivak	Alfred Taubman Max Fisher	NA
New Jersey	J. Walter	Donald Trump	Donald Trump
New Orleans	NA	Joseph Canizaro	NA
Oakland	Tad Taube	Tad Taube	Alfred Taubman Tad Taube
Oklahoma	NA	William Tatham, Sr.	NA
Orlando	NA	NA	Donald Dizney Jim English
Philadelphia	Myles Tannenbaum	Myles Tannenbaum	NA
Pittsburgh	NA	Edward DeBartolo, Sr.	NA
Portland	NA	NA	Joseph Canizaro
San Antonio	NA	Clinton Manges	Clinton Manges
Tampa Bay	John Bassett Steve Arky	John Bassett Steve Arky	John Bassett Steve Arky
Washington	Berl Bernhard Bob Linowes	Berl Bernhard Bob Linowes	NA

7. Article X provided that "[n]o club shall cause or permit a game in which it is engaged, to be telecast or broadcast into any area included within the home territory of any other club, without the consent of such other club" on a day on which the other club was either playing or broadcasting one of its games at home. The government contended that this provision restricted competition among clubs in the sale of broadcast rights.

8. ABC now televises Monday night games and certain prime-time games. CBS televises National Football Conference ("NFC") games throughout the season, on Thanksgiving Day, and on Saturdays in December. NBC televises American Football Conference ("AFC") games throughout the season, Thanksgiving Day, and on Saturdays in December. Interconference games are televised by the network with the rights to the conference of the visiting team. CBS televises NFC playoff games, and NBC televises AFC playoff games. The first Super Bowl, held in 1967, was broadcast by both CBS and NBC. Since 1967, CBS and NBC have alternated telecasts of the Super Bowl, except that pursuant to its 1982-86 contract with the NFL, ABC televised the Super Bowl played in January 1985. Broadcasting rights to Super Bowl games are not bid for separately but are rotated among the networks.

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until January 30, 1985, Jay Roulier owned the stock of Express Football Club, Inc., the general partner of LAEFC, Ltd. As of January 30, 1985, the stock of Express Football Club, Inc. was acquired by USFL Holdings, Inc., the stock of which is wholly owned by the USFL. 9. USFL Commissioner Harry Usher testified that he was told by Roone Arledge, the president of ABC Sports, that Arledge "had had negative reaction from the NFL for putting the USFL on initially." ABC sportscaster Howard Cosell testified that he was told by Arledge that Commissioner Rozelle was "all over" Arledge because ABC was televising the USFL in the spring. (Arledge testified unequivocally that he had never made such a statement to Cosell.) Jim Spence, a senior vice-president at ABC, testified that he believed that the NFL was "less than enamoured" of the network's dealings with the USFL, although he did not recall that any NFL official had directly expressed any displeasure to him.

10. For example, Jim Spence, former senior vice-president of ABC Sports; Frederick Pierce, former president of ABC; Roone Arledge, group president of ABC News and Sports, former president of ABC Sports; Neil Pilson, president CBS Sports, executive vice-president of CBS, former president of CBS Sports; Arthur Watson, president of NBC Sports; William Grimes, president of ESPN.

11. For example, CBS Sports President Neil Pilson testified that he would consider televising the USFL in the fall only if another network was involved. This double exposure would increase the USFL's value and also not leave CBS in a position that would induce the NFL to give the other networks better treatment, including a better schedule of games.

12. NBC Sports President Watson testified that his network did not conduct a business study concerning the feasibility of broadcasting USFL games on Saturday in the fall because of the network's commitments to other sporting events, including baseball, college basketball, golf, and thoroughbred racing.

13. Included were such prominent NFL stadiums as Soldier Field in Chicago (capacity 65,793); the New Orleans Superdome (72,675); Giants Stadium in New Jersey (76,891); the Houston Astrodome (47,965); the Silverdome in metropolitan Detroit (72,675); and RFK Stadium in Washington, D.C. (54,794). Before trial, Judge Leisure granted summary judgment in favor of the NFL on the USFL's stadium-related claims on Noerr- Pennington grounds. This ruling has not been appealed.

14. A number of the USFL's coaches had coached in the NFL: George Allen (Redskins and Rams); Chuck Fairbanks (Patriots); Frank Kush (Colts); Walt Michaels (Jets); Red Miller (Broncos); and John Ralston (Bills). Several had been successful NFL players: John Hadl, Craig Morton, Jack Pardee and Steve Spurrier.

15. The ABC agreement provided for additional payments for the telecast of more than twenty USFL games per season as well as for the shifting of daytime telecasts into prime time.

16. After a January 1984 USFL owners' meeting, Myles Tanenbaum of the Philadelphia franchise complained that the "'Original' franchise owners" had become outnumbered, and expressed his outrage that "one of the group believes it would be fair or appropriate to simply 'pay off' others in the event there is a potential big hit by way of merger or whatever."

17. In ruling that any inconsistency in these verdicts did not require a new trial, a ruling not challenged on appeal, the district court first recognized that inconsistent verdicts in a civil case are fully permissible in this circuit. The court also plausibly reconciled the actual verdicts in the instant case.

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[The following is not part of the judge's decision -- Ed.]

1983 USFL FINAL STANDINGS (Spring Season)

Atlantic Division	W	L	T	Pct.	PF	PA
Philadelphia Stars	15	3	0	.833	379	204
Boston Breakers	11	7	0	.611	399	334
New Jersey Generals	6	12	0	.333	314	443
Washington Federals	4	14	0	.222	297	442

Central Division	W	L	T	Pct.	PF	PA
Michigan Panthers	12	6	0	.667	451	337
Chicago Blitz	12	6	0	.667	456	271
Tampa Bay Bandits	11	7	0	.611	363	378
Birmingham Stallions	9	9	0	.500	343	326

Pacific Division	W	L	T	Pct.	PF	PA
Oakland Invaders	9	9	0	.500	319	317
Los Angeles Express	8	10	0	.444	296	370
Denver Gold	7	11	0	.389	284	304
Arizona Wranglers	4	14	0	.222	261	442

Divisional Playoffs: Philadelphia 44, Chicago 38 (OT)
Michigan 37, Oakland 21
Championship Game: Michigan 24, Philadelphia 22

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1984 USFL FINAL STANDINGS (Spring Season)

EASTERN CONFERENCE

Atlantic Division	W	L	T	Pct.	PF	PA
Philadelphia Stars	16	2	0	.889	479	225
New Jersey Generals	14	4	0	.778	430	312
Pittsburgh Maulers	3	15	0	.167	259	379
Washington Federals	3	15	0	.167	270	492

Southern Division	W	L	T	Pct.	PF	PA
Birmingham Stallions	14	4	0	.778	557	316
Tampa Bay Bandits	14	4	0	.778	498	337
New Orleans Breakers	8	10	0	.444	348	395
Memphis Showboats	7	11	0	.389	320	455
Jacksonville Bulls	6	12	0	.333	327	455

WESTERN CONFERENCE

Western Division	W	L	T	Pct.	PF	PA
Houston Gamblers	13	5	0	.722	618	400
Michigan Panthers	10	8	0	.556	400	382
San Antonio Gunslingers	7	11	0	.389	309	325
Oklahoma Outlaws	6	12	0	.333	251	459
Chicago Blitz	5	13	0	.278	340	466

Pacific Division	W	L	T	Pct.	PF	PA
Los Angeles Express	10	8	0	.556	338	373
Arizona Wranglers	10	8	0	.556	502	284
Denver Gold	9	9	0	.500	356	413
Oakland Invaders	7	11	0	.389	242	348

Quarterfinals:	Philadelphia 28, New Jersey 7
	Los Angeles 27, Michigan 21 (OT)
	Birmingham 36, Tampa Bay 17
	Arizona 17, Houston 16
Semifinals:	Arizona 35, Los Angeles 23
	Philadelphia 20, Birmingham 10
Championship:	Philadelphia 23, Arizona 3

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1985 USFL FINAL STANDINGS (Spring Season)

Eastern Conference	W	L	T	Pct.	PF	PA
Birmingham Stallions	13	5	0	.722	436	299
New Jersey Generals	11	7	0	.611	418	377
Memphis Showboats	11	7	0	.611	428	337
Baltimore Stars	10	7	1	.538	368	260
Tampa Bay Bandits	10	8	0	.556	405	422
Jacksonville Bulls	9	9	0	.500	407	402
Orlando Renegades	5	13	0	.275	308	481

Western Conference	W	L	T	Pct.	PF	PA
Oakland Invaders	13	4	1	.750	473	359
Denver Gold	11	7	0	.611	433	389
Houston Gamblers	10	8	0	.556	544	388
Arizona Wranglers	8	10	0	.444	376	405
Portland Breakers	6	12	0	.333	275	422
San Antonio Gunslingers	5	13	0	.278	296	436
Los Angeles Express	3	15	0	.167	266	456

Quarterfinals:	Birmingham 22, Houston 20

	Memphis 48, Denver 7
	Oakland 48, Tampa Bay 27
	Baltimore 20, New Jersey 17
Semifinals:	Baltimore 28, Birmingham 14
	Oakland 28, Memphis 19
Championship:	Baltimore 28, Oakland 24

* * *

Combined 3-Year Records

Team	W	L	T	Pct.	Avg.*	Yrs.
Philadelphia Stars	31	5	0	.861	24-12	83-4
Birmingham Stallions	36	18	0	.667	25-17	83-5
Tampa Bay Bandits	35	19	0	.648	23-21	83-5
Houston Gamblers	23	13	0	.639	32-22	84-5
Michigan Panthers	22	14	0	.611	24-20	83-4
Boston Breakers	11	7	0	.611	22-19	83
Baltimore Stars	10	7	1	.583	20-14	85
New Jersey Generals	31	23	0	.574	21-21	83-5
Oakland Invaders	29	24	1	.546	19-19	83-5
Denver Gold	27	27	0	.500	20-20	83-5
Memphis Showboats	18	18	0	.500	21-22	84-5
Chicago Blitz	17	19	0	.472	22-20	83-4
New Orleans Breakers	8	10	0	.444	19-22	84
Jacksonville Bulls	15	21	0	.417	20-24	84-5
Arizona Wranglers	22	32	0	.407	21-21	83-5
Los Angeles Express	21	33	0	.389	17-22	83-5
San Antonio Gunslingers	12	24	0	.333	17-21	84-5
Portland Breakers	6	12	0	.333	15-23	85
Oklahoma Outlaws	6	12	0	.333	14-26	84
Orlando Renegades	5	13	0	.278	17-27	85
Washington Federals	7	29	0	.194	16-26	83-4
Pittsburgh Maulers	3	15	0	.167	14-21	84

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For player rosters and all-league selections, see Tod Maher and Jay Langhammer, The All-Time United States Football League Register, North Huntington, PA: Professional Football Researchers Association, 1986.

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