Employment Law, Negotiation and the Business Environment: A Cooperative Collective Bargaining Negotiation of the National Hockey League Lockout of 2004

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Employment Law, Negotiation and the Business Environment:

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National Hockey League Lockout of 2004

Corey A. Ciocchetti*

I. INTRODUCTION†

Employment law is a “must-cover” subject in business environment courses. The vast majority of enrollees will cease their legal studies upon completion of this course but soon encounter legal quandaries upon landing their first job. Students without basic knowledge of employment contracts, discrimination law, wage/hour/leave regulations and workplace privacy will find themselves at a distinct disadvantage in these employment relationships. Comparing the plethora of topics requiring coverage with the limited time devoted to employment law during a typical academic term, other important employment subjects – such as negotiation and collective

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† Please note that the appendices, designed to help professors implement this exercise in their classes, are located online at http://www.daniels.du.edu/busethics/publications.cfm rather than at the end of this article.
bargaining – commonly receive short shrift.¹ This article offers a creative solution designed to cover these oft-omitted topics with maximum effectiveness and within a brief period of time.²

¹ Due to the plethora of relevant employment law topics and ever-evolving case law, I find myself time-limited when scheduling collective bargaining issues into a course specifically dedicated to employment law.

² There are a few relatively-recent articles dealing with collective bargaining in the professional sports context. See, e.g., Sharlene A. McEvoy, The Legal Environment of Baseball, 12 J. LEGAL STUD. EDUC. 197 (1994) (discussing legal issues arising in the professional sports environment – including collective bargaining and mentioning the possibility of a collective bargaining negotiation exercise). The American Business Law Journal published an issue devoted to sports law. See AM. BUS. L. J. Vol. 35, Issue 2 (although none of the articles in this special volume cover collective bargaining or negotiation, there is an interesting article questioning whether sports officials are independent contractors and another discussing the regulatory scheme for player agents in the National Football League). There are also relevant articles dealing with negotiation in general as well as negotiation exercises in undergraduate business environment courses. See, e.g., Mark Lampe, A New Paradigm for the Teaching of Business Law and Legal Environment Classes, 23 J. LEGAL STUD. EDUC. 1, 27-29 (2006); Susan Denbo, Contracts in the Classroom – Providing Undergraduate Students with Important “Real Life” Skills, 22 J. LEGAL STUD. EDUC. 149 (2005) [hereinafter Contracts in the Classroom] (discussing the importance of negotiation skills); Judith Stilz Ogden & Mary Ellen Benedict, What’s On Your Mind? A Negotiation Role-Play, 18 J. LEGAL STUD. EDUC. 307 (2000) [hereinafter What’s On Your Mind] (presenting a student negotiation exercise dealing with an intellectual property dispute where the groups draft a settlement agreement); Peter J. Shedd, Let’s Make a Deal: To Sign or Not to Sign, 14 J. LEGAL STUD. EDUC. 87 (1996) [hereinafter Let’s Make a Deal] (discussing negotiation of a marketing contract); Anna S. Rominger, Negotiation: An Idea Whose Time Has Come, 13 J. LEGAL STUD. EDUC. 101 (1995) (discussing the utilization of negotiation to settle disputes); and Marlene E. Barken, Integrating Contract and Property Fundamentals with Negotiation Skills: A Teaching Methodology, 9 J. LEGAL STUD. EDUC. 73 (1990) [hereinafter Contract and Property Fundamentals] (setting up an exercise whereby students negotiate and draft a real estate purchase agreement).
The following discussion utilizes a student-led collective bargaining negotiation as a vehicle to: (1) cover management and labor issues within the professional sports environment (specifically – the National Hockey League Lockout of 2004-05) and apply lessons to the broader workplace, (2) teach valuable negotiation techniques and (3) provide insight into an interesting, formidable and real-world business issue. From a pedagogical standpoint, the goal of the exercise is for each student to: (1) understand that the collective bargaining issues/regulations they discover apply equally to negotiations at the factory down the road, (2) improve teamwork skills, (3) test strategies tailored to achieve objectives effectively, (4) improve critical thinking and public speaking skills and (5) appreciate the ethical implications of a real-world business/legal dilemma. Additionally, this exercise forces students to deal with authentic financial information and realistic consequences stemming from their actions at the bargaining table.

At the outset of the exercise, one-half of the student teams are assigned to the National Hockey League (NHL) Board of Governors (BOG) to represent individual club owners (Owners). The remaining teams are assigned to the National Hockey League Players Association (NHLPA) to represent unionized NHL players. Students are assigned a series of background readings – Parts II through IV of this article – covering the collective bargaining process, negotiation strategies and a brief history of the NHL and the 2004-05 lockout. Throughout a series of three negotiations and debriefings students are forced to compromise and adopt effective negotiation strategies to obtain a successful outcome and avoid the disruption of a continued lockout. At the

3 Parts II, III and IV each contain a thorough essay written in a law review format; each essay is distributed to students one class period prior to the negotiation exercise as a background reading assignment.
end of the day, the parties either sign a memorandum of agreement consummating a new collective bargaining agreement or part ways with a continued lockout to deal with in the future.

This article proceeds in five parts. Part II describes laws governing the collective bargaining process; this Part also categorizes and analyzes four “hot-button” issues in contemporary collective bargaining negotiations. Part III focuses on negotiation by identifying and discussing the six primary stages of a typical collective bargaining negotiation – including specific examples from the professional sports context. Part IV introduces the National Hockey League and its labor history and addresses the pertinent events leading to the 2004-05 lockout; this part also demonstrates the negotiation exercise by running through the activity in step-by-step detail.\(^4\) Part V summarizes the resolution to the real-world lockout and presents ideas for applying the exercise to other professional sports dealing with expiring collective bargaining agreements.

II. EMPLOYMENT LAW AND COLLECTIVE BARGAINING

A. The Collective Bargaining Process in Professional Sports

From an employment law perspective, the workplace in American professional sports is considerably different from non-unionized workplaces and a bit different from other unionized workplaces. In non-unionized workplaces, the typical employee enters the organization and is governed by predetermined work rules and regulations (i.e., overtime policies, dress codes and

\(^4\) This exercise is designed to be plug-and-play and, therefore, specific exercise materials are included as appendices to this article. See Appendices A – E, available at http://www.daniels.du.edu/busethics/publications.cfm. Professors utilizing this activity are encouraged to contact the author at cciocche@du.edu with any specific questions or comments.
benefits packages). Employers generally set these terms unilaterally and employees possess little leverage to negotiate. On the other hand, in a unionized workplace – including the world of professional sports – employers and employees bargain over major workplace terms and conditions. These efforts are part of a process known as collective bargaining. The work rules stemming from such bargaining are codified into a governing document known as a collective bargaining agreement (CBA). CBA negotiations in professional sports are a bit different from the typical union CBA negotiations because they draw much more media and public attention and because the highly-demanded talents of professional athletes grant these employees much more negotiating leverage than the typical unionized employee.

Interestingly, this leverage was virtually nonexistent before the advent of player unions and collective bargaining. In the professional sports context, team owners were historically better

5 Collective bargaining can be more formally defined as “a process by which a group of workers of an industry bargain or negotiate as a collective whole (unit) with the management to determine the working conditions, benefits, and salaries of the industry.” RAY YASSER ET AL., SPORTS LAW: CASES AND MATERIALS 395 (5th ed. 2003) [hereinafter SPORTS LAW] (discussing that in the professional sports context, individual players and owners subject to a collective bargaining agreement also have the authority to “individually negotiate significant elements of the employment contract” aside from the mandatory terms contained within the collective bargaining agreement). Although a common assumption is that collective bargaining and company/union negotiations are phenomena of decades past, the fact remains that collective bargaining negotiations are a regular occurrence in contemporary society. See, e.g., Valerie Scher, Symphony Musicians Approve Contract; 5-Year Pact Provides Raises, Extends Season, THE SAN DIEGO UNION-TRIB., June 30, 2006, at B1 (discussing the collective bargaining process and eventual agreement between the San Diego Symphony and its musicians) and Judge Rules Fire Official Can Join Talks, SAN ANTONIO EXPRESS-NEWS, June 29, 2006, at B3 (discussing a dispute during the collective bargaining process between the city of San Antonio Fire Department and the fire-fighters’ union).
organized and more solidly financed and found themselves in stronger bargaining positions relative to their players. This power imbalance left players underpaid and parties to contracts binding them to one team for an entire career. The balance of power began to equalize in the 1950s, however, as professional athletes unionized and attempted to win better employment terms. Ever since the 1950s, organized players’ unions have become powerful forces exerting pressure upon owners and helping professional athletes garner favorable employment terms. This recent equilibrium, however, has come at quite a price. Although a strong collective bargaining presence on both sides of the table brought about more competitive games, expanded player movement and other positive benefits for professional sports, it also created prolonged labor disputes with both sides employing damaging labor tactics. These disputes – purposely played out publicly – garner negative national attention and shed an ugly light on labor issues in an industry where owners and players generally make a great deal of money.

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6 See, e.g., SPORTS LAW, supra note 5, at 395 (stating that “Player associations first formed in the 1800s, but evolved into player labor unions only recently.”). Union organizers attempting to create a players’ association bargain with team owners for the right to organize; once approved, the union attempts to receive recognition from the National Labor Relations Board (NLRB) before its begins collective bargaining with the owners/league. See, e.g., Kenneth Kovach et al., Leveling the Playing Field: Collective Bargaining has Tried to Create Equity in Professional Sports, but it has also Spawned Bloody Legal Battles and Angry Fans, BUS. & ECON. REV., Oct.-Dec. 1997, at 12 [hereinafter Leveling the Playing Field]. Oftentimes the team ownership “resents the reduction in control and power, especially economic power, unions can cause and may refuse to recognize the players association – a decision that may result in charges being brought before the NLRB.” Id.

7 See, e.g., Leveling the Playing Field, supra note 6, at 12 (“[I]n recent years, professional sports have experienced open labor warfare. Most of these disputes have spilled over into the American political and legal arenas and, in the end, the sports have suffered, and sports consumers, i.e., the fans, have become victims of labor chaos and conflict.”).
Fortunately for the hundreds of millions of sports fans worldwide, a federal law provides a remedy to unfair and prolonged labor disputes. The National Labor Relations Act of 1935 (NLRA) governs collective bargaining efforts in professional sports; passed by Congress under its Commerce Clause powers, the NLRA is applicable to employees working in interstate commerce (including professional athletes playing games in different states). While primarily drafted to protect employees choosing to unionize, the NLRA also allows owners to protect their businesses upon expiration of a collective bargaining agreement. Additionally, the National Labor Relations Board (NLRB) supplements the protections of the NLRA by issuing rulings and petitioning federal courts for assistance in enforcing its decisions.

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10 29 U.S.C. § 158 (discussing, among other things, actions taken by employers and labor organizations that can constitute unfair labor practices as well as the obligation of both sides to bargain collectively).

11 Id. at §§ 153-156. Congress created the NLRB in 1935 to administer the NLRA and the NLRB:
The expiration of a collective bargaining agreement is a tense time for all stakeholders – i.e., players, owners, team employees, league officials and fans. These parties understand that, even with the NLRA/NLRB regulating the process, negotiating a new CBA is a delicate matter. Much of this tension is created by the powerful weapons possessed by each side. Weapons popularized

[C]onducts elections and prevents and remedies unfair labor practices. It is made up of two different "arms." The Board is a group of five persons based in Washington, D.C., who act in a judicial capacity, though they are not judges. This group decides whether improper labor practices have actually occurred, either during an election campaign or during management-union bargaining sessions. The General Counsel is the prosecutorial side of the Board. It has offices throughout the country and is charged with the investigation and prosecution of those who engage in unfair labor practices. The NLRB is designed to be completely equitable, taking sides for neither management nor union, acting as a sort of "referee" in what is usually an emotionally charged action between employees and employers. If a complaint is filed, the case is heard before an Administrative Law Judge, part of the judicial arm of the NLRB. The Administrative Law Judge's decision on the case is adopted by the Board. If exceptions are made, the transcript, briefs, and other documentation of the case is sent to the Board in Washington for a decision. The NLRB rarely hears oral arguments; it usually making decisions based on the documentation from the Administrative Law Judge. The NLRB decisions do not have the impact of law because the NLRB is an administrative agency. Their decisions are recommendations, but NLRB opinions carry a great deal of weight in courts of law. If either the union or employer is unwilling to follow the guidelines set down in the decision, the NLRB files a petition in the Court of Appeals—the level directly below the Supreme Court—for the district where the case arose. If this decision is contested, the Board will request that the United States Supreme Court hear the case.

in the press – such as strikes and boycotts – are complemented by less acclaimed weapons – such as lockouts, replacements and alternative league formation – and exerted in the battle for concessions. Although federal law can curtail abuses, both sides are allowed to utilize these potentially damaging tactics at different stages in the bargaining process.

The players’ most powerful tactic is the strike.\textsuperscript{12} Strikes are often portrayed as picket lines of employees protesting outside corporate headquarters but can also occur without any picketing or protesting; basically, a strike occurs whenever employees agree to refuse to come to work. The owners’ most powerful weapon is their ability to lockout (both literally and figuratively)\textsuperscript{13} their players from the workplace. Additionally, each side possesses less powerful weapons utilized to gain leverage. For instance, players may: (1) create or join a competing league\textsuperscript{14} and (2)

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\textsuperscript{12} See, e.g., Daniel Taylor, Football: Player’s Strike: Reaction: Angry Club Chairmen Hit Out at Union Tactics: Taylor Comes Under Attack from All Premier Sides, THE GUARDIAN (London), Nov. 22, 2001, at 32 (detailing owner reaction to a proposed Professional Footballers’ Association strike and other union “tactics”).


\textsuperscript{14} See, e.g., Tom Jones, Players Form New League, ST. PETERSBURG TIMES, Sept. 8, 2004, at C5 (describing the intentions of some NHL players to create a new, competing, professional hockey league – called the Original Stars
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encourage league and team boycotts.\textsuperscript{15} The owners, on the other hand, may: (1) utilize replacement players\textsuperscript{16} or (2) cancel an entire season.\textsuperscript{17} Of all the weapons in the holsters of both sides, the lockout is the most powerful weapon of all and forms the basis of this negotiation exercise.

Lockouts occur in two primary forms: offensive and defensive. Offensive lockouts take place when management suspends employees from working before unions can undertake a major labor action. Defensive lockouts occur as a management response to the implementation of various

\textsuperscript{15} See, e.g., SPORTS LAW, supra note 5, at 400. A team boycott in support of players is often advocated as a tactic against management. \textit{See, e.g., Another Boycott Advocate, PITTSBURG POST-GAZETTE, July 29, 2005, at D2 (advocating a fan boycott of the Pittsburg Pirates organization by arguing that “the only way to catch the organization's attention, is for the fans to boycott the team and not attend the games to bring down the attendance.”). From a financial standpoint, a “player strike may be supported by funding from other unions or a development strike fund.”} SPORTS LAW, supra note 5, at 400.

\textsuperscript{16} This tactic is not always successful as the talent level of replacement players rarely compares to the talent level of professional players. \textit{See, e.g., Replacement Players Not Even Close to Real Thing, PITTSBURG POST-GAZETTE, Mar. 2, 1995, at C1 (discussing the idea that replacement players brought in during the Major League Baseball strike of 1995 were not even close in ability-level to the professional players on strike).}

\textsuperscript{17} See, e.g., SPORTS LAW, supra note 5, at 400-01. Cancellation of an entire season in professional sports is a blunt weapon – causing a loss of revenue and fan goodwill – that was never utilized in North America before the cancelled NHL season. \textit{See, e.g., Ken Campbell, NHL Deal by Weekend or Season Cancelled, TORONTO STAR, Feb. 10, 2005, at A1 (stating that the NHL cancellation was the first cancelled season in the history of professional sports in North America). Financially, “management is economically supported by strike insurance, a strike fund, or other reciprocal agreements among league franchise members.”} SPORTS LAW, supra note 5, at 401.
union tactics.\textsuperscript{18} Regardless of which side initiates the labor action, lockouts are generally undertaken for two purposes: to avoid excessive economic loss or operational difficulties due to union activities and/or (2) to pressure unions into concessions by withholding pay and access to the workplace.\textsuperscript{19} From a timing perspective, it is important to understand that team owners cannot merely impose a lockout at any time of their choosing. Before employees are banned from employer facilities and suspended from work, management is required to meet with union representatives within a reasonable time after the expiration of the collective bargaining agreement.\textsuperscript{20} Both sides must negotiate in good faith about wages, hours and other terms of employment although neither side need reach a final agreement.\textsuperscript{21} After good faith negotiations have taken place, and before any lockout occurs, the owners must establish that they have negotiated with the players to the point of impasse — basically, to the point where further discussions would be hopeless.\textsuperscript{22} Federal courts and the NLRB, in making the determination as to whether an impasse exists, will look to the:

\textsuperscript{18} See Lockout Law, supra note 13, at 482 (describing the initiator of the lockout as either management (offensive) or the union (defensive)).

\textsuperscript{19} See id. at 482-83 (describing other purposes of lockouts as intending to “centralize bargaining,” “defeat an organizing drive in non-union or partially-unionized workplaces” and “avoid payment of wages and other entitlements during a period where little or no production is occurring”).

\textsuperscript{20} See, e.g., Alan Model, How to Play Collective Bargaining Hardball with the Union, LAWMEMO.COM, http://www.lawmemo.com/articles/hardball.htm (last visited July 2, 2006) [hereinafter Hardball]. This requirement is known as the employer’s “duty to bargain.” Id.

\textsuperscript{21} See id.

\textsuperscript{22} See American Ship Bldg. v. Labor Bd., 380 U.S. 300, 317-18 (1965) [hereinafter American Ship Bldg.] (upholding a management lockout designed to create economic pressure on the labor union and unionized employees, thereby overruling a NLRB ruling that the lockout was an unfair labor practice under the NLRA).
• Bargaining history of the parties;

• Good faith of the parties, which may include: the presence of delaying tactics, unreasonable bargaining demands, efforts to bypass the union, failure to designate an agent, arbitrary scheduling of meetings and whether the employer has withdrawn already agreed-upon provisions;

• Length of negotiations, although no set number of meetings are required;

• Importance of issues on which the parties are deadlocked;

• Belief of the parties as to whether impasse exists;

• Rejection of a final offer by the rank-and-file union membership;

• Union’s rejection of proposals without presentation of counterproposal or requesting more time to negotiate;

• Union’s refusal to recommend a final offer to the rank-and-file for ratification;

• Union’s withdrawal from negotiations without attempting to schedule more meetings; and

• Whether reasonable time existed for the union to review information supplied to it by the employer and analyze its impact on counteroffers.  

Impasses in labor negotiations occur in industries other than professional sports. See, e.g., Ron Fields, Plant Enforces Lockout: CNH Keeps Union Workers From Returning; UAW Calls Move “Unnecessary,” The Hawkeye, Nov. 24, 2004 (discussing a lockout after management at certain CNH Global plants in Iowa declared an impasse in negotiations with the United Auto Workers labor union after a nineteen-day strike that evolved into a lockout).

Hardball, supra note 20. Management must be careful not to signal that its position on an issue is flexible or be too quick to reach a mini-settlement on a particular issue in a bargaining session as these activities may indicate the lack of an impasse. See id.
If management senses that the union will not budge or otherwise desires a lockout, owners have the incentive to rush to declare an impasse even if negotiations are still a viable option. As mentioned above, under circumstances where players do not believe that good faith negotiations have taken place or that an impasse has not been validly reached, the players can bring charges of unfair labor practices with the NLRB to address perceived inequalities. The NLRB will then issue a ruling and, potentially, petition a federal court to enforce such ruling.

At the point where an impasse is validly declared, management may conduct the following activities in lieu of, or in addition to, a lockout: (1) maintain the status quo, (2) hire replacement workers, (3) implement the latest set of management-created work rules offered to the union

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24 29 U.S.C. § 158 (detailing specific unfair labor practices conducted by an employer that violate the NLRA). See, e.g., Associated Press, Players Pull Legal Move on NBA in Lockout, OTTAWA CITIZEN, July 24, 1998, at F2 [hereinafter NBA Lockout] (NBA players alleging that the owners imposed a lockout without bargaining to an impasse and filed an unfair labor practice charge with the National Labor Relations Board).

25 29 U.S.C. § 160 (stating that the NLRB is authorized to prevent unfair labor practices as defined in the NLRA). See, e.g., NBA Lockout, supra note 24 (recalling a situation in 1995 when the NLRB found that Major League Baseball Owners failed to negotiate with the players in good faith and asked a federal court to issue an injunction – which it did – restoring the labor rules under the previous collective bargaining agreement) and Larry Whiteside, NLRB Votes to Seek Injunction, BOSTON GLOBE, Mar. 27, 1995, at 26 (giving the details leading up to and following a NLRB meeting declaring that baseball owners failed to negotiate in good faith).

26 See, e.g., American Ship Bldg., supra note 22, at 318 (the Supreme Court stating “Accordingly, we hold that an employer violates neither 8 (a)(1) nor 8 (a)(3) [of the NLRA] when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position.”).
and/or (4) negotiate interim agreements with the union.\textsuperscript{27} No matter which option is chosen, management must continue to be committed to bargaining in good faith until a collective bargaining agreement is formed or until management chooses to exit the industry.\textsuperscript{28}

After covering the basics of the collective bargaining process, this section now analyzes four hot-button issues found in contemporary professional sports CBAs. Beginning with cost certainty – in the form of salary caps – and ending with player work rules – such as dress codes and minimum age requirements – the discussion demonstrates how these difficult issues can lead to lockouts.

\textbf{B. Four “Hot-Button” Issues in Professional Sports Collective Bargaining}

Today, the most prominent labor law issues in the professional sports collective bargaining context revolve around: (1) salary caps/cost certainty, (2) luxury taxes, (3) free agency and (4) player work rules.


\textsuperscript{28} This unilateral imposition of work rules cannot occur until the collective bargaining agreement has expired. See \textit{Hardball, supra} note 20. If no lockout is issued, employees can choose to work under management’s rules or strike. \textit{See id.} (explaining that workers who cross the picket line will also be forced to work under management’s unilateral implemented rules).
1. Salary Caps

A salary cap is an artificial upper limit on the amount of money that can be paid to individual players, to an entire team, or both. A salary cap can be either a “hard cap” – a set amount a team cannot exceed – or a “soft cap” – a set amount teams may exceed for authorized, predetermined reasons.\(^{29}\) For example, some soft salary caps do not count salaries of injured players towards the specific team’s cap total and/or allow a team to defer an injured player’s salary; hard caps, on the other hand, count all player salaries – whether a player is injured or healthy – toward the total cap amount.\(^{30}\) Both the National Football League (hard cap) and the National Basketball League (soft cap) are governed by CBAs containing salary caps.\(^{31}\)

\(^{29}\) See, e.g., Richard Kaplan, Note: The NBA Luxury Tax Model: A Misguided Regulatory Regime, 104 Colum. L. Rev. 1615, 1624 (2004) [hereinafter Luxury Tax] (discussing the NBA’s creation of a soft salary cap that creates exceptions allowing NBA teams to pay salaries over the cap limit in certain situations – such as a season-ending player injuries).

\(^{30}\) See, e.g., Aaron Lopez, With Nene Likely Out for the Season, Nuggets Might Seek-Salary Cap Relief, Rocky Mtn. News, Nov. 4, 2005, at C9 (stating that the NBA’s CBA allows for a “disabled-player exception” whereby individual teams can apply for salary-cap relief when one of their players is injured before November 30 of any season. If the NBA League Office grants the exception the team is allowed to trade for or sign a player for up to fifty percent of the injured player’s salary).

\(^{31}\) See, e.g., Allen Wilson, NFL’s Salary Cap Leads to Some Wild Spending, The Buffalo News, Apr. 9, 2006, at D4 (stating that the NFL’s adjusted $102 million per team salary cap is allowing players to obtain high-value contracts) and David DuPree, How Teams Shape Up, USA Today, Oct. 4, 2005, at C14 (referring to the NBA’s $5.63 million increase of its salary cap to $49.6 million per team).
A salary cap – especially a salary cap with a low ceiling – allows more team revenue to enter the owner’s bank account as profit. Without a cap, however, such revenue is more likely to enter the player’s pockets as salary expense to the owner. Therefore, team owners generally prefer a salary cap – or “cost certainty” – to no salary cap at all. For the same reasons, owners also prefer a lower salary cap ceiling to a higher salary cap ceiling and an aggregate team cap to an individual player cap. Owners unable to obtain a salary cap on aggregate salaries from the player’s union can bargain for an individual player salary cap instead. Players, on the contrary, continually seek an increase in salaries paid for their services and will argue against a salary cap. However, if precedent for a cap does exist in prior CBAs, or in cases where the inclusion of a cap in a subsequent agreement is inevitable, players will negotiate for the highest possible cap ceiling.

2. Luxury Tax

32 See, e.g., Charles McGrath, Maybe Slam Dunks and Orange Pucks would Help Sports, N. Y. TIMES, FEB. 27, 2005, at 7 [hereinafter Slam Dunks] (reiterating the NHL owner’s desire for “cost certainty”).

33 Luxury Tax, supra note 29, at 1626 (stating that a “league unable to compel its players to agree to a Hard Cap, a backdoor means of achieving some measure of salary control, is to limit the amount of money that may be paid to individual players.”).

34 See, e.g., Slam Dunks, supra note 32, at 7 (reiterating the NHL players’ “squeamishness about anything resembling a salary cap”).
A luxury tax is a penalty imposed upon a professional sports team whose aggregate salaries exceed a predetermined upper limit set by the league. The amount of the tax – oftentimes referred to as a “competitive balance tax” – is generally a percentage of the salary amount exceeding the limit and may be distributed either to a common fund or redistributed to the poorest teams in the particular league. The major difference between a salary cap and a luxury tax is that an owner is allowed to pay salaries exceeding the luxury tax ceiling for any reason, and pay the corresponding tax penalty, whereas the same owner is not generally allowed to exceed a salary cap ceiling.

Both Major League Baseball (MLB) and the National Basketball Association (NBA) have incorporated a luxury tax system into their collective bargaining agreements. The current MLB luxury tax contains an upper limit which increases every year. The system is structured to

35 See Luxury Tax, supra note 29, at 1627-1628 (“[T]he entity taxed is required to pay a specified percentage of the margin by which its spending exceeds a mandated threshold.”).

36 See, e.g., 2003 MAJOR LEAGUE BASEBALL BASIC AGREEMENT, art. XXIII (Sept. 5, 2002) [hereinafter 2003 MLB CBA] (referring to Major League Baseball’s luxury tax system as a “competitive balance tax”).

37 See Luxury Tax, supra note 29, at 1628 (“[P]layers, along with the minority of owners who have the ability and willingness to outspend other owners at any cost, appreciate the fact that the luxury tax is not an absolute ceiling on salaries.”).

38 MLB was the first professional sports league to utilize a luxury tax system. See Luxury Tax, supra note 29, at 1629 (stating that “after highly contentious negotiations beginning in 1994 and lasting until 1996, MLB and the [Major League Baseball Players’ Association] MLBPA finally came to an agreement over acceptable salary control mechanisms, including the first ever professional sports luxury tax.”).

39 2003 MLB CBA, supra note 36, at art. XXIII(B)(2) (explaining how the upper salary limit for tax purposes – referred to as the “tax threshold” – begins at $117 million in 2003 and increases every year to its current state of
assess a tax of between seventeen and one-half to forty percent of every salary dollar exceeding the upper limit depending upon the number of years the team has exceeded the luxury tax threshold.\textsuperscript{40} The first $5 million in luxury tax revenue is allocated to a reserve fund intended to compensate teams that overpaid their share of the luxury tax with the remaining money allocated to MLB League Offices funds to provide player benefits and to promote baseball worldwide.\textsuperscript{41} The luxury tax under the NBA’s updated collective bargaining agreement,\textsuperscript{42} on the other hand, penalizes teams if league-wide player salaries exceed a certain percentage of basketball-related income.\textsuperscript{43} If league-wide salaries are too high then teams that exceed the percentage threshold must pay one dollar for every one dollar they exceed the percentage.\textsuperscript{44} The NBA luxury tax

\textsuperscript{40} Id. at art. XXIII(I) (leaving the next set of MLB Owners’ and MLBPA representatives to work out the logistics of a new luxury tax system, if such a system is not vetoed by the players, for the 2007 MLB season).

\textsuperscript{41} Id. at art. XXIII(B)(3)(a)-(d) (describing how the luxury tax will be assessed considering the date and the number of times that a team has exceeded the tax threshold over the course of the current CBA (2003-2006)).

\textsuperscript{42} 2005 NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, art. VII [hereinafter 2005 NBA CBA].

\textsuperscript{43} Id. at art. VII(a)(17) (defining the “tax level” calculation used to determine the maximum amount in salaries that can be paid by the NBA as a whole and also to determine the maximum amount individual teams can pay in salaries before the luxury tax kicks in).

\textsuperscript{44} Id. at art. VII(f) (stating that teams whose salaries exceed the tax threshold must pay a tax equal to the amount that the team exceeds the level (i.e. dollar-for-dollar)).
proceeds can be distributed, at the NBA’s discretion, and are often distributed to all other teams that have not exceeded the upper limit for the current season.\textsuperscript{45} The NBA luxury tax scheme creates a much stiffer penalty than the MLB system and discourages NBA teams from overspending on salaries.

3. Free Agency

In a professional sports league where athletes are consistently able to sell their services to the highest-bidding team, player salaries skyrocket as teams compete for the most talented players. On the other hand, a league that severely restricts player movement can better control increases in salaries as players are forced to stay with their current teams for extended periods of time.\textsuperscript{46} Conceptually, free agency attempts to strike a middle ground between free player movement and increasing player market value on one hand and a team’s ability to control its talent and salary levels on the other. There are two basic forms of free agency: (1) unrestricted free agency and (2) restricted free agency. Unrestricted free agents are generally allowed to sign with any team they choose after their contract expires; restricted free agents must remain with their current club if it matches the offer of the team desiring the player.\textsuperscript{47} Most leagues categorize players as

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\textsuperscript{45} Id. at art. VII(g)(2)(i) and (ii) (stating that the NBA cannot distribute tax proceeds to teams that have exceeded the tax threshold for the current season but may use some of the tax proceeds, not distributed to teams under the tax threshold, for “League purposes”).

\textsuperscript{46} See Luxury Tax, supra note 29, at 1618-19 (discussing the idea that “the oldest method of limiting player salary growth in American professional team sports is restricting market competition for players.”).

\textsuperscript{47} See, e.g., Mike Stevenson, How Free Agency Works, ST. PETERSBURG TIMES, Feb. 25, 2001, at C11 (discussing the major issues implicated in a professional sports free agency system).
\end{flushleft}
unrestricted free agents if they have spent a substantial amount of time in the league on a team’s active roster – meaning that they were not injured for a substantial amount of games – and restricted free agents with more limited, but still substantial, service.\textsuperscript{48} Some forms of free agency require teams acquiring a player to provide specific compensation to the former team – usually in the form of money or future draft picks – in return for the acquired player.\textsuperscript{49} This twist in the process will make teams think twice about acquiring a player in free agency as they have to now consider future draft picks as part of the acquisition package. Disputes concerning free agency are common in contemporary CBA negotiations with different sports leagues adopting various forms of free agency.\textsuperscript{50}

4. Player Work Rules

An unheralded, nonetheless significant, sticking point in many sports labor negotiations revolves around work-related requirements applicable to professional athletes. For instance, the logistics of athlete arrival at pre-season training camps, on-the-job dress codes and road-trip expense

\textsuperscript{48} See id. (stating that NFL players who have played in at least six games for at least four years can qualify as unrestricted free agents while players who have played in at least six games for at least three years can qualify as restricted free agents).

\textsuperscript{49} See id. (stating that in the NFL, if a new team obtains a restricted free agent because the player’s current team refuses to match the offer, and if such offer is high enough, then the acquiring team will owe the player’s current team compensation in the form of future draft picks).

\textsuperscript{50} See, e.g., Bill Ordine, Curtain Never Falls on League’s Drama, BALTIMORE SUN, Apr. 15, 2006, at C1 (discussing the National Football League’s new collective bargaining agreement and its free agency clauses which are more limited than those pertaining to Major League Baseball).
accounts often generate disputes that must be negotiated before a CBA can be consummated.\textsuperscript{51} An emerging issue in this area deals with the minimum age upon which an athlete is allowed to be employed within a professional league. Resolutions of this controversial issue can have a great impact on high school students choosing to skip college entirely to play a professional sport. Recently, the NBA sought to increase the minimum age of players entering the league – with a mixed reaction from current NBA players – and both the owners and the players’ association agreed that the minimum age for an NBA player should be increased in the new CBA.\textsuperscript{52} This revised rule requires that a player must be at least one year removed from high school graduation before entering the NBA draft thereby encouraging players to attend college or play professionally overseas for one year.\textsuperscript{53} This new rule has great consequences for players

\textsuperscript{51} See, e.g., Michael Cunningham, \textit{NBA Dress Code has Struck a Chord}, HOUSTON CHRON., Nov. 9, 2005, at S7 (discussing the new NBA dress code that requires players to dress-up to and from games and the idea that, when the code was issued, “some players called [it] unfair, unnecessary, an attack on hip-hop culture and even racist.”)). Additionally, the current NBA CBA contains provisions for player moving and meal expenses. 2005 NBA CBA, \textit{supra} note 42, at art. III (stating that an NBA player assigned to a different team is entitled to a certain amount for hotel and rent expenses and all NBA players on road trips are entitled to a daily meal expense set at $85 in 1999 and including a cost-of-living adjustment for future years).

\textsuperscript{52} 2005 NBA CBA, \textit{supra} note 42, at art. X(1)(b).

\textsuperscript{53} See, e.g., Associated Press, \textit{NBA’s Collective Bargaining Agreement Finalized and Signed}, USA TODAY, July 30, 2005, http://www.usatoday.com/sports/basketball/nba/2005-07-30-cba-finalized_x.htm?POE=SPOISVA (explaining that the new NBA CBA states that American players must be at least one year removed from their high school class graduation date to be eligible to participate in the NBA draft. Additionally, international players must turn nineteen during the calendar year of the NBA draft at issue to participate). As one indication of the tension between the owners and the players concerning the age restriction issue, at least one current NBA player decried the age policy as racist towards African-Americans. See, e.g., Tim Sullivan, \textit{It’s a Little Late Now for Stern’s NBA Age-Limit Plan},
now required to postpone working at a job they are qualified for (assuming they would be drafted) in order to encourage them to finish college and mature emotionally.

The collective bargaining process is a delicate dance between owners and players (and their corresponding representatives), between supply and demand and between labor peace and labor strife. The structure and environment of the negotiations that surround a tentative collective bargaining agreement can create a document acceptable to all parties or a break down in communication followed by the implementation of costly labor tactics. Part III introduces the six stages of a typical collective bargaining negotiation as well as selected tactics that often prove successful in this emotionally-charged, pressure-filled bargaining environment.

III. NEGOTIATION IN THE COLLECTIVE BARGAINING CONTEXT

A. Understanding Negotiation Structure and Strategy is Crucial in Collective Bargaining

It is fruitless to ponder professional sports and collective bargaining without at least touching on negotiation theory and strategy – the backbone of the process. A poorly-equipped negotiation team frequently retreats to a client: (1) with a collective bargaining agreement containing suboptimal employment terms and conditions or (2) with no agreement at all. Unsurprisingly, understanding negotiation is also crucial for success in the broader business environment where parties invariably bargain over contractual provisions, price terms and other substantial particulars important to each side. It is true that negotiation is omnipresent in the twenty-first

SAN DIEGO UNION-TRIB., Apr. 15, 2005, at D1 (stating that NBA All-Star Jermaine O’Neil claimed that the vast majority of potential NBA players that may be drafted before high school graduation are African-Americans).
century business world. In fact, the collective bargaining process implemented in this exercise is also implemented in a similar fashion at the factory down the road or between a school board and a teacher’s union. The practice of negotiation is also prominent in the legal environment, with evidence demonstrating that nearly ninety-five percent of all federal civil lawsuits settle outside of court based upon some form of negotiation between the parties. Despite its importance in the real-world soon to be encountered, undergraduate students have a difficult time understanding that most parties, most of the time, at least attempt to iron out their

54 See Robert Mnookin, *When Not to Negotiate: A Negotiation Imperialist Reflects on Appropriate Limits*, 74 U. COLO. L. REV. 1077, 1077 (2003) (expanding upon the idea that in “the workplace, employers negotiate collective bargaining agreements with union representatives and nearly all managers and supervisors at times negotiate with their subordinates. In the business world, executives negotiate joint ventures, acquisitions and mergers; and goods and services are regularly exchanged by negotiation.”).

55 See, e.g., Mori Irvine, *Better Late Than Never: Settlement at the Federal Court of Appeals – Part One*, WASH. STATE B. ASS’N (Sept. 2001) (citing sources revealing that nearly 95% of all federal cases settle before trial); Gerald Williams, *Using Simulation Exercises for Negotiation and Other Dispute Resolution Courses*, 34 J. LEGAL EDUC. 307, 307 (1984) [hereinafter *Using Simulation Exercises*] (stating that “most legal disputes are resolved not by trial and appeal but by a negotiated settlement”); Theodore Postel, *Despite Attacks, Tort Litigation has Certain Efficiencies, Prof Says* 1 CHI. DAILY L. BULL. (Aug. 8, 2002) (arguing that tort lawsuits are not as expensive to the litigants as most people think because “most lawsuits settle, settlements are exchanges, and we usually expect exchange partners to minimize transaction costs”); Findlaw: For the Public, *Ten Things to Think About: Lawsuits*, http://public.findlaw.com/litigation_appeals/life_events/le17_8ten.html (last visited July 5, 2006) (arguing that “you should realize that most lawsuits settle, and that the court system is designed to put pressure on you to settle the lawsuit.”).

differences at the bargaining table rather than through expensive and potentially risky legal action. The significance of negotiation in contemporary legal and businesses transactions highlights the importance of teaching negotiation strategies in undergraduate business courses. The student-led collective bargaining exercise described in detail in Part IV, aids in this process by creating a realistic negotiation environment in the classroom within which students are encouraged to hone their negotiation skills. Before introducing the exercise, however, an understanding of basic negotiation structure as well as typical professional sports bargaining tactics helps to provide a solid background on the topic upon which a negotiation team can build its collective bargaining strategy.

57 It has been my experience that undergraduate business students believe that success in a lawsuit occurs only after one party destroys the other party in court and wins large sums of money in a win-lose scenario. This negotiation exercise helps refocus such misconceptions more towards the idea that a negotiated settlements – striving for more of win-win solutions – lead to most successful outcomes in civil disputes. The literature contains several interesting arguments on how to structure a negotiation course at the law school level from which many interesting strategies may be honed. See, e.g., Teaching Negotiation: A Valuable Experience, 31 J. LEGAL EDUC. 108, 118 (1981-1982) (discussing a law school negotiation class and emphasizing the importance of making negotiations as realistic as possible); Michael Moffitt, Lights, Camera, Begin Final Exam: Testing What We Teach in Negotiation Courses, 54 J. LEGAL EDUC. 91, 106-111 (2004) (discussing a creative negotiation course activity whereby students review videotapes of their in-class negotiations to evaluate their techniques); Chris Guthrie, Review Essay: Using Bargaining for Advantage in Law School Negotiation Courses, 16 OHIO ST. J. DISP. RESOL. 219 (2000-2001) (reviewing a relatively recent negotiation text assigned in certain law school negotiation classes). There are also some very good articles providing negotiation examples in the business law context. See, e.g., What’s On Your Mind, supra note 2 (presenting a student negotiation exercise dealing with an intellectual property dispute where the groups draft a settlement agreement); Let’s Make a Deal, supra note 2 (discussing negotiation of a marketing contract); Contract and Property Fundamentals, supra note 2 (setting up an exercise whereby students negotiate and draft a real estate purchase agreement).
B. Typical Stages in a Collective Bargaining Negotiation

Structurally, collective bargaining in professional sports is a process exhibiting little difference from more common business or legal negotiations which are generally structured around six definitive stages: (1) the preparation stage, (2) the preliminary stage, (3) the information stage, (4) the distributive stage, (5) the closing stage and (6) the cooperative stage.  

1. The Preparation Stage

The initial part of the collective bargaining process – the preparation stage – is crucial in any negotiation. Evidence shows that prepared negotiators generally outperform unprepared negotiators. Preparation, in the form of research and issue comprehension, emotional control

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59 See, e.g., Darshini M. Nathan, *Negotiating the Impossible*, NEW STRAITS TIMES (Malaysia), June 1, 2000, at EX6 (quoting a business negotiations expert who stated “most negotiations also fail because people tend to see it as an event and not a process. For this reason, it is important that the parties undertake pre- and post-negotiation
and organization provides many benefits to a bargainer such as confidence, the ability to move quickly past basic issues as well as an opportunity to make more creative and credible arguments. A prepared negotiator in the professional sports context, among other things, must have solid knowledge of the expiring collective bargaining agreement and other relevant labor issues, an understanding of sports and labor law (including relevant judicial precedents and statutory protections relevant to both sides) as well as the past bargaining positions, offers, strengths and weaknesses of the other side. 61 Aside from preparation on the substantive issues, effective negotiators must also prepare from a logistical perspective. Negotiation logistics such as: (1) team make-up, (2) strategy, (3) professionalism and (4) location should be also be strategically evaluated during the preparation stage.

preparations, [and adding] that pre-negotiation efforts showed a strong positive influence in the outcome of 85 per cent of cases studied.

Negotiation Process, supra note 58, at 273-86 (stating that “knowledge constitutes power at the bargaining table” and citing an article discussing preparation and performance); Business Mentor, NEW ZEALAND HERALD, Feb. 18, 2005 (stating that “In negotiation, preparation is power. Preparation is about the collection of information, and information is power. Never underestimate the necessity of detailed preparation if a successful result to the negotiation is to be expected.”).

60 It is important for negotiators to be passionate about their issue as well as measured in their approach during the actual bargaining.

61 See discussion supra at Part II.B for an analysis of the hot-button issues in contemporary collective bargaining negotiations. See also David Falk, The Art of Contract Negotiation, 3 MARQ. SPORTS L. J. 1, 3 (1992-1993) (a high-profile sports agent describing the serious preparation he takes before each contract negotiation by stating that “despite my longevity in the sports representation business, I always prepare thoroughly. I spend a considerable amount of time before every negotiation preparing, taking copious steps to understand the task I am about to approach.”). As part of the preparation process, it is also important to understand the trends in the particular sport at issue in the negotiation. See id. at 3 (discussing the importance of understanding the current trends in contract length, salary growth, etc.).
a. Team Composition

Although a client may choose to send in one chief negotiator in lieu of a team, most collective bargaining situations are team negotiations consisting of owner teams and player association teams. Anytime a team is involved in a business transaction team dynamics are in play and must be considered. To minimize the problems associated with teamwork, a negotiation team should be composed of individuals with different temperaments, backgrounds, strengths and weaknesses. If these attributes can be effectively utilized, the negotiation team will have a good chance of gaining favorable employment terms in the final collective bargaining agreement. In


63 See, e.g., Team Negotiations, supra note 62, at 888-89 (describing some of the common pitfalls experienced by negotiation groups).

64 See id. at 884-85 (discussing the idea that not all negotiation teams function effectively and that there are many “dangerous pitfalls” – such as groupthink where dissenting ideas are not proposed – that teams must avoid in order to obtain a better result than an individual negotiator could achieve alone). If these pitfalls can be avoided, there is evidence that teams “reach deals of better quality than do their solo counterparts. This is true regardless of whether teams negotiate against other teams or against solos.” Id. at 886. These strengths stem from having more brains thinking and reacting to the issues – “the extra memory capacity and parallel data processing offered by the linked minds of the team may be able to handle complex issues and interests that would overwhelm and ‘crash’ a solo negotiator.” Id. at 887.
a collective bargaining situation, a strong argument can be made to send as many team members
to the table as feasible (but not too many to intimidate the other side or appear to be wasting
resources) in order to take advantage of the team benefits and creativity – even if only one
person serves as the lead negotiator.65

b. Strategy

Moving forward within the preparation stage each team must also determine a preliminary
negotiation strategy. In collective bargaining parties generally utilize one of three basic
negotiation styles: (1) competitive, (2) cooperative and (3) interest-based.66

(1) Competitive Negotiation

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65 See id. at 888 (arguing that there are downsides to sending teams to the negotiation table such as the added
expense for the extra bodies, the appearance of people wasting time watching their teammates negotiate, and the
time it takes for group members to get up to speed and define negotiation roles etc.). See also See Jeffrey T. Polzer,
negotiations conducted by a team versus negotiations conducted by an individual and stating “one of the most
important findings of this study is that teams outperform their individual opponents. The evidence suggests that
teams are viewed by both parties as more powerful than individuals.”).

66 Negotiation teams need to decide whether to take on a cooperative or competitive mentality. See Team
Negotiations, supra note 62, at 886 (stating that cooperative teams “have members who share the same motives and
incentives and are focused on reaching a common goal” while competitive teams “are motivated to maximize their
own gains irrespective of others’ outcomes.”).
A competitive negotiator is typically aggressive and attempts to maximize gains on each issue important to the client.\(^6\) Competitive negotiators are not overly concerned with the other side gaining any of its target objectives or with the other side leaving the table with any sense of satisfaction – winning is the only goal.

The competitive negotiator tends to define success in negotiation rather narrowly. It is simply getting as much as possible for himself: the cheapest price, the most profit, the least cost, the best terms and so on. In its simplest form, this strategy focuses on immediate gain and is not much concerned with the relationship between the negotiating parties.\(^6\)

A quasi-strength of competitive negotiation is that the tactic often intimidates opponents and creates a situation where competitive negotiators steamroll more cooperative negotiators into offering concessions and more readily agreeing to the objectives of the competitive negotiator. A major weakness of competitive negotiation, on the other hand, is that the other side will likely become competitive as well leading to prolonged labor disputes as recently witnessed in the National Hockey League lockout.\(^6\)

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\(^6\) *Competitive Bargaining*, supra note 67, at 326.

\(^6\) See, e.g., Jonathan Cohen, *When People are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739, 769-70 (2001) (arguing that negotiators often use the excuse of the other side’s tactics to utilize similar tactics in response).
(2) Cooperative Negotiation

Cooperative negotiators take a more cordial approach and “rather than emphasize a goal of victory . . . emphasize the necessity of reaching agreement [and] the standard moves are to make offers and concessions, to trust the other side, to be friendly, and to yield as necessary to avoid confrontation.” A cooperative negotiator will generally look for ways to compromise and attempts to please the other side in order to reach an agreement.

[Cooperative] bargainers believe they must trade off some of what they want in order to get at least something. This means that, in some sense, they concern themselves not only with their own gain, but with that of the parties with whom they are dealing. They may do this out of genuine concern for others' well-being or because they conclude they must give up something to reach any agreement at all. In this sort of bargaining, the negotiator only receives, for whatever reason, some of what is desired. . . . As long as the result is in the range of what they deem acceptable, they are satisfied.

70 See ROGER FISHER AND WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 8 (2nd ed. 1991) [hereinafter GETTING TO YES]. This type of negotiation is commonly referred to as “cooperative-compromise bargaining . . . soft-bargaining, or win-some-lose-some, or give-and-take bargaining.” Competitive Bargaining, supra note 67, at 327.

71 See GETTING TO YES, supra note 70, at 8 (arguing that cooperative, or “soft” negotiators “prefer to see [the other side] as friends” as opposed to adversaries).

72 Competitive Bargaining, supra note 67, at 327.
This strategy can be effective if the other side adopts it as well but can be disastrous if the other side adopts a competitive approach inducing cooperative negotiators to give away too much while attempting to cooperate and/or compromise.

(3) Interest-Based Negotiation

An interest-based negotiator will tend to focus on interests rather than positions in an attempt to allow both parties gain at least part of what they desire.\textsuperscript{73}

In [interest-based] bargaining, the parties aim to satisfy their own interests, as well as those of the other negotiating parties . . . they seek to maximize their own gain \textit{and} the gain of the other parties. The parties achieve this aim through a process in which the parties collaborate to discover what mutual action they can take to satisfy their respective interests.\textsuperscript{74}

The following is an example of interest-based bargaining: Assume that two parties, a husband and wife, are discussing dinner and the husband desires to eat a large slice pepperoni pizza all by

\textsuperscript{73} See \textit{GETTING TO YES}, \textit{supra} note 70, at 41-55 (arguing that “since the parties’ problem appears to be a conflict of positions, and since their goal is to agree on a position, they naturally tend to think and talk about positions – and in the process often reach an impasse.”). “This kind of bargaining is generally referred to as integrative or problem-solving bargaining, but is also called interest bargaining, positive-sum, or win-win bargaining.” \textit{Competitive Bargaining, supra} note 67, at 327.

\textsuperscript{74} \textit{Competitive Bargaining, supra} note 67, at 327-328.
itself while his wife desires he eat something healthier. There is only one way to solve this problem if the focus is on positions – either the husband eats pizza for dinner (his position) or does not eat pizza for dinner (his wife’s position). However, a solution readily appears if the focus is on the interests of both parties. Focusing on interests instead, the husband can agree to only eat half of the piece of pizza or mix in a salad while the wife can accept that this new meal will be healthier than it would have been had her husband eaten the entire piece of pizza by itself or omitted the salad. The major strength of this strategy is that both parties will attempt to meet their goals without excessive compromising – something along the lines of “ok, you can have the entire piece of pizza this time” – that may lead to diminished returns as oftentimes occur in a cooperative approach. A major weakness to this strategy is that it only works if both sides utilize it; a negotiator utilizing the competitive approach will have little desire to look into interests or expand the pie to help both sides gain.

c. Professionalism

75 See Getting to Yes, supra note 70, at 40 (presenting a similar situation where one party at a library would like a window closed to avoid the draft and another would like the window open for the fresh air; the solution based on positional bargaining is hopeless with only one party ending up happy, but, with interest-based bargaining the solution becomes easier when the window in question is closed to avoid the draft and another in a different part of the room is opened to provide fresh air without a draft).

76 Competitive Bargaining, supra note 67, at 328.

77 “Nothing, except perhaps local culture, standard, custom or practice in a particular industry or negotiating arena, requires negotiating parties to negotiate in any particular way. None of these ways of bargaining is necessarily ‘better’ than any other way. Most sophisticated practitioners, however, would probably acknowledge that integrative bargaining is the most productive and efficient way to bargain.” Id. at 328.
A bargaining team’s overall professionalism is less crucial than the negotiation strategy adopted – but still very important from a psychological perspective.\textsuperscript{78} For instance, the physical appearance of a negotiation team, from dress to personal grooming characteristics, can add credibility and a non-trivial amount of seriousness to their arguments.\textsuperscript{79} Similar to a salary negotiation or a job interview, collective bargaining negotiators should strive to create an aura of professionalism during the entire process – even through the late-night sessions that often occur during the process.\textsuperscript{80} In fact, the recent NHL collective bargaining negotiations contained

\textsuperscript{78} See, e.g., Martha Lagace, \textit{The Emerging Art of Negotiation}, HBS WORKING KNOWLEDGE (May 23, 2000), http://hbswk.hbs.edu/item/1517.html (discussing the idea that, from a psychological perspective, research is demonstrating that preconceptions – in areas such as personal characteristics of the parties on the other side of the table – matter in negotiations). \textit{See also} Bonnie Goldberg, \textit{Students Take a Course in Etiquette}, TORONTO STAR, Apr. 10, 2004, at D15 (presenting an example of educational courses emphasizing the importance to students concerning how to dress, groom and act professionally in business settings).

\textsuperscript{79} See \textit{The Art of Contract Negotiation}, supra note 61, at 20 (arguing that “depending on who you are meeting with, how you dress can have an impact.”).

\textsuperscript{80} See, e.g., M.B. Owens, \textit{Best to Prepare for Compensation Negotiations}, SEATTLE POST-INTELLIGENCER.COM, (Feb. 27, 2006), http://seattlepi.nwsource.com/business/260921_negotiate27.html (“When you go to an interview make sure you present yourself properly. Dress appropriately. Give firm handshakes. Act as if your job and career depended on how you present yourself. Be on time to the interview -- how you are perceived can affect the compensation offered by the employer.”). From a physical appearance standpoint, professional attire in the form of a business suit may be more appropriate in a professional sports CBA negotiation than it would be in a merger of two Silicon Valley technology companies. \textit{See, e.g.}, Angelica Pence and Laura Thomas, \textit{Cool Tools}, S. F. CHRON., Nov. 16, 2002, at WB5 (discussing the dress code in Silicon Valley in the following manner: “Used to be every day was casual Friday in offices across the country. Khakis, jeans and button-down shirts and logo T-shirts were standard garb from Silicon Valley to Wall Street. Then the Internet boom went bye-bye. Now Dockers have lost much of their workplace chic, and many fashionistas are forecasting the return of (gasp) the men's suit. That may be
statements from the parties discussing the professionalism, or lack thereof, of the parties on the other side of the table during certain parts of the heated discussions.  


d. Location

As for the negotiation location, the term “home court advantage” may be appropriate with both sides seeking locations where they feel the most comfortable and can maximize their strengths. Experienced negotiators, or negotiators in a position of power, like to negotiate on their own turf so that they can exert a bit of control over the course of the proceedings. This control is both

so, but try selling that to the surviving dot-com crowd.”). Interestingly, sometimes collective bargaining sessions iron out dress codes for the players themselves – an issue arguable more important than the dress code for the negotiators. See, e.g., Murray Chass, *Baseball; Dress Code Gets Sleek*, N. Y. TIMES, Sept. 20, 2002, at D3 (discussing the Major League Baseball CBA and the idea that “uniform regulations have long been included in the official baseball rules, but labor representatives of the clubs and the players added new regulations in their recent negotiations to account for recent uniform trends.”).

81 See, e.g., Jeremy Rutherford, *Goodenow Resigns as NHL Players Union Chief*, ST. LOUIS POST-DISPATCH, July 29, 2005, at D1 (quoting Gary Bettman, the Commissioner of the NHL concerning the departing NHLPA head Bob Goodenow in the following way: “I have always respected Bob's tenacity, passion and *professionalism*, and I wish him well in his future endeavors.”) (emphasis added); Lance Hornby, *Bad Blood Boils Over*, TORONTO SUN, Feb. 22, 2005, at S4 (discussing the CBA bargaining and citing one sports agent who called the process “a dysfunctional negotiation from Day 1” and quoting a few NHL players who referred to NHL Commissioner Gary Bettman as a villain).

82 See The Art of Contract Negotiation, supra note 61, at 18 (discussing the idea that the meeting place in any negotiation can have a distinct advantage – in the same idea as the home-court advantage in professional sports).

administrative and psychological; a negotiator’s home environment provides an opportunity to control the administrative functions such as meals and material distribution as well as the psychological attributes of the conference room and the seating arrangements. A home negotiation will also minimize travel time and exhaustion for the “home” team and increase these factors for the “away” team.\textsuperscript{84} There are also some substantial weaknesses, however, to holding a negotiation on home turf such as the difficulty of walking out on the negotiation from within your own office.\textsuperscript{85} A neutral negotiation site can eliminate any advantage and can help set the stage for a productive negotiation.

2. The Preliminary Stage –

Occurring at a mutually-scheduled time after the preparation stage, the preliminary stage constitutes the time period when the parties first sit down to talk about introductory and administrative negotiation logistics.\textsuperscript{86} Although no substantive issues are negotiated, this stage sets the tone for the future discussions. If approached correctly, the preliminary stage can lead to a pleasant negotiating environment throughout the bargaining even if tensions elevated entering the process. It is during this stage that the parties should “look for common interests they share with their opponents. . . . Persons who can identify and share such common interests enhance the

\textsuperscript{84} See id. (discussing the idea that there is minimal time and monetary expense from negotiating on home turf).

\textsuperscript{85} See id. (leaving the bargaining table can be an effective negotiation tactic that is much more difficult to execute if you are in your own conference room negotiating).

\textsuperscript{86} See Negotiation Process, supra note 58, at 286-92.
probability they will like each other and develop mutually beneficial relationships.” This stage is also important because the parties learn a bit about the demeanor and potential negotiation style of their opponents and, in fact, a negotiation team is at an advantage if it can discern the negotiation strategy of the other side during this preliminary stage.

3. The Information Stage –

The information stage is where the parties finally get down to business and the bargaining actually begins. At this point flags are planted as parties lay out their positions on the relevant issues. All of the effort put into the previous two stages hopefully bears fruit as the negotiators tackle the big-picture issues as well as supplemental, and generally smaller, side-issues. For instance, the key issue in the recent NHL collective bargaining process revolved around the idea of a salary cap or cost certainty. The NHL owners were not going to sign any agreement, or even negotiate any further, without discussing and receiving some form of control over what

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87 Id. at 287 (giving examples that the parties “may be from the same city or state, they may have attended the same college or law school, their children may attend the same schools, or they may enjoy the same music or sports.”).

88 These styles will likely be one of the three mentioned above: (1) competitive, (2) cooperative, or (3) positional. See discussion supra at Part.III.B.1.a-c.

89 See The Art of Contract Negotiation, supra note 61, at 10-14 (stating that a negotiator needs to understand the authority to make the deal, the objectives and the trade-offs the other side may be willing to make in order to be successful).

90 See Negotiation Process, supra note 58, 292-302 (this is the first substantive stage of the process and the shift from the preliminary stage is easy to notice because “this point coincides with a shift from small talk to questions regarding the other side’s needs and interests.”).
they considered to be out-of-control player salaries. The information stage allowed the owners to place their demands on the table and listen for the response from the players who argued that the dire economic system was being overstated by the owners.

4. The Distributive Stage

The distributive stage follows the information stage and is the point at which the major issues have been covered and where a narrowing down to core positions occurs and points of agreement begin to appear. At this point negotiators tend to make offers that are either accepted, turned into counter-offers or rejected completely. Oral or written offers are common at this point as the final contract or agreement begins to fall into place. Collective bargaining teams must make a

91 Associated Press, “We Can’t Live Any Longer” Under this CBA, ESPN.com (May 26, 2004), http://sports.espn.go.com/nhl/news/story?id=1809397 (“NHL commissioner Gary Bettman promised again Tuesday that owners are determined to reach a radically different labor agreement no matter how long it takes and warned the players union not to test that resolve. . . . Until the core issue [of a salary cap or cost certainty] is resolved, Bettman said both sides have decided there will be no bargaining on lesser issues.”).


93 See Negotiation Process, supra note 58, at 302-18 (stating that “[T]he transition from the Information Stage to the Distributive Stage is usually visible. The participants cease asking each other about what they want and why they want it, and begin to talk about what they have or are willing to give up.”).

94 See The Art of Contract Negotiation, supra note 61, at 20 (discussing the idea that there is a difference between written and oral offers and arguing that putting something in writing is like having that resolution “carved in stone” and more difficult to amend in the final agreement).
strategic decision as to whether or not to make the first offer on each particular issue during the distributive stage. This is a key strategic decision because making the first offer can be a benefit if a party is able to “set the market”\(^95\) (or create the appearance that the offer constitutes the correct market value placed on the issue at hand) or a disaster if a party makes an offer that is too low or so high that the offeror loses credibility.

5. The Closing Stage

The closing stage, the penultimate step in the collective bargaining process, occurs when “the participants realize that a mutual accord is likely to be achieved” and create a tentative agreement memorializing the agreed-upon terms.\(^96\) Obtaining a tentative agreement is one of the most important steps because all of the negotiation skills and craftiness in the world are useless without party sign-off on a new CBA.\(^97\) One of the most important occurrences at this point in the process is the ability and willingness to compromise. Without some form of compromise or an incredibly weak party across the table, no negotiation will exit the closing stage with a signed

\(^{95}\) *See id.* at 23 (stating that making the first offer on a specific issue can be the best decision if “you know what you are doing, if you have done your homework, if you are confident, it is important for you to set the market, as opposed to having the [other side] come in first.”).

\(^{96}\) *Negotiation Process, supra* note 58, at 318-20 (stating that “the Closing Stage represents a critical part of the bargaining process. The majority of concessions tend to be made during the concluding portion of negotiations, and overly anxious participants may forfeit much of what they obtained during the Distributive Stage if they are not careful.”).

\(^{97}\) *See The Art of Contract Negotiation, supra* note 61, at 25 (stating that “last, but not least, you have to take the most important step; you have to close the deal.”).
agreement. On the other hand, the closing stage can pose significant challenges when, “in their haste to close” and after committing much time and attention to the process, negotiators over commit and offer “last-minute concessions.” A middle-ground must be found where both sides are willing to agree to tentative terms that can be ironed out and enhanced in the last phase of the negotiation process – the cooperative stage.

A great example of the compromises needed to reach a tentative agreement occurred where both sides in the renegotiation of the National Basketball Association CBA compromised in order to avoid a lockout similar to the NHL lockout of 2004-05. In return for a higher salary cap of 51 percent of basketball-related revenue, the NBA Players Association agreed to smaller annual raises and shorter maximum contract lengths.

6. The Cooperative Stage

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99 Janny Hu, NBA Strikes Labor Accord; Stern Says Compromise was Key to Reaching a New Six-Year CBA, S. F. CHRON., June 22, 2005, at D2 (discussing the tentative NBA CBA and stating that “Commissioner David Stern called it a ‘50/50 deal,’ with half the concessions coming from owners and half from players. Though neither party appeared overjoyed by the final give-and-take, both sides stressed avoiding a lockout was more important than getting every demand -- especially considering the current NHL labor mess and the NBA’s previous shutdown in 1998.”).
In multi-issue bargaining situations, the closing stage is followed by a brain-storming session referred to as the cooperative stage – a process which concludes the negotiation. Although many parties feel that bargaining is complete with a tentative list of agreed-upon terms, a chance exists during the cooperative stage to attempt to expand the pie for mutual benefit. In other words, once a “tentative accord has been reached . . . the negotiators should contemplate alternative trade-offs that might concurrently enhance the interests of both parties.” Charles Craver, an expert on negotiation offers some examples of the inner workings of this cooperative stage:

There will always be distributive items that both sides value. These issues generally concern monetary terms. Even in this area, however, if negotiators are willing to think outside the box and seek innovative solutions, they may be able to expand the pie and simultaneously improve their respective positions. For example, if profits have been declining, a company may offer workers a bonus instead of a pay

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100 A multi-issue bargaining situation is one with many issues needing resolution before a final agreement is formalized. This is different from a zero-sum negotiation over an item – such as an automobile – that can only go to one party or the other.

101 See The Art of Contract Negotiation, supra note 61, at 320-321 (“Once the Closing Stage has been successfully completed . . . many persons consider the negotiation process finished. Though this conclusion may be correct with respect to zero sum problems . . . it is certainly not true for multi-issue encounters.”).


103 The Art of Contract Negotiation, supra note 61, at 321 (“[T]he bargainers may be mentally, and even physically, exhausted from their prior discussions, but they should at least briefly explore alternative formulations that may prove to be mutually advantageous.”).
increase. The employees get the benefit of the cash payments, but the base pay rates remain unchanged. Parties dealing with rising health costs may agree to larger deductibles and co-payments instead of higher employee premiums.  

Although the parties may have tentatively agreed to base salary increases or lower employee premiums, such agreements would put pressure on a company experiencing a decline in profits leading to resentment or financial instability in the future. However, if the parties utilize the cooperative stage to obtain creative solutions, both side can leave the table satisfied and remain more satisfied in the future. This type of synergy of ideas and creative thinking is possible at this stage and not necessarily at the closing stage due to the gamesmanship, tactics and emotional interference present in the process during the earlier stages but minimized once a tentative accord is reached. In the end, although the closing stage often leads to an acceptable agreement, the negotiating environment during the closing stage often reduces the likelihood of obtaining an optimal agreement.

The following section describes an exercise allowing students to put their knowledge of employment law, collective bargaining and negotiation into practice by negotiating a solution to the National Hockey League Lockout of 2004-05.


105 See, e.g., The Art of Contract Negotiation, supra note 61, at 321 (stating that “if parties conclude their interaction at [the closing stage], they may leave a substantial amount of untapped joint satisfaction on the bargaining table.”).

106 See Steven Tischler, Sports and the Labor Studies Curriculum, SPORTS AND LAB. STUD., 15-25, 16 (2001) (discussing the interest students take in legal issues surfacing in the professional sports context and stating “labor
IV. THE NHL AND THE LOCKOUT NEGOTIATION EXERCISE –

A. The NHL and its Current State of Affairs

The National Hockey League was born in 1917 with five teams playing each other over a twenty-two-game season. At the end of each season, the team winning the NHL title played the title-winner from a rival professional hockey league – the American Pacific Coast League (PCL). These teams faced-off in a championship game vying for sole possession of a trophy called the Stanley Cup. After the PCL folded in 1926, the NHL became the only professional hockey league in North America and gradually expanded from its original five teams to the thirty-team league in existence today. Since the 1920s the excitement of professional hockey educators will find in sports excellent examples illustrating collective bargaining strategies, organizing and union-busting techniques and the social profiles of labor and management.”).


108 This trophy – the ultimate prize for NHL players and teams today – was named after Lord Stanley of Preston – the English Governor General of Canada. See, e.g., NHL.com, The Stanley Cup, http://www.nhl.com/cup/cup.html (last visited July 16, 2006). Lord Stanley allegedly bought a silver bowl and awarded it to the top amateur team in Canada on an annual basis and later, in 1926, the trophy became the championship award to the NHL champion. Id.

109 NHL.com, Teams, at http://www.nhl.com/teams/index.html (last visited June 27, 2006). The NHL has expanded eleven times since its inception with the first expansion occurring in 1967 and with its most recent expansion occurring in 2001 when the Minnesota Wild and the Columbus Blue Jackets were added in to bring the league to its current tally of thirty teams. See, e.g., NHL Expansion and Relocation: Expansion History,
has provided the NHL with increased attendance levels and additional fans across the globe.\footnote{Id.} Despite this rise in popularity, however, the League recently found itself embroiled in an economic crisis as its expenses – primarily in the form of player salaries – were increasing more rapidly than its revenues.\footnote{See, e.g., THEODORE CAPLOW ET AL., THE FIRST MEASURED CENTURY: AN ILLUSTRATED GUIDE TO TRENDS IN AMERICA, 1900-2000 vi (2001) (stating “the major professional sports of baseball, football, basketball, and ice hockey achieved extraordinary growth in the last two decades of the century. . . . [and that] professional basketball and ice hockey first acquired mass audiences in the 1950s”); Jonathan Powell, Training Camp for Ice Hockey Enthusiasts, S. CHINA MORNING POST, Nov. 30, 2004, at 12 (citing stories that evidence hockey’s growing international popularity – even as far away from its Canadian roots as Hong Kong).} This inverse profitability model really hit home in 2003 when twenty of the thirty NHL teams lost money and NHL owners, as a group, lost over $220 million.\footnote{Thomas Heath and Tarik El-Bashir, As Expected, NHL Players Locked Out; Lack of New Agreement Puts Season in Jeopardy, WASH. POST, Sept. 16, 2004, at D1 (arguing that that NHL owners are trying to convince the NHLPA that the NHL is on the verge of an economic meltdown without some form of ceiling on player salaries).} Fortunately for all of hockey’s stakeholders, the NHL’s collective bargaining agreement expired on September 15, 2004. This expiration provided the opportunity for the two primary parties – the NHL Owners’ Board of Governors (the BOG) and the NHL Players’ Association (the NHLPA) – to hash out a new agreement and attempt to remedy the economic crisis. Unfortunately, little progress was made during preliminary talks and bargaining ended in

\footnote{http://www.geocities.com/nhlexpandrelocate/expansionhistory.html (last visited June 27, 2006) It is also interesting that seven teams currently in the NHL have relocated to different locations over the past thirty years. Id.}

\footnote{See id. (reiterating the NHL’s position that increasing player salaries are overshadowing revenue growth and also stating that two NHL franchises – Ottawa and Buffalo – have filed for bankruptcy since 2001).}
a stalemate as both camps entrenched themselves attempting to win better terms/more concessions in the new agreement.\textsuperscript{113}

In the midst of the finger-pointing and off-and-on bargaining schedule, the NHL Commissioner retained former Chairman of the Securities and Exchange Commission Arthur Levitt to conduct a detailed analysis of the NHL’s economic situation – including obtaining financial reports from all thirty teams (the Levitt Report).\textsuperscript{114} The Levitt Report found that: (1) the NHL’s economic system was broken, (2) the majority clubs were losing money on an annual basis, (3) player salaries comprised too great a percentage of annual revenues and (4) the NHL was on “a treadmill to obscurity.”\textsuperscript{115} After the release of this report and a continued failure to reach an agreement through the bargaining process, the NHL Owners declared an impasse and locked out the players on September 16, 2004.

\textsuperscript{113} See, e.g., Associated Press, NHL Lockout Chronology, ESPN.COM, Feb. 16, 2005, http://sports.espn.go.com/nhl/news/story?id=1993004 (stating that these meetings began in secret on January 6, 2003 and were made public on October 1, 2003 once the threat of a salary cap was made by the owner’s bargaining representatives).


\textsuperscript{115} See Hockey Analysis, supra note 114, at D7 (citing an Arthur Levitt press conference during which he uttered this phrase).
B. Negotiating the National Hockey League Lockout of 2004-05

The professor can introduce some drama into the classroom by declaring: “With the NHL players locked-out and the upcoming season teetering on the verge of cancellation, the time has come for one last effort at obtaining an agreement. In fact, the clock is ticking towards cancellation and the students – as the representatives of the relevant parties – hold the future of professional hockey in their hands!” After alerting the class to the gravity of this situation and discussing the upcoming negotiation, the activity commences one week in advance when students are

116 A similar collective bargaining exercise in the professional sports context deals with Australian Rules Football. See Peter Gahan and Robert Macdonald, Collective Bargaining Simulation: The Federal Football League versus the National Association of Professional Footballers, 4 SPORTS MGMT. REV., 89-114 (2001) [hereinafter Collective Bargaining Simulation] (presenting an exercise which pits the owners of Australian Rules Football teams in a new league against the players’ union for professional footballers and allocates points based on the success of both sides in obtaining favorable work rules for their side).

117 In fact, an unsuccessful negotiation of a new CBA remedying the dire economic situation in the NHL could lead to the collapse of the league. “Both the players and the owners have implied they could withstand a one- or two-season work-stoppage and reportedly have built up war chests to weather the storm. The reality . . . is that neither party can truly afford to risk testing the resiliency of the fragile league. No miracles on ice will occur to solve this problem.” John Loughnae and Chris Dale, NHL, Union Can’t Count on a Miracle on Ice, STREET AND SMITH’S SPORTS BUS. L. J. (March 22-28, 2004), at http://www.ghlaw.com/assets/NHLarticle2004.pdf.

118 At my institution, business school class periods are one hour and fifty minutes in length and meet twice per week. Having two hours to conduct this activity is much more fruitful than trying to squeeze it into a fifty minute class period or carrying-over to a subsequent class period where memories fade and the time pressure dynamic is altered. See Detailed Exercise Outline (Appendix E), available at http://www.daniels.du.edu/busethics/publications.cfm. In a one-hour class period the amount of negotiations can be reduced from three to two and the time allotment for each negotiation and debriefing can be shortened to fifty minutes.
assigned a student-written background paper describing the NHL and its current labor-relations situation as well as Parts II – IV of this article.\textsuperscript{119} Students are encouraged to read these materials carefully and attempt to understand the key terminology and the stated positions of both sides.\textsuperscript{120} Because the students know neither their team composition nor which side – the NHLPA or the NHL Owners Board of Governors – they will represent, they enter the exercise with an unbiased understanding of the terms and a readiness to wholeheartedly advocate for either party.\textsuperscript{121}

On negotiation day, the professor randomly selects negotiation teams of three to four students apiece\textsuperscript{122} and assigns half of the teams to represent the NHLPA and the other half to represent

\textsuperscript{119} This article was located via an Internet search. Benny Chan et al., \textit{The NHL Lockout}, http://www.hss.caltech.edu/~mcafee/Classes/BEM106/Papers/2005/NHL.pdf (last visited July 15, 2006). This piece was written by undergraduate students. Utilizing a student-written article is helpful because the language and tone is not overly technical and also leaves the impression that “other students can understand and write about this, I can understand this information as well!”

\textsuperscript{120} It is best to conduct this exercise at a point in the term after the class has covered employment law so some of the terms and concepts involved in the exercise will be familiar to the students.

\textsuperscript{121} I also take this approach of last-minute team and position selection because I do not encourage outside research on this short project in order to avoid a situation where one overly-ambitious team decides to conduct outside research and steamroll the opposing side during the negotiation. A more realistic approach may be to allow unlimited outside research and preparation, but I have found that these efforts often will make the negotiations more difficult as teams bring in outside information that skews the power relationship when the other team merely reads the assigned materials.

\textsuperscript{122} These numbers were chosen deliberately so that all students are forced to participate effectively in preliminary meetings and negotiations/debriefings and to avoid, as much as possible, the opportunity to free ride on the work of
the National Hockey League BOG. Each team receives the same common facts memorandum and individual teams receive a confidential issues memorandum appropriate to their position. The common facts memorandum contains the factual universe of the exercise disclosed to both sides while each confidential issues memorandum contains a comprehensive and confidential list of the issues that groups are free to negotiate — including a point allotment based upon the success each team has in obtaining its goals on four distinct issues. The confidential issues memorandum alerts the students that they need not disclose their private facts to the other side unless such disclosure can work to their advantage. While dozens of other issues exist that could be negotiated, the issues selected for this situation are: (1) a salary cap, (2) a linkage of player salaries to NHL revenues, (3) starting the upcoming season on time and (4) free agency.

The document distribution is followed by a ten-minute instructional lecture given by the professor. These instructions cover, in step-by-step detail, how this collective bargaining negotiation is structured and emphasize that each negotiation and subsequent debriefings are

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123. See Team Negotiations, supra note 62, at 885 (citing research showing that groups composed of more than four members “can suffer from free rider problems”).

124. Random group selections help to eliminate a situation where like-minded students in the same peer circle end up on the same team. I generally number students off into teams, but an alphabetical or other random selection will also work. Research on teams demonstrates that “many of the benefits of teams only occur if there are differences in perspectives, information, and histories,” attributes that are not necessarily present if students choose their own teams of friends. Team Negotiations, supra note 62, at 889.

It is important that the instructions and stages of the exercise are clear and that the professor actually takes the time to answer questions at this point as a lack of understanding of the exercise frustrates the learning process later on.
timed activities. At this point, an interesting twist is added in that teams that cannot reach an agreement at the end of the last negotiation session will receive none of the points listed on the confidential issues memorandum and their efforts will be considered a complete failure as the lockout will continue and the season will be cancelled. Although the instructions for this exercise must be specific about the process, they need not give away too much in the way of strategy. For instance, student teams should be allowed to determine the following pieces of information without much guidance from the professor:

1. How many students to send to the negotiation table;
2. Where the negotiation will take place;
3. The negotiation tactics to be adopted;
4. Which issues are most important and cannot be compromised;

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125 These time limits should be strictly enforced or teams will straggle back to their debriefings and the meetings will lose effectiveness as the next negotiation will begin before the students can complete a full debriefing.

126 See, e.g., Team Negotiations, supra note 62, at 884-90 (arguing that sending a negotiation team as opposed to a solo negotiator may be more effective because of, among other things, the division of labor and combination of different skills).

127 See discussion supra at Part III.B.1.d (discussing the “home-court advantage” in negotiations). This is an interesting issue because the students conduct the exercise in a common classroom area. I have found, however, that the most successful negotiation teams encourage the other side to come to their location within the classroom to conduct the negotiation sessions and, therefore, obtain some minimal form of “home-court advantage.”

128 Studies show that students initially treat negotiation exercises as a friendly game but become more and more involved as the simulation moves on. See, e.g., Denton Moore and Jerry Tomlinson, The Use of Simulated Negotiation to Teach Substantive Law, 21 J. LEGAL EDUC. 579, 585 (1968-1969) (arguing that students tended to react with more genuine emotions as negotiation simulations progressed).
5. Which issues are least important and should be compromised;

6. When to walk away from the first round of negotiations and debrief with the rest of the team; and

7. When to complete the talks and sign a memorandum of agreement (MOA).

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129 Each side’s confidential issues memorandum contains one issue that must be successfully negotiated or else the team failing to achieve success will receive zero points for the entire negotiation. See NHL Owners Confidential Issues Memorandum (Appendix B) and NHLPA Confidential Issues Memorandum (Appendix C), available at http://www.daniels.du.edu/busethics/publications.cfm. The NHL Owners must obtain some form of a salary cap/cost certainty and the NHLPA must obtain a minimum level of aggregate salaries (a salary floor). Id.

130 Each side’s confidential issues memorandum also contains three issues – in addition to the must-have issue – that are not as crucial as the must-have issue but that will garner the team points if successfully obtained. See id. (for instance, the NHL owners would like to see player salaries tied to a low percentage of NHL revenues while the NHLPA would like to see player salaries tied to as high a percentage of NHL revenues as possible).

131 Also referred to as a memorandum of understanding or a letter of intent, a MOA is basically a “written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement.” Black’s Law Dictionary 916 (7th ed. 1999). Upon the execution and submission of this document, students should be informed that they are entering into what some courts may consider a legally binding agreement that cannot be altered until the CBA expiration date. See, e.g., Paul Sandler, Commentary: Beware of Lax Letters of Intent, Kan. City Daily Rec., Feb. 11, 2006 (“[L]etters of intent are generally non-binding, but parties should never presume that this is true in every situation. Given that letters of intent have sometimes been found to create enforceable contracts, lawyers who carelessly prepare these documents place their clients at risk of litigation and defeated expectations.”). A MOA form created for this exercise. See Appendix D, available at http://www.daniels.du.edu/busethics/publications.cfm. Also, recall that the entire negotiation will be considered a failure if the teams cannot sign this MOA at the end of the final bargaining session because the upcoming NHL season will be cancelled and the lockout will continue.
Armed with this information, the groups then huddle for fifteen minutes to discuss their instructions, recap the background reading, decipher their group’s common goals as well as hone their negotiation strategy. This is the first time that the students will discuss the activity with their teammates.

As the fifteen minutes expire, the planning session morphs into the first negotiation as the two sides meet up for the first of three, ten-minute, negotiation sessions. At this point all students are on the same page; they have read the background paper and the common facts memorandum, but have only a vague idea of the issues and point schemes contained within the other side’s confidential issue memorandum. These first negotiations rarely lead to a signed MOA but are very helpful for the teams to gauge the emotional make-up and negotiation strategy of the other side and react accordingly. The first negotiation ends promptly after ten minutes when all conversations must stop and the individual groups reconvene for the first ten-minute debriefing session.

The purpose of each debriefing session is to react to the negotiation that just occurred while the situation is fresh in students’ minds and also to fill in the members of the group who did not

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132 This initial huddle is crucial to the success of the exercise because students need this opportunity to gather themselves and make sure that everyone in the entire group thoroughly understands the common facts and the confidential information packets.

133 Keep in mind that, based upon a class size of 40 students, there will be approximately five negotiations conducted simultaneously (five teams representing the BOG and five teams representing the NHLPA will conduct separate negotiations) and that additional meeting space may be required. With five negotiations a medium-sized classroom is adequate and teams moving to a separate location have a hard time sticking to the time limits.
participate in the bargaining, if any. The next step is for the team to determine how to: (1) proceed in future negotiations, (2) figure out which issues seem most important to the other side and (3) determine how a compromise may be reached.

At the end of this first debriefing, the second ten-minute negotiation session begins followed by a second debriefing and then the third negotiation session and the third debriefing. Sometimes, two teams will reach a signed MOA after the second negotiation at which point both teams tally their points and wait for the rest of the class to find a solution or end in a deadlock after the third negotiation. By the end of the third negotiation, the majority of the teams will grind out an agreement avoiding a cancelled season and zero points. Such a failure to agree will not necessarily affect a student’s final grade for the exercise but does help to demonstrate that a stalemate is not to the benefit of either side and will likely do more harm than good to the NHL over the short- and the long-term.

At the end of the third negotiation session, all points are tallied and submitted to the professor who reveals the scores and determines whether the BOG or the NHLPA scored higher overall. All of the scores are written on the board and the students begin to compare them, mistakenly believing that a higher total equals a more successful negotiation. Following the score tallying, a fifteen-minute lecture on negotiation strategies begins and covers the relevant negotiation strategies that were available in this type of negotiation and introduces the idea that a

\[134\] These interpretations will be altered once the professor conducts a lecture and debriefing session to demonstrate why a large point total or a large margin of victory is not usually the true measure of success in a negotiation. See discussion infra at Part IV.C.
closer score, rather than a blowout, may indicate a more successful negotiation and a Pareto optimal result for the NHL as a whole.\textsuperscript{135} Finally, this lecture transitions into a fifteen-minute debriefing session where students discuss their successes and failures during the exercise.

C. Goals/Learning Objectives of the Exercise

This exercise is conducted in an introductory Business Environment course. The enrollees are always undergraduates and primarily freshman and sophomores. This course surveys the major areas of law, ethics and public policy students will face upon entering the real world. Because the course moves rapidly through the employment law topic, this exercise is designed to provide an introduction to the collective bargaining and negotiation processes in a short period of time – namely one class period. Therefore, a professor must take great pains to ensure that the learning

\textsuperscript{135} “Pareto optimality is a measure of efficiency. An outcome of a game is Pareto optimal if there is no other outcome that makes every player at least as well off and at least one player strictly better off. That is, a Pareto Optimal outcome cannot be improved upon without hurting at least one player.” Glossary: Pareto Optimal, GAME\textsc{THEORY.NET}, http://www.gametheory.net/dictionary/ParetoOptimal.html (last visited July 15, 2006). In this negotiation exercise, a Pareto optimal situation occurs where the combined scores of both teams are the maximum possible and any other alternative point distribution will worsen the outcome for one party or for the NHL in general. In this exercise, if both teams compromised and chose the middle point total on a salary cap, percentage of player salaries tied to NHL revenue and free agency and agreed to have the players ready for training camp on September 1 (the best solution for both sides), the combined score of both teams would be 120. This is opposed to a combined score of 110 accumulated if one side bullied the other side into its full allotment of points. Therefore, the lesson can be taught that a Pareto optimal result is achieved here – in a situation where all parties have to work closely together in the future – most easily through compromise. \textit{See Collective Bargaining Simulation, supra} note 116, at 97-99 (discussing Pareto optimal outcomes in a collective bargaining student simulation).
objectives described below are adequately achieved by thoroughly explaining the instructions and creating a brief lecture that gets students up to speed with the concepts and the terminology involved in the collective bargaining process. Although collective bargaining is becoming less common in today’s places of employment, the topic is relevant enough to merit two hours in the employment law section of a business environment survey course.

The most important learning objective of this exercise is for students to understand that negotiation groups should work to maximize the combined point total of all parties involved. This type of agreement will generally allow all sides to feel that they achieved at least some of their aspirations. This long-term comfort level between the parties is crucial as everyone involved in the collective bargaining process must work side-by-side in the future for the organization to function effectively. At the end of the exercise, this result will appear counter-intuitive to students who assume that the winner is the party scoring the most points or defeating the other side by the largest point differential. As mentioned in Part III, students must gain an understanding that win-win negotiations are the preferred solution in many legal disputes as opposed to a win-lose, and potentially expensive, court battle. In addition to grasping the Pareto optimal concept, the following learning objectives – mentioned briefly in Part I – are also important as students should:

1. Gain substantive knowledge of a contemporary employment law/collective bargaining issue through background reading, a brief lecture, student-to-student discussion/negotiation/debriefing, student-to-professor discussion and debriefing;
2. Understand that the collective bargaining issues and tactics they are discovering apply not only to the professional sports world but also to the factory down the road;

3. Comprehend and retain introductory negotiation strategy;

4. Comprehend and retain the basic tenets of the negotiation process from start to finish within a timed negotiation setting and a real-world issue;

5. Hone their skills in working with teams in pressure-filled situations;

6. Test strategies tailored to achieve objectives effectively;

7. Improve their critical thinking and public speaking skills; and

8. Appreciate the ethical implications of a real-world business/legal situation.

D. Evaluation of Students

Students are evaluated based on: their individual participation during the exercise and an individual, two-page reflective memorandum. Effective participation is demonstrated when a

136 This evaluation rubric for both the participation and the memorandum components is made available to the students one class period prior to the negotiation exercise so that everyone knows what I am looking for in terms of effectiveness. This exercise counts as twenty-five percent of a student’s participation grade for the term (and the overall participation grade counts for ten percent of the student’s final grade). I incorporate the evaluation for this exercise into the participation column of my syllabus because of the heavy emphasis effective participation has on the success of these negotiations. Another option is to grade this exercise on a pass/fair basis. This approach is not unprecedented as at least one law school negotiation course allows students to choose whether they want to enroll for a pass/fail grade or for a conventional grade for the entire course. See Charles Craver, The Impact of a Pass/Fail Option on Negotiation Course Performance, 48 J. LEGAL EDUC. 176, 176-86 (1998) (arguing that negotiation classes with team negotiations place a large portion of a student’s grade on the team’s, rather than the individual
student actively participates in team preparation, negotiation and debriefing sessions. Effective participation is not demonstrated by students dominating the negotiation process or being the loudest, toughest, or lead negotiator; instead, effective participation is demonstrated via a careful consideration of the issues and a thoughtful contribution to the negotiations and team discussions. Each time this exercise is incorporated into my curriculum, I find that students participate in these negotiations more passionately and competently than in any other team-based exercise on my syllabus. I also find that most students leave this exercise having reaped the rewards stemming from this type of participation — and even go home and discuss the exercise with their families and friends! Therefore, the participation grades are usually very strong and deservedly so.

The memorandum component is designed for thoughtful reflection outside of the heat of the moment. Students are encouraged to take one hour or so outside of the classroom to ponder what went right and what went wrong during their negotiations and to take three positive lessons from the experience. These memoranda often summarize the exercise as being “very creative,” “fun and useful” and “an interesting way to learn about employment and labor law.” The overall memorandum score is based on the following rubric: (1) thoughtfulness of the reflection as judged in comparison with papers written by fellow students, (2) organization and expression of student’s, effort — a situation where “personal conflicts with partners or opponents may adversely affect their performance on particular exercises, perhaps with significant impact on their final grade.”). See also Denbo, Contracts in the Classroom, supra note 2 (discussing the importance of negotiation skills and incorporating a writing exercise). The participation grade is complete as soon as the exercise ends while the memorandum is due one class period following exercise completion.
the three lessons learned and (3) grammar, spelling and style. As with all written projects assigned in my classes, I thoroughly read each paper without looking at the author’s name, mark it up and place it into one of six groups based on the three criteria above. Papers in the top two groups receive an A and an A- score respectively and on down the line for the remaining groups. The memorandum grade (100 points possible) is combined with the participation grade (100 points possible) to determine the final score for this negotiation exercise.

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137 I also automatically deduct five points for every contraction, spelling error and major grammatical error (such as using the word weather instead of whether). Therefore, a paper in group two may initially receive an A score that turns into a B+ score if the student loses five points for an automatic deduction.

138 The following chart represents the grade distribution for a typical negotiation exercise memorandum:

<table>
<thead>
<tr>
<th>GROUP NUMBER</th>
<th>MEMORANDUM SCORE</th>
<th>NUMBER OF PAPERS IN EACH GROUP (IN A FORTY-STUDENT CLASS)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>100</td>
<td>3</td>
</tr>
<tr>
<td>2</td>
<td>93</td>
<td>5</td>
</tr>
<tr>
<td>3</td>
<td>88</td>
<td>10</td>
</tr>
<tr>
<td>4</td>
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<td>10</td>
</tr>
<tr>
<td>5</td>
<td>80</td>
<td>7</td>
</tr>
<tr>
<td>6</td>
<td>76</td>
<td>5</td>
</tr>
</tbody>
</table>

139 This assignment is not graded on a strict curve although the grades often fall into a typical curve formation. Therefore, at the end of the grading process it is possible for every student to receive an A or an A- if all papers fall into the top two groups and do not have any automatic deductions. Students papers are allocated into groups based on a comparison to other papers but no paper worthy of an A will fall into group six merely because it is the worst paper out of all of the A papers submitted.
V. CONCLUSION –

A. The Resolution of the NHL Lockout

Collective bargaining negotiations stretched through opening day of the 2004-05 season. With each passing day precious NHL games – representing a crucial source of League revenue and fan goodwill – faded away. 140 Finally, in mid-February 2005, with over half the season lost and no consummated collective bargaining agreement in sight, the NHL Commissioner officially cancelled the remainder of the regular season, 141 the playoffs and the NHL entry draft. 142 With this announcement the NHL “became the first professional sports league in North America to ever cancel an entire season on account of a labor dispute.” 143 At this point many owners and

140 Dave Molinari, NHL Stalemate Continues; Opening Day Comes, Goes as Neither Side Budges in Talks, PITTSBURG POST-GAZETTE, Oct. 14, 2004, at C9 (“On the day when the 2004-05 season was scheduled to start, [the] NHLPA released a statement reiterating that the players have no intention of accepting any collective bargaining agreement that they believe functions as a salary cap. . . . Meanwhile, [the] NHL commissioner . . . stressed again that the owners will not settle for any economic system that doesn’t link salaries with revenues.”).

141 See Associated Press, Lockout Over Salary Cap Shuts Down NHL, ESPN.COM, Feb. 16, 2005 [hereinafter ESPN Lockout], http://sports.espn.go.com/nhl/news/story?id=1992793 (“[A] hockey season on the brink is now a season gone bust. The NHL canceled what was left of its decimated schedule Wednesday after a round of last-gasp negotiations failed to resolve differences over a salary cap – the flash-point issue that led to a lockout.”).


players, joined by the media and NHL fans worldwide, publicly and privately fretted that the labor dispute might continue indefinitely and that fan interest would dissipate even further for what was already the least popular major professional sport in America.\textsuperscript{144}

Understanding the implications of an additional cancelled season in 2005-06, including another lost draft, the NHL Board of Governors and the NHLPA embarked upon a series of all-night negotiation sessions. Through this effort both sides came to an agreement that ended the nearly year-long labor dispute and signed a new collective bargaining agreement on July 13, 2005.\textsuperscript{145}

This 454-page document governs the employment relationship for a six-year term\textsuperscript{146} and memorializes a common understanding pertaining to free agency, standard player contracts and a

\textsuperscript{144} See, e.g., ESPN Lockout, supra note 141 (stating that “hockey was already a distant fourth on the popularity scale among the nation’s major league sports. . . . Taking a year off, or more, will only push the league further off the radar screen”); Tom Jones, \textit{All Quiet on the NHL’s CBA Front}, \textit{St. Petersburg Times}, Feb. 14, 2005, at C5 (“[G]iven the stance of both sides, it’s hard to imagine an agreement being worked out. Owners insist on a salary cap. Players say they will not accept one.”).

\textsuperscript{145} 2005 \textsc{collective bargaining agreement between the national hockey league and the national hockey league players’ association} (July 22, 2005) [hereinafter NHL 2005 CBA]. \textit{See also Time for a Line Change, supra} note 143, at 485 and ESPN.com News Services, \textit{Sides Will Have to Ratify New CBA}, ESPN.com (July 13, 2005), http://sports.espn.go.com/nhl/news/story?id=2106776 (“[A]fter losing an entire season to a lockout, players and owners ended an all-night bargaining session Wednesday by reaching their goal: a tentative deal, which includes a salary cap, that virtually ensures hockey will return this fall.”).

\textsuperscript{146} NHL 2005 CBA \textit{supra} note 145, at 11. The 2005 NHL CBA extends to midnight Eastern Standard Time on September 15, 2011 “and shall remain in effect from year to year thereafter unless and until either party shall deliver to the other a written termination of this Agreement.” \textit{Id.} Interestingly, the NHLPA has the option of terminating the new CBA on September 15, 2009 or to extend the new CBA for an additional year to September 15, 2012. \textit{Id.}
Along with this new collective bargaining agreement, the NHL also passed new game rules designed to increase offensive productivity and introduced a new logo with upward-facing letters signaling a new era for the League. To some critics, this new era

147 NHL 2005 CBA, supra note 145, at 27-39 (regarding updated procedures for unrestricted and restricted free agency. Unrestricted free agency will operate as follows: in 2005-06, a player aged at least 31 with four accrued seasons; in 2006-07, a player aged at least 29 with four accrued seasons or with eight accrued seasons; in 2007-08, a player aged at least 28 with four accrued seasons or with seven accrued seasons; beginning in 2008-09 and for the duration of the agreement, a player aged at least 27 with four accrued seasons or with seven accrued seasons will be an unrestricted free agent. For purposes of qualifying for unrestricted free agency, the 2004-05 cancelled season will be counted as a year of accrued service. Restricted free agency will operate similar to its operation under the prior CBA), id. at 40-51 (regarding the new NHL standard player contract and the agreement that all standard player contracts in existence prior to the 2004-2005 season being cancelled be reduced by twenty-four percent and all contracts for the 2004-2005 season be cancelled) id. at 160-252 (regarding the new salary cap containing a formula to determine the ranges of the “Upper” and “Lower Limits” of NHL player salaries as a percentage of NHL annual revenue. Under this formula, the players' share – including salaries, performance bonuses and signing bonuses – will be fifty-four percent when league revenues in any year are below $2.2 billion; fifty-five percent when league revenues are between $2.2 billion and $2.4 billion; fifty-six percent when league revenues are between $2.4 billion and $2.7 billion; and fifty-seven percent when league revenues exceed $2.7 billion).

148 NHL.com, CBA FAQ, NHL Enacts Rules Changes, Creates Competition Committee, http://www.nhl.com/nhlhq/cba/rules_changes072205.html (last visited June 27, 2006) (stating that the new Competition Committee, composed of current NHL players and current NHL club management professionals, was responsible for formulating and debating potential rules changes that were then approved by the NHL Board of Governors on July 22, 2005).

149 NHL.com, CBA FAQ: What’s New, Invigorated NHL Shield, http://www.nhl.com/nhlhq/cba/whats_new072205.html (last visited June 27, 2006) (stating that the NHL claims that the “updated mark uses upward-reading letters to project a vibrant, optimistic image, yet defers to tradition by maintaining the time-honored shape of the original shield.”).
began with a newly-minted CBA favoring the owners, while others argued that both sides came out ahead because of the creation of a sustainable economic system that will allow the NHL to function effectively for years to come.

B. In Conclusion

The world of professional sports is engaging, dramatic, immensely popular and filled with many business/legal issues that can be utilized to enhance a legal studies curriculum. The unprecedented NHL lockout of 2004-05 is one of these intriguing issues. In fact, a student-led CBA negotiation allows a professor to tie in often-omitted topics in employment law (such as collective bargaining and labor disputes) with negotiation strategy by using an example that made nationwide headlines. This exercise is designed to encourage all students to participate effectively and walk away with a thorough understanding of each of these important concepts. From a pedagogical standpoint, it is amazing to witness an entire classroom of undergraduate students completely absorbed by one activity and begging for another chance to repeat the

150 See, e.g., John Dellapina, Players Vent, Then Ratify CBA, N. Y. DAILY NEWS, July 22, 2005, at 96 (arguing that “soon after, the salary-cap point was conceded and the only question was how thoroughly the final terms would favor the owners”); Players Set to Vote Today on Labor Deal; NHL-Approval Expected, Ending Long Lockout, SEATTLE TIMES, at D3 (arguing that “Union executive director Bob Goodenow has been criticized for a deal that clearly favors the owners except in free agency, in which the players have an upper hand.”).

151 Bucky Gleason, A Brand-New NHL; CBA may Bring Level Playing Field, Big Rules Changes, BUFFALO NEWS, July 14, 2005, at D1 (arguing that, after eighty-two meetings and a major public relations disaster, a new competitive balance exists in the NHL – including a more solid financial position, more salary money to be spent on more players instead of one superstar – and stating that, “no doubt, the lockout was excruciating. It was destructive. In the end, it was also necessary.”).
exercise in search of more favorable results. This excitement noticeably transfers to subsequent lectures and discussions over the remainder of the term and creates more demand as additional students – after hearing of the activity and course content from their classmates – choose enroll in future sections of the course. As for the topic – if the National Hockey League labor dispute appears a bit stale considering its recent resolution, there are always different professional sports labor disputes on the horizon that may used to craft similar CBA negotiation exercises.\footnote{Mark Maske, NFL Owners Meet to Consider Proposal, WASH. POST, Mar. 8, 2006, at E6 (discussing the NFL team owners’ efforts to reach an agreement with the NFL Players’ Association to extend the current CBA) and Jim Besada, NBA is Heeding Mistakes Made by NHL, DENV. POST, Feb. 20, 2005, at C1 (discussing the idea that the NBA owners and the NBA’s player’s union are eagerly working on a new collective bargaining agreement before the prior CBA’s expiration to avoid the problems experienced in the most recent NHL labor dispute).}
THE NATIONAL HOCKEY LEAGUE LOCK-OUT OF 2004-2005:

COMMON FACTS MEMORANDUM

You are part of a negotiation team striving to find a resolution to the current National Hockey League lockout (congratulations!). Your job is to negotiate the best possible deal for your assigned side during the renegotiation of the Collective Bargaining Agreement (CBA). This negotiation is between the National Hockey League Players Association (NHLPA) and the National Hockey League Board of Governors (NHL Owners). Both sides are attempting to come to terms on a new CBA as the previous agreement recently expired. You will receive points – as listed on a separate confidential negotiation memorandum – for each issue you successfully negotiate. The other side does not know which issues are most important to you and has important items of its own; you can decide whether to tip your hand to the other side or to keep this information confidential. Remember, you might need to concede in certain areas to ensure your overall success.

Both sides must keep the following facts in mind during the negotiations. Assume that all facts below are true and compromise the entire factual universe for this exercise:153

➢ Today is June 30, 2006 and the previous CBA expired on September 15, 2005.

---

153 These are the only facts that you may use for this negotiation and outside information is not allowed. Some of this information – especially the dates – has been changed to make the exercise proceed more smoothly.
- Prospects for a new CBA are bleak and the parties stand far apart on issues crucial to forming an agreement.

- The NHL season runs from October to April with 20 million fans attending games during an average season.

- The 2005-06 season was officially canceled representing 1,230 hockey games (not including playoff games)

- Because a CBA is not in effect, the Owners are currently locking out the players and the players are not on strike. Assume that this lock-out began on September 15, 2005 and is still in effect today.

- You are concerned that the upcoming season will also be canceled if a new CBA is not negotiated quickly.

- All players must be in training camp by September 1, 2006 for a meaningful season to take place.

- 2005 was the first time since 1919 that a Stanley Cup Finals series was not played – the 1919 cancellation was due to an outbreak of the flu and not labor unrest.

- The NHL has the smallest fan-base of any major United States professional sport and its television ratings are very low in comparison.
American sports fans have many options to fulfill their sports fixes – especially in markets like Phoenix and Nashville where hockey does not have a long history.

Major League Baseball and the NHL are the only two professional sports in the United States that do not currently have salary caps.

The longer this lock-out lasts, the more corporate sponsors the NHL will lose.

Both sides have met repeatedly and each time the talks end in complete failure – neither side will budge. The NHL Commissioner and the NHLPA president allegedly dislike each other.

Either side can go to the National Labor Relations Board (NLRB) for a ruling. This decision will be final and each side should be careful before taking this route, but it can be used as a bargaining tool. The NLRB could issue an injunction and require the owners to let the players play hockey at a given future date. Keep in mind that the NLRB commissions are majority Republican and nominated by President George W. Bush.

The owners have the option of using replacement players at any time and on the owners’ terms – this has been tried in other sports and has failed to create the same high level of play.

The players have the option of creating their own professional leagues – this has been tried in the past and has failed to generate enough revenues to stay afloat.
The NHL is in serious financial trouble and needs to restructure the salary situation or it may face bankruptcy – a situation where everyone loses. The NHL lost $273 million during the 2002-03 season.

The owners are continually investing money into their teams to insure that the NHL remains solvent. This is unlike other businesses where the owners would generally fold under such circumstances.

The average NHL team makes approximately $50 million per season – $1.5 billion per season for the league as a whole – in revenue and approximately $5 million in concessions. Remember, this is not necessarily profit until expenses, including player payroll, have been paid. Other large expenses are staff payroll, equipment and travel budgets and arena maintenance for buildings seating around 20,000 fans apiece. During the 2002-03 season, nineteen teams lost money after expenses were subtracted from revenues.

The average NHL player salary is $1.8 million with total salaries equaling almost 75% of all NHL revenues.

Without the players – the best in the world – there is no NHL.

During a lockout, people working for teams or at arenas – earning pay far lower than players – will lose jobs.

IMPORTANT DEFINITIONS –
✓ **Free Agent** – a player allowed to negotiate with other teams at the expiration of a contract and who may change teams with compensation (restricted free agent) or without compensation (unrestricted free agent) required from the acquiring team.

✓ **Luxury Tax** – represents a tax imposed on team owners when teams pay over a certain amount in salaries. Such teams are generally required to pay a fixed amount to the other owners in the league. This hurts rich teams and helps poor teams in an effort to restore a competitive balance.

✓ **Minimum Payroll Guarantee** – represents a floor above which each NHL team must pay all of its players combined. Owners are not fond of a minimum payroll guarantee.

✓ **Salary Cap** – represents the total amount of salaries each team can pay its players. This total is “capped” at a certain amount. A team cannot make a trade or sign a player if that player’s salary would take them over the salary cap. Players are not fond of a salary cap. This is also referred to as “cost certainty” and is a major bargaining point for team owners. There can be both a maximum salary cap and/or a minimum salary floor under any CBA.

✓ **Salary Cap Linked to Revenues** – represents a salary cap that increases when NHL revenues expand and decreases when NHL revenues decrease.
There can be both a maximum salary cap and/or a minimum salary floor under any CBA.

THIS COMPLETES THE FACTUAL UNIVERSE FOR THIS NEGOTIATION –

BEST OF SUCCESS!
You are on the negotiating team representing the National Hockey League Owners and their governance committee called the Board of Governors (congratulations!). Your job is to negotiate the best possible deal for your employer during the current renegotiation of the Collective Bargaining Agreement (CBA). You are negotiating across the table from the National Hockey League Players Association (NHLPA), the preeminent union representing the vast majority of current NHL players. Your team will receive points – as detailed below – for every issue you can successfully negotiate in your favor.

**YOU MUST OBTAIN:** Successfully obtain the following item for your side and receive the allocated points pertaining to the total dollar figure negotiated. If you cannot obtain this item you receive zero points FOR THE ENTIRE LOCKOUT NEGOTIATION. This issue is a must for you!

➤ **SALARY CAP:** Keep in mind that this concept does not have to be phrased specifically as a “salary cap.” What you really want is “cost-certainty,” meaning that you want to know in advance the maximum amount each team will have to pay each season for its aggregate...
players’ salaries and, upon approval of this salary cap, salaries cannot exceed this upper limit. This is much different from a luxury tax that only affects the richest NHL owners who can afford to pay skyrocketing salaries. The players will not be very enthusiastic about this proposal but it is a must-have for your side considering the current economic state of the NHL. Assume each NHL team generated $60 million in revenues (not profit) on average at the end of last season.

<table>
<thead>
<tr>
<th><strong>Negotiation Result</strong></th>
<th><strong>Points Allocated</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Obtain a salary cap of less than $30 million per team</td>
<td>50 points</td>
</tr>
<tr>
<td>Obtain a salary cap between $30 million and $45 million per team</td>
<td>30 points</td>
</tr>
<tr>
<td>Obtain a salary cap of greater than $45 million per team</td>
<td>10 points</td>
</tr>
</tbody>
</table>

**You would like to obtain.** You should try to successfully obtain each of the following items. However, if you encounter difficulty obtaining any particular issue below the negotiation will not result in a complete failure. If you successfully negotiate an issue, you receive the
points that correlate most appropriately to the terms you agree to. If you fail to agree on any of the items below, you receive zero points for that issue only while keeping the points you obtained elsewhere.

- **PLAYER SALARIES SHOULD BE TIED TO A LOW PERCENTAGE OF NHL REVENUE:** You would like to maximize the percentage of NHL revenue going towards your bottom line and not towards your players’ salaries. One way to do this is a salary cap and another is tying league revenue to salaries – although obtaining both a salary cap and revenue tying is the best for your position. Therefore, try to obtain an agreement whereby the total of player salaries is tied directly to a low percentage of the aggregate annual revenue generated by the NHL.

<table>
<thead>
<tr>
<th>NEGOTIATION RESULT</th>
<th>POINTS ALLOCATED</th>
</tr>
</thead>
<tbody>
<tr>
<td>LINK PLAYER SALARIES TO LESS THAN 30% OF NHL REVENUE</td>
<td>15 POINTS</td>
</tr>
<tr>
<td>LINK PLAYER SALARIES TO BETWEEN 30% AND 60% OF NHL REVENUE</td>
<td>10 POINTS</td>
</tr>
<tr>
<td>LINK PLAYER SALARIES TO GREATER THAN 60% OF NHL REVENUE</td>
<td>5 POINTS</td>
</tr>
</tbody>
</table>
START THE UPCOMING SEASON ON TIME: You would like to see all players ready to start the upcoming season fully prepared – including remaining physically fit and in the proper mental state. Training camps must open by September 1, 2006 to have a meaningful season.

<table>
<thead>
<tr>
<th><strong>Negotiation Result</strong></th>
<th><strong>Points Allocated</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Players are ready for training camp on or by September 1, 2006</td>
<td>10 points</td>
</tr>
<tr>
<td>Players are ready for training camp between Sept. 2 and Oct. 1, 2006</td>
<td>5 points</td>
</tr>
<tr>
<td>Players are not ready for training camp until after October 1, 2006</td>
<td>0 points</td>
</tr>
</tbody>
</table>

YOU ARE AMBIVALENT ABOUT OBTAINING. You should try to successfully negotiate this issue; but, your negotiation will be an overall success even if you obtain only a few points here.

MINIMIZE FREE AGENCY: You would like to see NHL players obtain free agent status after as many accumulated seasons in the NHL as possible so that other teams are not allowed to make outrageously high offers and manipulate the market price of all NHL player salaries.
<table>
<thead>
<tr>
<th><strong>Negotiation Result</strong></th>
<th><strong>Points Allocated</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Players become free agents after five accumulated NHL seasons</td>
<td>15 points</td>
</tr>
<tr>
<td>Players become free agents anytime between the start of their second and the end of their fifth accumulated NHL season</td>
<td>10 points</td>
</tr>
<tr>
<td>Players become free agents as soon as they enter the NHL (Rookies)</td>
<td>5 points</td>
</tr>
</tbody>
</table>
You are on the negotiating team representing the NHLPA – the preeminent union representing the vast majority of current NHL players (congratulations!). Your job is to negotiate the best possible deal for your employer during the current renegotiation of the NHL Collective Bargaining Agreement (CBA). You are negotiating across the table from the National Hockey League Owners and their governance committee called the Board of Governors (Owners). Your team will receive points – as detailed below – for every issue you can successfully negotiate in your favor.

**YOU MUST OBTAIN**: Successfully obtain the following item for your side and receive the allocated points pertaining to the total dollar figure negotiated. If you cannot obtain this item you receive zero points FOR THE ENTIRE LOCKOUT NEGOTIATION. This issue is a must for you!

- **Minimum Payroll Guarantee**: You are required to obtain the Owners’ promise to pay a minimum amount in salaries per team for each season – especially to the rookies who are drafted and denied the compensation you feel they are worth based solely on their lack of experience. If you choose to concede to the Owner’s demands and allow a salary cap, any
minimum payroll guarantee agreed to must fall at or below such cap. If it helps in your negotiation, keep in mind that you do not have to title this as a “minimum payroll guarantee,” as what you are looking for is a salary floor insuring player salaries remain competitive with other American professional sports leagues. This minimum payroll guarantee is different from a luxury tax that penalizes owners for paying too much in salaries. Assume each NHL team generated $60 million in revenues (not profit) on average at the end of last season.

<table>
<thead>
<tr>
<th>Negotiation Result</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Obtain a minimum salary guarantee of &lt; $30 million per team</td>
<td>10 points</td>
</tr>
<tr>
<td>Obtain a minimum salary guarantee between $30 million and $45 million per team</td>
<td>30 points</td>
</tr>
<tr>
<td>Obtain a minimum salary guarantee of &gt; $45 million per team</td>
<td>50 points</td>
</tr>
</tbody>
</table>

**You would like to obtain.** You should try to successfully obtain each of the following items. However, if you encounter difficulty obtaining any particular issue below the negotiation will not result in a complete failure. If you successfully negotiate an issue, you receive the...
points that correlate most appropriately to the terms you agree to. If you fail to agree on any of the items below, you receive zero points for that issue only while keeping the points you obtained elsewhere.

**PLAYER SALARIES SHOULD BE TIED TO A HIGH PERCENTAGE OF NHL REVENUE:** Although you are opposed to any limits on the upper range of player salaries, the Owners strongly desire some form of cost certainty in an attempt to contain escalating salaries. If you concede to their demands, you would at least like to maximize the percentage of NHL revenues that go towards players’ salaries and not into the owner’s pockets. Therefore, you would like to see the total of player salaries tied directly to a high percentage of aggregate NHL revenue. If you agree to a salary cap as well, keep in mind that a team’s aggregate salaries linked to revenue cannot exceed the maximum salary cap allotted to the team for any given year.

<table>
<thead>
<tr>
<th>NEGOTIATION RESULT</th>
<th>POINTS ALLOCATED</th>
</tr>
</thead>
<tbody>
<tr>
<td>LINK PLAYER SALARIES TO &gt; 60% OF TOTAL NHL REVENUE</td>
<td>15 POINTS</td>
</tr>
<tr>
<td>LINK PLAYER SALARIES TO BETWEEN 30% AND 60% OF NHL REVENUE</td>
<td>10 POINTS</td>
</tr>
<tr>
<td></td>
<td>5 POINTS</td>
</tr>
</tbody>
</table>
START THE UPCOMING SEASON ON TIME: You would like to see all players ready to start the upcoming season fully prepared - including remaining physically fit and in the proper mental state. Training camps must open by September 1, 2006 to have a meaningful season.

<table>
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<tr>
<th>Negotiation Result</th>
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</tr>
<tr>
<td>Players are not ready for training camp until after October 1, 2006</td>
<td>0 points</td>
</tr>
</tbody>
</table>

YOU ARE AMBIVALENT ABOUT OBTAINING. You should try to successfully negotiate this issue but your negotiation will be an overall success even if you obtain only a few points here.

MAXIMIZE FREE AGENCY: You would like to see all players obtain free agent status as early in their careers as possible so that other teams may bid for their services and the market can
appropriately set their salaries. Expanded free agency has the tendency to raise salaries for all players and not just the superstars.

<table>
<thead>
<tr>
<th><strong>NEGOTIATION RESULT</strong></th>
<th><strong>POINTS ALLOCATED</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PLAYERS BECOME FREE AGENTS AS SOON AS THEY ENTER THE NHL (ROOKIE YEAR)</strong></td>
<td>15 POINTS</td>
</tr>
<tr>
<td><strong>PLAYERS BECOME FREE AGENTS ANYTIME BETWEEN THE START OF THEIR SECOND AND THE END OF THEIR FIFTH ACCUMULATED NHL SEASON</strong></td>
<td>10 POINTS</td>
</tr>
<tr>
<td><strong>PLAYERS BECOME FREE AGENTS AFTER FIVE ACCUMULATED NHL SEASON</strong></td>
<td>5 POINTS</td>
</tr>
</tbody>
</table>
**APPENDIX D – MEMORANDUM OF AGREEMENT**

**NEGOTIATION AND THE BUSINESS ENVIRONMENT**

**THE NATIONAL HOCKEY LEAGUE LOCK-OUT OF 2004-2005:**

**MEMORANDUM OF AGREEMENT**

This document – along with a similar document signed by the other side – comprises the Memorandum of Agreement (MOA) between the NHL Owner’s Board of Governors and the NHLPA. Please indicate your group’s points below and assent to the negotiated settlement with each team member’s signature at the bottom of this document. It is important that you keep this information confidential until all scores are submitted.

---

1. **Point Tally** –

   **Team Number**  

<table>
<thead>
<tr>
<th>Negotiation Issue</th>
<th>My Team’s Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>1)</td>
<td></td>
</tr>
<tr>
<td>2)</td>
<td></td>
</tr>
</tbody>
</table>
II. **SIGNATURES** –

By signing below, I consent to the agreement reached in this negotiation as described above. My signature on this document also indicates my assent to the new NHL Collective Bargaining Agreement which will include these terms and officially end the lockout.

Respectfully,

MEMBER ONE ________________________________________

MEMBER TWO  ________________________________________

MEMBER THREE ________________________________________

__________________________________________________________________________

**APPENDIX E – EXERCISE OUTLINE**

**NEGOTIATION AND THE BUSINESS ENVIRONMENT**
**The National Hockey League Lock-Out of 2004-2005:**

**Detailed Exercise Outline**

<table>
<thead>
<tr>
<th>Activity</th>
<th>Actual Classroom Time Based on a Two-Hour Period</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Preparation &amp; Introduction to the NHL Lockout</strong> –</td>
<td>Assigned as Homework</td>
</tr>
<tr>
<td>a. Students individually read <em>The NHL Lockout</em> article as well as the <em>Common Facts Memorandum</em></td>
<td>One Class Prior</td>
</tr>
<tr>
<td><strong>2. Exercise Instructions and Team Selection</strong> –</td>
<td></td>
</tr>
<tr>
<td>a. Professor distributes remaining exercise materials:</td>
<td>15 Minutes</td>
</tr>
<tr>
<td>1) <em>Specific Confidential Issue Memorandum</em></td>
<td></td>
</tr>
<tr>
<td>2) <em>Memorandum of Agreement</em></td>
<td></td>
</tr>
<tr>
<td>b. Professor randomly selects negotiation groups</td>
<td></td>
</tr>
<tr>
<td>a. Professor gives instructional lecture</td>
<td></td>
</tr>
<tr>
<td><strong>3. Group Strategy Meeting</strong> –</td>
<td>10 Minutes</td>
</tr>
<tr>
<td>a. Groups prepare for their negotiation sessions</td>
<td></td>
</tr>
<tr>
<td><strong>4. First Negotiation</strong> –</td>
<td>10 Minutes</td>
</tr>
</tbody>
</table>

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>Parties convene to negotiate</td>
</tr>
<tr>
<td>b.</td>
<td>First negotiation location determined by NHLPA</td>
</tr>
<tr>
<td>c.</td>
<td>All negotiating must stop at the end of ten minutes</td>
</tr>
</tbody>
</table>

5. **FIRST TEAM DEBRIEFING** –

<p>| | |</p>
<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>a.</td>
<td>Teams regroup and analyze the first negotiation</td>
</tr>
<tr>
<td>b.</td>
<td>Groups determine their second negotiation strategy</td>
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6. **SECOND NEGOTIATION** –

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<thead>
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<tbody>
<tr>
<td>a.</td>
<td>Parties reconvene for the second negotiation</td>
</tr>
<tr>
<td>b.</td>
<td>Second negotiation location determined by Owners</td>
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<tr>
<td>c.</td>
<td>All discussions must stop at the end of ten minutes</td>
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7. **SECOND TEAM DEBRIEFING** –

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<tbody>
<tr>
<td>a.</td>
<td>Teams regroup and analyze the second negotiation</td>
</tr>
<tr>
<td>b.</td>
<td>Groups determine their third negotiation strategy</td>
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8. **THIRD NEGOTIATION** –

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<tbody>
<tr>
<td>a.</td>
<td>Parties reconvene for this final negotiation</td>
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<tr>
<td>b.</td>
<td>Third negotiation location determined by coin-flip</td>
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<tr>
<td>c.</td>
<td>All discussions must stop at the end of ten minutes</td>
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9. **EXERCISE DEBRIEFING** –

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<table>
<thead>
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<tbody>
<tr>
<td></td>
<td>35 MINUTES</td>
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</tr>
<tr>
<td>a.</td>
<td>Groups tally points and submit score sheet</td>
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<tr>
<td>b.</td>
<td>Professor leads discussion on results and implications and discusses negotiation strategy</td>
</tr>
<tr>
<td>c.</td>
<td>Debriefing conversation with the entire class:</td>
</tr>
</tbody>
</table>

1) What worked?  
2) What did not work?  
3) Pertinent Ethical Implications |