Fumbling Away the Season: Will the Expiration of the NFL – NFLPA CBA Result in the Loss of the 2011 Season and Beyond?

Jeffrey Frank Levine

Available at: https://works.bepress.com/jeffrey_levine/1/
Fumbling Away the Season: Will the Expiration of the NFL – NFLPA CBA Result in the Loss of the 2011 Season and Beyond?

By Jeffrey F. Levine¹ and Bram A. Maravent²

Introduction

On Tuesday, May 20th, 2008, the National Football League (the “NFL” or the “League”) officially notified the National Football League Players’ Association (the “NFLPA,” “PA” or the “Union”) that ownership (the “Owners” or “Ownership”) had elected to opt out of the parties’ current collective bargaining agreement (“CBA” or the “Agreement”).³ This decision now threatens nearly two decades of uninterrupted labor peace and mutual financial gains. Owners hastily ratified the CBA during an emergency 2006 meeting. Owners capitulated to Union demands in the interest of maintaining steadily climbing League revenues.⁴ This action by Owners was intended to avoid a work stoppage, which would have derailed the continuing economic success professional football had enjoyed. The chief concession was to allocate an additional percentage of league revenues to player salaries,⁵ which under the 2006 CBA now approached sixty percent (60%) of League gross revenues. In signing the agreement, Ownership seemed more concerned with preserving labor peace than considering the long-term consequences of the future.

---

¹ Jeffrey F. Levine received his J.D. in 2007 from Tulane University Law School and his B.A. in 2004 from the University of Michigan, Ann Arbor. The author recently served in various legal capacities with the Phoenix Coyotes and Cleveland Cavaliers. He currently serves as staff writer for the Business of Sports Network.

² Bram A. Maravent is an Associate with the firm of Mierzwa & Associates, P.A., located in Lake Worth, FL, where he practices traditional labor law, employee benefits law, and election law. Bram thanks his colleagues: Matthew J. Mierzwa, Jr. Mark W. Floyd, Shelle S. Sewell, and Maria S. Melius for their time and support during the writing and editing process. Bram also thanks the love of his life, Stacey Brandt, for her constant support during the drafting of this article.


⁵ Id.
Fast-forward a few years; skyrocketing player salaries and a severe recession have drastically altered Ownership’s opinion of the CBA. Despite league-wide revenues approaching a healthy nine billion dollars, Ownership’s position is the 2006 CBA allocated too high a percentage of revenues to players and now threatens the NFL’s economic viability. “It’s a bad deal, a lot of people realize that now,” said one owner.

The NFLPA expected ownership to opt out of the CBA. Now, the Union is unifying its front after the passing of the PA’s longtime and seminal Executive Director, Gene Upshaw. Shortly before passing, Mr. Upshaw had commented on the League’s rationale for opting out, saying “[j]ust because the owners did not make as much as they wanted, they feel they lost money. We are not going to retreat [from a higher allocation of revenues] and we are not going to take less.”

When the NFL opted out, Commissioner Roger Goodell sent Upshaw an email providing three reasons why the League had exercised its option to reopen the contract for negotiation. Goodell pointed to (1) high labor costs (an unacceptable percentage of League revenues being allocated to paying player salaries); (2) problems with NFL rookies (exorbitant contracts to unproven players); and (3) the legal inability of franchises to recoup signing bonuses from players who breach contracts or refuse to perform (issues with player discipline). Commissioner Goodell also stated in separate comments that it is “very clear…that…[O]wnership doesn’t believe that this deal is working,” While the NFL was not suffering undue financial hardship, Ownership recognized that player

---

7 Id.
8 Clayton, supra note 3.
9 Gene Upshaw, Executive Director, Nat’l Football League Players Ass’n, Panel Address at the Sports Lawyers Conference (May 2008).
salaries needed to be curbed. Thus, opting out of the 2006 CBA and bargaining to sign a more favorable accord became the League’s new cost containment strategy.

In response, the NFLPA commissioned a study that found “the average value of an NFL franchise in the last [ten] years has risen from $288 [Million] to $1.04 [Billion], increasing at a compound annual rate of 13.7%.” In other words, Owners were making money. The League questioned the accuracy of this study, considering the only franchise data actually used was from the Green Bay Packers, who are the League’s only publicly owned franchise. As illustrated, both sides have a sharply contrasting picture about the financial viability of the NFL; one should expect a long, protracted and contentious labor dispute if a new CBA is not in place before the completion of the 2010 season.

Both labor and management are making personnel-related and financial preparations for a protracted labor dispute. One move that increases the likelihood of a protracted labor dispute is the NFL’s decision to hire veteran labor attorney Bob Batterman. Batterman, as National Hockey League (“NHL”) outside counsel, was intimately involved with planning the NHL’s strategy in its labor dispute with the National Hockey League Players Association (the “NHLPA”). During this work

12 Goodell chose his words carefully, as we will see such wording is important when discussing finances and an employer’s ability to pay.
stoppage, the NHL locked players out to achieve “cost certainty.”\textsuperscript{18} This directly translated into cutting player salaries and installing a “hard salary cap.”\textsuperscript{19} The NHL ultimately sacrificed a full season of hockey to achieve cost certainty. However it is unclear whether this lost year was in the best interest of hockey. The NFL may be using Batterman’s NHL’s labor strategy as a blueprint for its own approach to dealing with the Union. The question remains whether this same strategy when employed against the NFLPA, a more powerful union, will achieve a result that is in the best interest of professional football.

With the addition of Batterman, it is unclear whether the NFL will implement a similar hard-line strategy utilized by the NHL or whether the parties will strike a more reconciliatory tone. However considering the parties’ bargaining history is important when evaluating the NFL’s bargaining strategy.\textsuperscript{20} This comment examines the material issues and likely arguments regarding the looming NFL-NFLPA labor stoppage in 2011. Section One recounts the origins of the NFL as well as the recent events that were material in leading to this labor dispute. Section Two examines the origins of the NFLPA. As it is a labor stoppage that Mr. Batterman oversaw,\textsuperscript{21} Section Three recounts the NHL’s 2004 lockout. Section Four summarizes and explores the major concepts of labor law, most principally the theory of good faith bargaining. Section Five provides a brief statement of the case and discusses the issues germane to this labor dispute. In this

\textsuperscript{18} See Joshua Lieberman, \textit{Tip Your “Cap” to the Players: 2007-2008 Off-Season Reveals NHL’s Salary Cap Benefits on Players}, 16 \textit{SPORTS LAW J.} 81, 92 (Spring 2009) (mentioning “cost certainty” via potentially implementing a salary cap linked to league revenues); see also Roger I. Abrams \textit{Sports Law Issues Just Over the Horizon}, 3 Va. Sports & Ent. L.J. 49, 61 (Fall 2003) (describing Commissioner Bettman having a steadfast adherence to the goal of “cost certainty” in discussing the NHL inevitable conflict with the NHLPA).

\textsuperscript{19} A “hard salary cap” prohibits teams from having payrolls in excess of a mandated number. If a team goes over the salary cap, it is penalized.

\textsuperscript{20} The parties’ history is full of strikes and lockouts. See Section II Infra.

\textsuperscript{21} The NFL may also be basing its strategy in a similar vein as the NHL, who attributed the year of lost hockey to the sport’s dire need to achieve “cost certainty.” Thus, it may be foreseeable that the NFL, by bringing in Batterman, is seeking to use the NHL’s strategy as a blueprint for management’s handling of this upcoming labor stoppage.
section each author chooses a side and presents the positions/arguments of the NFL and the Union. Section Six briefly discusses how an antitrust lawsuit pending before the United States Supreme Court may impact the positions of the parties. Finally, Section Seven provides several predictions and a conclusion to this comment.

This comment recounts the origins of both the NFL and the PA, providing great detail into the bargaining process between the two entities from 1950 until 1993. This level of detail is necessary because the most effective method to determine a party’s sincerity in good faith bargaining, which is a paramount concept in labor law, is to keep in context the bargaining history of the parties. This history may influence the level of contentiousness amongst the parties and their sincerity to reach an agreement.

Part I: National Football League

A: NFL Origins

A league with humble beginnings, the National Football League was born in an Ohio automobile showroom in 1920. The NFL enjoyed a period of modest growth while trying to find its way onto solid financial ground after being resurrected from the defunct “American Professional Football Association.” The League found its footing under Commissioner Bert Bell’s sturdy leadership. He implemented measures such as the rookie player draft and recognized the power of televising games. However professional football truly began to make strides with the rise of Commissioner Pete Rozelle. The legendary commissioner’s leadership was instrumental in convincing team

---

26 Yost, supra, note 24, at 55.
27 Although Bert Bell was the first commissioner to put NFL games on television, Alvin “Pete” Rozelle would be the first commissioner in sports to fully utilize the power of television. See id. at 63.
executives to make decisions that promoted the best interests of the League. 28 This thinking led to major results such as harnessing the power of television for the benefit of the entire NFL. 29 Rozelle convinced large market owners such as New York Giants owner Wellington Mara to forego lucrative local television contracts in favor of a deal that equally benefited every franchise. 30 Owners embraced Rozelle’s “league think” ideology 31 to pool individual team television broadcasting rights and leverage them into several large contracts. One deal was signed with CBS; the other with NBC. Over time, broadcasting contracts provided the financial security member franchises desperately sought. More importantly, these contracts served as a foundation to allow the NFL to find economic and competitive parity amongst its clubs.

The NFL faced continuous competition from rival leagues because of its financial success. 32 While it faced competition from multiple upstart leagues, the greatest challenge came from the American Football League (AFL). The AFL was founded in 1960 after charter owner Lamar Hunt was denied an NFL franchise. 33 It was Hunt’s AFL that demonstrated the potential value of pooling a league’s collective broadcast rights, as he built the AFL around its national television contract with ABC. The NFL was unable to defeat the AFL despite the League’s greatest efforts. Consequently, the NFL took a

---

28 “Rozelle surmised that the NFL’s future depended on every NFL owner—from the wealthiest and most profitable to the neediest and most owing—perceiving his or her equity stake as vitally interconnected, with one team’s economic failures threatening all others.” See Michael A. McCann, American Needle v. NFL: An Opportunity to Reshape Sports Law, 119 YALE L.J. ___ (Draft as of 11.10.2009, forthcoming, 2009) (citing a New York Times Article by David Harris detailing how “Rozelle persuaded his employers that the key to marketing the NFL’s product was maintaining a consistently high level of competition among all the clubs”).

29 The first NFL television broadcast occurred in 1939.

30 This occurred in 1962.

31 Harris, supra, note 23, at 13.

32 Competitors include The All-American Football Conference (ACC), 1946-49; The American Football League (AFL), 1960-69; The World Football League (WFL), 1974-75; The United States Football League (USFL), 1983-86; The Canadian Football League (CFL), as it had a brief presence in the United States, (1993-95); the Extreme Football League (XFL), 2000-01; and the Arena Football League (AFL), 1987-present.

different route. After a series of secret meetings between the two rival leagues\textsuperscript{34} that required receiving congressional approval for the action,\textsuperscript{35} the AFL merged into the NFL. This new NFL now boasted a twenty-four-member league and would expand up to thirty member teams soon thereafter.\textsuperscript{36} Thus the NFL was poised to take on baseball for supremacy amongst the American sports consumer.

B: Modern NFL and Issues

The NFL continued its success after Rozelle retired in 1989. Paul Tagliabue, a graduate of Georgetown Law School and former League outside counsel, succeeded Rozelle as commissioner. Tagliabue’s strategy was to increase League revenues through stadium construction.\textsuperscript{37} During his term, Tagliabue oversaw an ambitious League initiative of stadium construction/refurbishment and also presided over almost two decades of uninterrupted NFL/NFLPA labor peace. While these two accomplishments did much to cement a positive legacy for Tagliabue, he is also increasingly being blamed by Ownership for the NFL’s agreeing to the 2006 CBA. It was Tagliabue who urged ownership to sign a CBA that seemingly mortgaged the NFL’s future in order to allow the commissioner to retire from his position without incident. This forced Tagliabue’s successor, Roger Goodell, to handle the uncertainties of the future.

C: Negotiating the 2006 CBA

During the 2006 negotiations, Owners seemingly believed that preserving lasting labor peace was too immense to jeopardize with a potential labor stoppage. Not wanting his legacy tarnished by retiring just as labor unrest was developing, Tagliabue lobbied

\textsuperscript{35} Harris, supra, note 23, at 17.
\textsuperscript{36} NFL.com, supra note 34.
\textsuperscript{37} At the League’s 1994 winter meetings, Tagliabue urged owners to focus stadiums as a high priority. Yost, Supra, Note 24, at 190-91.
Ownership to accept the deal. The Agreement was negotiated within a matter of weeks, which culminated in an eleventh-hour decision by Ownership to accept the Union’s proposal. At the time of the agreement, Rozelle’s league think ideology seemed to be back in place. Both labor and management seemingly acted in the best interests of the game by preserving labor peace and the massive financial revenues that are now a staple of professional football. However, even at this time where both parties’ interests seemed aligned, the CBA failed to address several areas of concern for the League: (1) high player salaries and (2) escalating rookie salary structures. In fact, the CBA was modified to allocate more revenue for player salaries.

Some Owners were dissatisfied with the 2006 CBA even though it ensured short-term labor peace. Buffalo Bills owner Ralph Wilson questioned whether management acted too hastily without carefully deliberating its future economic consequences. Wilson felt that ownership lacked a clear grasp on several issues covered in the proposed CBA. It was especially unclear how the new CBA was going to solve the revenue sharing disparity amongst clubs. “I didn't understand [the revenue sharing sections of the 2006 CBA]…it is a very complicated issue and I didn’t believe we should [have] rush[ed] to vote in 45 [sic] minutes,” said Wilson. League competitive balance depends on a successful revenue sharing policy. Small market teams such as Buffalo and Indianapolis

---

38 The proposal was approved by Ownership 30-2 (the Bills and Bengals dissented). Jarrett Bell, NFL owners accept player union proposal with 30-2 vote, USA TODAY, Mar. 8, 2006, http://www.usatoday.com/sports/football/nfl/2006-03-08-labor_x.htm (last visited Dec. 29, 2009).
39 “This agreement is not about one side winning or losing,” said Executive Director Upshaw in a statement. “Ultimately, it is about what is best for the players, the owners and the fans of the National Football League. “As caretakers of the game we have acted in the manner the founders intended.” See ESPN.com, NFL owners approve six-year CBA extension, http://sports.espn.go.com/nfl/news/story?id=2360258, (last visited Dec. 29, 2009).
41 See ESPN.com, supra note 39.
42 Id.
depend on shared revenue to maintain financial viability. Financial viability is essential to fielding a competitive club to maintain League competitive balance.

Both sides thought that adequately addressed the increasing revenue disparity between clubs through provisions in the 2006 CBA. Under the agreement, the top fifteen revenue-producing teams pledged to contribute about nine hundred million dollars to a shared pool over the life of the CBA. Those funds would then be equally distributed to lower revenue-generating franchises per the CBA. The new deal also increased the revenue sharing pool from forty million dollars to approximately one hundred million dollars annually. However, this provision did nothing to address the millions of dollars in revenue streams derived through stadia.

When the 1993 CBA was signed, stadiums generated almost no revenues. There was no need to include stadium revenues into the CBA as shared revenue. However, stadium revenues now account for about twenty percent (20%) of league-wide revenue and are not factored into the CBA. Savvy NFL owners leverage the name-recognition power of their franchises by creating additional revenue streams through new or refurbished stadia. However these new streams along with increasingly more creative sponsorship methods are contra to the core NFL league think ideology. An uneven increase in unshared team revenues threatens the competitive balance and viability of the League. Any injury to the League is also felt by its chief employees: the players.

43 Deubert, supra, note 40, at 182.
44 See Don Pierson, There’s peace on turf in NFL; 6-year accord raises salary cap, revenue sharing, CHI. TRIB., Mar. 9, 2006 at C1.
45 Each one of the NFL’s top fifteen top revenue producing-teams was required to give even more money to less financially stable owners in addition to sharing revenue with the NFLPA. See id.
47 Revenue streams may include premium club seating, luxury suites, stadium clubs and personal seat licenses. Personal Seat Licenses, or PSLs, are a one-time fee that fans pay in exchange for the privilege to buy a season ticket. Yost, supra, note 24 at 6.
48 As one NFL owner contended, unshared revenues generated by new or refurbished stadia provide teams with “an extra pool of cash that could be used to compensate players above, beyond, and ‘around’ the salary cap limitations.” Id. at 10-11 (presenting the small market prospective in the unshared revenue debate).
Part II: The National Football League Players Association

A: From Clean Uniforms to a Piece of the Pie

The National Football League Players Association began in earnest in 1956. Members of the Green Bay Packers and Cleveland Browns were in search of a few simple guarantees from management such as clean uniforms and payment of salaries to injured players.\textsuperscript{49} Players eventually enlisted the assistance of attorney Creighton Miller, a former NFL player and team general manager. Players eventually signed authorization cards and, by November 1956, Miller became their leader. This effort led to the creation of the National Football League Players Association (the “NFLPA”). The entity now represented National Football League players in their collective bargaining efforts.

Ownership initially balked at the PA’s attempts at collective bargaining. Players, fearful of owner reprisal due to frowned upon union involvement, held secret meetings to plan a strike.\textsuperscript{50} Fear of owner reprisal was justified; one owner stated to his team that if they struck he would simply play the game without them.\textsuperscript{51} The players quickly capitulated.\textsuperscript{52} Negotiating leverage was squarely with management.

Player mobility was a cardinal issue long before any football union was formed. Since no leverage existed to bargain, players opted to litigate the issue. The first notable player lawsuit was Bill Radovich’s 1957 challenge under the Sherman Antitrust Act. The Detroit Lions nose guard claimed that the NFL’s refusal to allow his request to move from Detroit to California to be near an ill family member was a restraint of trade.\textsuperscript{53} The

\textsuperscript{50} Id.
\textsuperscript{51} That individual threatening reprisal was Washington Redskins’ owner, George Preston Marshall. \textit{Id.}
\textsuperscript{52} Id.
NFL argued that the League was immune from antitrust challenge citing that the Supreme Court exemption of Major League Baseball from the Sherman Act.\textsuperscript{54} The High Court instead sided with Radovich, holding that football did not have the same antitrust exemption that Major League Baseball enjoyed.\textsuperscript{55} This favorable ruling gave the PA an important victory that the Union could use as leverage in negotiations with ownership. Although \textit{Radovich} was a significant victory, the PA failed to take advantage by challenging other fundamental NFL concepts.\textsuperscript{56}

The next decade brought a new challenge to League owners as it was forced to deal with the upstart American Football League. After these leagues merged in 1966, player solidarity became a significant issue of concern for the Union. NFL player reps faced the task of representing all members that had merged into the league. The PA only represented sixteen of the twenty-six team rosters in the League at this point.\textsuperscript{57} After the merger player solidarity became a significant issue of concern. The players sought guidance from the American Federation of Labor and Congress of Industrial Organizations to assist in forming a labor union of professional athletes. The AFL-CIO was not interested, and neither was Miller.\textsuperscript{58} As a result the players voted to remain an association instead of a union. The NFL responded by refusing to negotiate with the players.\textsuperscript{59} Knowing the PA was weak, in 1968 Ownership locked the players. The

\textsuperscript{54} Id. at 449-50.
\textsuperscript{55} Id. at 453-54. See also McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir.1979) (finding that professional hockey does not enjoy an exemption from antitrust scrutiny).
\textsuperscript{56} Michael Oriard, Brand NFL 57 (UNC Press 2007).
\textsuperscript{58} The players also rejected overtures from the International Brotherhood of Teamsters to organize. Oriard, supra note 56, at 58.
\textsuperscript{59} Id.
weeklong labor stoppage resulted in the first-ever NFL-NFLPA CBA. But the lack of player solidarity contributed to less-than-hoped-for results.⁶⁰

**B: A Cat and Mouse Game – Negotiations Between the NFL and NFLPA**

Players took a significant step toward achieving cohesiveness by consolidating the NFL and AFL Players Associations into one PA in 1970.⁶¹ While both NFL and AFL loyalists pushed for their respective union leaders to be the Union’s first-ever president, Baltimore Colts tight end John Mackey was eventually selected.⁶² With its new leader the PA was ready to engage Ownership in a new round of negotiations.

Ownership seemed receptive to recognize and meet with the PA. However recognition was based on several conditions including a promise to eliminate lawyers from being present during meetings.⁶³ When a meeting actually occurred, nine individuals showed up to represent Ownership.⁶⁴ Only two representatives were supposed to be present for each side.⁶⁵ After the meeting Mackey was advised by his counsel to sign a contract that Ownership had provided. This document included a provision that would have bound the players to Ownership’s only offer “in perpetuity.”⁶⁶ Instead of signing the document Mackey fired his attorney and hired the law firm of

---

⁶⁰The CBA embodied less than hoped for team results, as player-representatives accepted Ownership’s terms without first consulting the Association. The Association attempted to negotiate into the first NFL-NFLPA CBA (1) ownership’s promise to contribute $3 million over two years to the players’ pension fund (a $200,000 per year increase but far below its demands for $5 million over two years), (2) minimum salaries of $15,000 for rookies and $20,000 for veterans, (3) exhibition game pay of $500 per game, (4) lowering retirement age to 45, and (5) impartial grievance arbitration. “But, under the contract eventually agreed to, minimum salary remained at $9,000 for rookies and $10,000 for veterans, exhibition game pay stayed at $50 per game, the commissioner remained as the arbitrator, and retirement age stayed at 65.” NFLPA.com, supra note 57; see also Oriard, supra note 56 at 58.


⁶²Id.

⁶³Ownership would recognize and meet with the Mackey only if the Union (1) eliminated lawyers from the meeting and (2) did not attempt to further negotiate increases in pre-season pay. Id.

⁶⁴Id.

⁶⁵Id.

⁶⁶Id.
Lindquist and Vennum. The firm assigned Ed Garvey to work with Mackey. Shortly thereafter Garvey left the firm and became the PA’s first-ever Executive Director.

Garvey was charged with an arduous job as the first ever NFL CBA expired in January 1970. Negotiations led to a three-day players’ strike and Ownership retaliated with a seventeen-day lockout. Eventually Ownership conceded 19.1 million, which mostly came in the form of player pension contributions. Under Garvey’s direction the NFLPA started bargaining for concessions that it arguably should have based on the Radovich decision in 1957. These bargaining issues included (1) the elimination of the amateur draft, (2) the elimination of the options clause (3) the Rozelle Rule, (4) impartial arbitration of all disputes, (5) individual contracts to protect players, and (5) elimination of the waiver system. Under the Rozelle Rule, a player could change teams at the conclusion of his contract provided the new team compensated the old club for the loss of that player’s services. Compensation was provided to teams in the form of players, money, or draft picks. If teams failed to reach an agreement Commissioner Rozelle was able to arbitrarily award compensation. While players could negotiate with any team after their contract expired, the rule significantly restrained player movement.

In 1974, the PA levied sixty-three “freedom demands” upon the Owners, including a demand for the elimination of the “Rozelle Rule.” The positions of the parties quickly rose to the surface. Garvey’s PA sought the ability to freely sign agreements for player services at the conclusion of their contracts without the

---

67 NFLPA.com, supra note 61.
68 Id.
69 Berry et al, Supra, Note 49, at 125.
70 Id.
71 Id.
73 Id.
74 Id.
75 The mantra amongst the rank-and-file players became “no freedom, no football.” Berry et al, supra note 49 at 125.
Commissioner stifling player mobility through arbitrary action. Owners feared that such a free agency system would ruin the League’s competitive balance, thereby destroying the very foundation that the League’s success was based upon.76 Thus, each side had drawn their lines of contention. Ownership attempted to send a message to the Union by only inviting rookies and free agents to NFL training camps.77 The NFLPA tried to hold its line with pickets, but solidarity was still weak.78 After one month more than one-quarter of all players had crossed lines. The strike ended after forty-two days,79 leaving the Union “badly split and seriously underfunded.”80 Ownership punished players who were significantly involved with the strike, illustrating that there would be consequences for individuals who involved themselves with the PA.81

The NFLPA responded by filing unfair labor practice charges with the National Labor Relations Board (NLRB or Board).82 The NLRB Administrative Law Judge (ALJ) ordered reinstatement of the players.83 After another failed strike attempt in 1975, it became apparent that Garvey’s Union was still weak. Many players lacked the willingness to unite as a viable union. Instead of negotiating, the Union again found redress through the court.84 Mackey and thirty-five other players filed suit against the League in Minnesota Federal District Court, claiming that the Rozelle Rule violated

---

76 According to Rozelle, if players were “given total freedom to negotiate their services, the [L]eague would be dominated by a few rich teams and would eventually lose both fan interest and revenue.” Id.
77 Id. at 126
78 Id.
79 Id.
80 Id.
81 Goplerud, supra, Note 72, at 16.
82 Three Union leaders, Bill Curry, Kermit Alexander and Tom Keating, were either cut or traded by their respective NFL clubs during the 1974 strike as a consequence of their PA activities. The PA filed unfair labor practice charges with the National Labor Relations Board (NLRB or Board) as the result of the adverse actions taken against these players. While an NLRB Administrative Law Judge (ALJ) ordered reinstatement of the three players, sports law commentators viewed ALJ involvement as a symptom of the Union’s poor negotiating leverage with the NFL. Berry et al, supra, note 49 at 126.
83 Id.
84 Id.
85 See Goplerud, supra, note 72 at 17 (stating that using antitrust law was necessary because of the failure of the bargaining process and the strike to effectively represent the players’ interests, thus leaving antitrust laws as the only vehicle for challenging the owners’ actions).
antitrust laws as a restraint on trade. The district court ruled in the Union’s favor, finding that the Rozelle Rule was a per se violation of the Sherman Act in the form of a group boycott. Upon appeal, the League asserted that the non-statutory labor exemption precluded players from challenging this rule because players had collectively bargained to two previous CBAs that contained the Rozelle Rule.

The Eighth Circuit rejected the NFL’s argument and sided with the district court. However, the Eighth Circuit declined to follow the lower court’s ruling. Instead, the court suggested that the parties collectively bargain in good faith to create a player movement and inter team compensation system. The court required the parties to resolve this dispute through continued negotiations because the parties were better suited to determine their own mutual interests than the courts.

Despite this significant victory for free agency, support for the PA waned. For example, the March 1977 successor CBA scaled back some of the victories the Union achieved in Mackey, such as free agency. Among the additions to the 1977 CBA was a modified format for player movement and compensation. Under this new system players

---

86 Mackey II, 543 F.2d at 606.
87 The non-statutory labor exemption is a mechanism preventing antitrust scrutiny that survives the expiration of a collective bargaining agreement until the parties reach an impasse as to that issue. [T]hereafter, the term or condition is no longer immune from scrutiny under the antitrust laws, and the employer runs the risk that continued imposition of the condition will subject the employer to liability.” Powell v. Nat’l Football League, 678 F.Supp. 777, 782 and 788 (D. Minn. 1988), rev’d, Powell v. Nat’l Football League, 930 F.2d 1293 (8th Cir. 1989) (“Powell III”) (stating that the Supreme Court has recognized that in order to properly accommodate the congressional policy favoring collective bargaining under the National Labor Relations Act…certain union-employer agreements must be accorded a limited nonstatutory labor exemption from antitrust sanctions. See Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 621-622, (1975); see also Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689, 85 S.Ct. 1596, 1601-02, 14 L.Ed.2d 640 (1965).
88 The court of appeals stated that the Rozelle Rule was “significantly more restrictive than necessary to serve any legitimate purpose” and “as implemented, contravene[d] the Rule of Reason. Mackey II, 543 F.2d at 622-623.
89 Id. at 617.
90 Id. at 623.
91 NFLPA.com, supra note 61.
92 The 1977 CBA included impartial arbitration of non-injury grievances and, instead of outright free agency, a modified free agency scheme that included a team’s right of first refusal and compensation in the event a player was lost. Berry et al, supra, note 49, at 127; see also NFLPA.com, supra note 61.
played out their contracts and could pursue free agency. However teams had the option of matching a competing team’s offer or it was compensated if the player was lost. This proved to be an unworkable system as few players changed teams. The new system still discouraged player movement.

Following the 1981-1982 season the NFLPA held its membership meeting in Albuquerque. Players were increasingly showing signs of unity as at least 537 players attended the Albuquerque meeting (almost one-third of Union membership). During the meetings all twenty-eight of the league’s player representatives approved a strike if ownership rejected the PA’s proposal that player compensation come from a pool of fifty-five percent of league revenues. This scheme of player compensation was based on years of service, playing time, and individual and team performance.

NFL officials estimated that players were already receiving forty-eight percent of league revenue and preferred a salary system based on player performance in addition to seniority. Ownership worried that if salaries were based mostly on seniority, the newly formed United States Football League would then raid NFL talent. The League’s financial ability became a central topic of debate amongst the parties. Jack Dolan, Executive Director of the NFL Management Council, granted the PA’s request to inspect the League’s finances in a January 1982 letter. Ownership then reneged on this

---

93 Id.
94 Id. Additionally, if the team with this right of first refusal chose to not exercise this option, the other team would forfeit draft picks. During the 5-year period covered by the 1977 Collective Bargaining Agreement, fewer than 50 out of 600 players received offers from other NFL clubs after becoming free agents. See also Powell, 678 F.Supp at 780.
95 The NFLPA website described the resulting trend in practice: “Although the new free agent system made sense in theory, since it geared draft choice compensation to new salary offers made to the free agent player, it did not anticipate the huge increases in club revenues—and therefore salaries for players—which began occurring one year after the 1977 CBA was signed. As a result, most players were ‘worth’ more than a first-round choice when they became free agents.” NFLPA.com, supra note 61.
96 Berry et al, supra, note 49, at 130.
97 Id. at 131 and 134.
98 The NFL Management Council is the NFL’s labor relations unit.
agreement and instead proposed an anonymous audit for an average team. The Union challenged ownership’s refusal to provide financial information through the NLRB. The Board upheld the League’s position because the Union had no definitive basis from which to claim fifty-five percent of gross revenues that they voted upon in the Albuquerque meetings. This setback meant the Union would have to take other action.

The Union continued with its plans to strike as the 1982 season inched closer. Players joined hands prior to the start of each preseason contest as a showing of solidarity, an action that drew the ire of team owners. Four days prior to the regular season, ownership tendered a counter-offer to the Union that included what was labeled as “$600 million in new money.” This proposal broke down as forty million dollars in player benefits, $126 million in career adjustment bonuses for veterans, and $475 million for player salaries with the goal of increasing pay by fifteen percent per year during the agreement. Players would receive retroactive annual increases of ten thousand dollars for each season of player participation between 1977 and 1982, and an additional ten thousand dollars per each year played between 1983 and 1986. The NFLPA rejected the revenue sharing agreement but kept the proposal’s benefits and wage adjustments, proposing that 1.06 billion dollars come from fifty percent of the League’s television deal money. Ownership rebuffed this proposal.

---

100 Id.
101 Id.
102 The Union’s challenge was not a complete loss, however, as the NLRB’s General Counsel ordered the League to provide the Union with some of the information it requested. This sought-after information included broadcast contracts, players’ salaries, and workers compensation insofar as knowing whether team doctors had financial interests in the NFL clubs. While the PA did in fact receive some of the requested data, it fell short of full financial disclosure. Berry et al, supra, note 49, at 131.
103 The Owners considered fining the players. Id. at 136.
104 Id. at 137.
105 Id.
106 Id.
107 Id. at 133, 138.
In response, the Union voted to strike after week two through week four.\textsuperscript{108} The League, in response, shut down team operations and barred players from entering the premise for any reason.\textsuperscript{109} Ownership also said that players would not be paid for any additional games on the schedule and would no longer receive medical treatment at team facilities.\textsuperscript{110} Thus, both the Union and the League utilized their available weapons, the strike and the lockout, during the bargaining process.

A contentious relationship between lead negotiators further complicated the bargaining process. The relationship between Garvey and Dolan was so volatile that there was widespread distrust among the parties, clouding whether a compromise could be reached.\textsuperscript{111} Ownership only modified its stance twice: one week into and then again forty days into the strike.\textsuperscript{112} The PA rejected both proposals.\textsuperscript{113} On the forty-fifth day of the strike,\textsuperscript{114} Ownership offered what was labeled “money now” bonuses\textsuperscript{115} to all players who had played at least three games into their fourth season. The bonuses were to be payable at the time a new CBA was signed.\textsuperscript{116} Ownership made a calculated move by guaranteeing money to veteran players, a significant part of the bargaining unit.\textsuperscript{117}

The parties tentatively reached an agreement on November 16, 1982 and signed the new CBA on December 5, 1982 after another three weeks of negotiations.\textsuperscript{118} In the

\textsuperscript{109} Berry et al, supra, note 49, at 138.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} This date was more than seven weeks into the sixteen game regular season.
\textsuperscript{115} The bonus offered to players in this instance was $60,000.00.
\textsuperscript{116} Berry et al, supra, note 49, at 138.
\textsuperscript{117} Id. at 138-40.
\textsuperscript{118} NFLPA.com, supra note 121.
new agreement, players received their “money now” bonuses in the form of sixty million dollars from Ownership at the time the agreement was signed.\textsuperscript{119} Players gained increases in minimum salary, pension pay, and pre-season pay, and also the right to a second medical opinion, the right to select a surgeon for injury-related operations, and the right to inspect their club medical records.\textsuperscript{120} Yet still missing from the new CBA was the true free agency scheme that much of the NFLPA coveted.\textsuperscript{121}

C: The NFLPA Finds a New Leader and Fights for True Free Agency

During the life of the 1982 CBA Ed Garvey left his post as Executive Director and the Union elected former all-pro guard Gene Upshaw in June 1983.\textsuperscript{122} When Union membership was polled for key issues heading into negotiations for the 1987 CBA, the results clearly indicated that free agency was the “highest priority.”\textsuperscript{123} The player mobility provisions of the prior accord had been woefully ineffective, as “during the five year period covered by the 1982 CBA, not a single veteran player moved from one NFL club to another under the Right of First Refusal/Compensation system.”\textsuperscript{124} While Upshaw was making his rounds with the players and gathering important information for the upcoming negotiations, Ownership was readying for another labor stoppage. The League made arrangement to secure a $150 million line of credit for just such an event.\textsuperscript{125} This time, Ownership appeared to possess even greater negotiating leverage.\textsuperscript{126}

\textsuperscript{119} Id.; see also Harris, {	extit{Supra}, Note 23, at 304 and 648-49. (304 could be a mistake).
\textsuperscript{120} NFLPA.com, supra note 121.
\textsuperscript{121} Goplerud, {	extit{supra}, note 72, at 25.
\textsuperscript{122} NFLPA.com, supra note 121.
\textsuperscript{123} Id.
\textsuperscript{124} Powell, 678 F.Supp. 777 (stating that of the 1,415 players who became veteran free agents during the term of the 1982 Agreement (252 in 1983, 216 in 1984, 269 in 1985, 321 in 1986 and 357 in 1987), apparently only one player even received an offer from another club).
\textsuperscript{125} PAUL D. STAUDOHR, Collective Bargaining in the Private Sector 248 (Paul F. Clark, John T. Delaney and Ann C. Frost eds., Industrial Relations Research Association 2002).
\textsuperscript{126} Id.
The parties returned to the bargaining table to negotiate a successor agreement to the 1982 CBA and made little progress. Ownership quickly rejected the Union’s proposal for free agency and although they still hoped for a compromise, players voted to strike.\textsuperscript{127} The League did not capitulate to Union demands and instead hired replacement players.\textsuperscript{128} Games were played with scab players and television ratings suffered due to inferior play, but they continued to be televised in order for the networks to fulfill their contractual obligations. The PA knew that a strike would not work if the owners were willing to replace the on-the-field product with “inferior talent.”\textsuperscript{129} Accordingly, after just a few weeks, the Union voted to end its strike on October 15, 1987.\textsuperscript{130}

Ownership’s leverage negated the PA’s ability to wage an effective campaign through a strike. The Union instead opted for litigation. On October 15, 1987, the last day of its strike, the PA filed an antitrust lawsuit against the League in United States Federal Court challenging, among other practices, the League’s commissioner-determined right of first refusal compensation system.\textsuperscript{131} The Union argued that the NFL’s method of free agency violated Section One of the Sherman Antitrust Act because it was an unreasonable restraint on trade.\textsuperscript{132} The League filed its own motion, asking the court to declare that resolving the free agency issue can only occur “within the context of the national labor laws, and that the nonstatutory ‘labor exemption’ insulates the challenged restraints from antitrust scrutiny.”\textsuperscript{133}

\textsuperscript{127} Goplerud supra, note 72, at 27; see also, NFLPA.com, supra note 121.
\textsuperscript{128} According to the Union, “[t]he NFL Management Council Executive Committee (“CEC”)…believed that the [L]eague had been too soft on players in 1982…[t]he CEC] also knew free agency would push veteran salaries up and force clubs to be more competitive. That, of course, would mean less profit for him and other owners.” Id.
\textsuperscript{129} Id.
\textsuperscript{130} Still working without a contract, the Union elected to file suit with the NLRB and won $30 million in back pay owed to players. Id.
\textsuperscript{131} Powell, 678 F.Supp. at 789; NFLPA.com, supra, note 121.
\textsuperscript{133} Powell, 678 F.Supp. at 781.
The district court ruled that the nonstatutory labor exemption did in fact insulate the League’s right of first refusal/compensation system. Because this issue was a mandatory subject of bargaining, the nonstatutory labor exemption continued to protect Ownership’s activities until the parties reached a bargaining impasse. Thus, in order to protect the status quo and “foster a stable environment in which to negotiate a new collective bargaining agreement,” the nonstatutory labor exemption also survived the expiration of the CBA until an impasse. The district court stopped short of stating whether the parties reached an impasse, as the NFL had filed a charge with the NLRB alleging that the Union had not bargained in good faith. The court pointed out, “[b]ecause a finding of good faith must be made as a precondition to determining impasse, the Court must await the NLRB’s ‘good faith’ determination.” The NLRB eventually issued a ruling that allowed the PA’s lawsuit to continue.

On appeal the intermediate court found that the nonstatutory labor exemption did apply because the parties had negotiated to impasse. However, the appellate court refused to issue an injunction, opining that “issuing an injunction to secure unrestricted free agency would wholly subvert the collective bargaining process and thereby offend

---

134 The court opined that the free agency system provision of the 1982 CBA met the three necessary elements under the Mackey Test. Id. at 784.
135 Id. at 784-85.
136 Id. at 785.
137 This occurs following intense, good faith negotiations, where the parties have exhausted the prospects of concluding an agreement, despite their best efforts. 678 F.Supp. 777, 788 (citing the standard as provided in Taft Broad. Co., 163 NLRB 475, 478 (1967), which states that an impasse exists after “good-faith negotiations have exhausted the prospects of concluding and agreement”).
138 Powell, 678 F.Supp. at 789.
139 Id.
140 On April 28, 1988, the NLRB rendered its ruling, dismissing the League’s charge of bad faith bargaining. Powell II, 690 F.Supp. at, 814; see also Goplerud, supra, note 72, at 27.
141 Powell II, 690 F.Supp. at 817.
142 The court went further into its rational by saying: “[i]t would be highly destructive to collective bargaining if major issues could be removed from the bargaining table and preliminarily resolved in isolation in antitrust litigation. If one of the parties to the bargaining relationship were able to secure the substance of its bargaining objectives by obtaining a preliminary injunction, there would be very little motivation for that party to bargain in good faith toward reaching an agreement. Judicial intervention at this stage of the bargaining process would give one side a preliminary victory while effectively disabling the other.” Powell, 690 F.Supp. at 817.
a central purpose of the Norris-LaGuardia Act." Ultimately, the Eighth Circuit of the United States Court of Appeals held that the nonstatutory labor exemption protected the owners beyond impasse, and that as a result the Union could not bring an antitrust suit to enforce what should be enforced through good faith bargaining. In other words, the courts defer to federal labor law if the issue could be resolved through the bargaining process or be heard before the NLRB. As the Union was forced back to the bargaining table it took note of Justice Gerald Heaney’s dissent that subtly suggested a bold move: disband the union so the nonstatutory labor exemption no longer applies.

D: Decertification and Challenging “Plan B” Free Agency

The Union took Justice Heaney’s counsel literally. On November 3, 1989, two days after the Powell III decision, the Union formally disclaimed any interest in representing NFL players in collective bargaining. Player representatives convened in Dallas on December 5, 1989 and finalized this dramatic decision by ending the NFLPA’s official status as a union. Instead, the NFLPA now existed more as a trade association, lacking any authority to bargain on behalf of players.

Between Powell I and Powell II the League somewhat modified its free agency system and established a process called “Plan B Free Agency.” Under Plan B Free Agency all NFL teams preserved limited rights over no more than thirty-seven players.

---

143 Id.
144 Powell III, 930 F.2d at 1293.
145 Justice Heaney wrote “[t]he majority purports to reject the [O]wners’ argument that the labor exemption in this case continues indefinitely. The practical effect of the majority's opinion, however, is just that—because the labor exemption will continue until the bargaining relationship is terminated either by a NLRB decertification proceeding or by abandonment of bargaining rights by the union.” Id. at 1305.
146 The Union reformed itself as a professional organization. NFLPA.com, supra note 121; see also Powell III, 930 F.2d at 1293.
147 NFLPA.com, supra note 121.
148 Goplerud, supra note 72, at 29.
out of a forty-five man roster season. If a player was a protected free agent, the team signing that player was obligated to provide the previous club an opportunity to match the tendering-team’s offer, or a right of first refusal. If the player’s former organization chose not to match the offer, the signing club had to provide compensation in the form of draft choices. Unprotected players could negotiate contracts with a team of their choosing. Plan B Free Agency allowed generally less talented players to, in many instances, secure larger contracts than more highly skilled players simply because protected players were precluded from negotiating with other teams without compensating their original club.

Plan B Free Agency all but halted the mobility of marquee players. Union leaders filed a class action lawsuit against the League in response to this Rozelle Rule-like scheme. Because the Union had disbanded, labor law no longer governed the parties’ relationship. The lawsuit challenged the League’s free agency rules as an unlawful restraint of trade in court without contravening labor law. The Players ultimately prevailed as a jury found in their favor. The Court held that Plan B Free Agency deprived players of the opportunity to freely offer their services as professional football players to other teams, causing them to receive less compensation.

---

150 Id.
153 Nissim supra note 149, at 260
155 The District Court granted summary judgment as to whether the exemption terminated now that the NFLPA was a trade association with no bargaining authority. Goplerud , supra note 72, at 30-31 (recounting Powell, 764 F.Supp. at 1351).
156 See generally, McNeil, 1992 WL 315292 at 7 (illustrating the jury’s answers to questions of fact).
157 Id.
establishing or maintaining competitive balance within the NFL. Through the McNeil decision and additional ensuing litigation, the Union ended Plan B Free Agency and continued to apply pressure on the owners.

E: The Modern Era – a Time of Mutual Economic Gain and Benefit

With the League now susceptible to attack through antitrust law, Ownership began settlement talks with the PA in November 1992. During that time, Union leaders had filed another lawsuit, White v. National Football League, which sought true free agency and compensation relief through the legal system. Ownership desired enactment of a mechanism to curb unbridled free agency and protect smaller-market teams in the form of a salary cap. Players sought true free agency. The parties finally reached an agreement outside of the court in January 1993, and submitted it to Judge David S. Doty of the Federal District of Minnesota for a consent decree. The settlement agreement submitted to Judge Doty contained a provision that Judge Doty’s court would retain jurisdiction over the enforcement and review of the agreement as well as all other matters stemming from the eventual CBA. The stipulated settlement agreement was signed on April 30, 1993 and contained all of the major provisions sought by both sides. Settlement finally came through compromise. Once the CBA was approved and the consent decree was in place to settle the White antitrust lawsuit, the

---

158 Id.
160 Although it became increasingly evident that collective bargaining was going to settle this dispute, Ownership still attempted to break Union solidarity. For instance, Owners tried to steal players from the Union’s licensing arm over to the NFL’s licensing arm by giving certain players more money. (NFLPA 1990s, noting that Jim Kelly, Dan Marino, Bubby Brister, Warren Moon, Phil Simms, John Elway, Boomer Esiason, Troy Aikman, Jim Everett, and Randall Cunningham all defected to NFL Properties).
161 See generally White, 822 F.Supp. at 1389.
164 See White v. Nat’l Football League, 585 F.3d 1129, 1134 (Eight Cir. 2009).
NFL voluntarily recognized the NFLPA as the bargaining representative. Finally there was labor peace amongst the NFL and the NFLPA.

Over the years, the NFLPA and the League extended their 1993 agreement five times. The most recent extension took place in March 2006 when both sides voted to extend the CBA through the 2011 season. Ownership voted thirty-to-two to accept the NFLPA’s final proposal. Each vote to extend the collective bargaining agreement was also a vote against uncertainty and to maintain the status quo. However on May 20, 2008, in the midst of the worst recession in decades, League owners unanimously voted to opt out of the agreement.

Under the CBA the 2010 season operates as the agreement’s final year if one of the parties opts out. Further, the 2010 season will operate without a salary cap. While this may be perceived as being beneficial to NFL players, there are drawbacks. For instance, there is no salary floor. Ownership can spend as little as it desires on player salaries. Other negatives include free agency going from four years to six years of service, franchises may use an additional franchise tag and there are restrictions on a playoff team’s ability to sign free agents. Thus the players will also be penalized in the uncapped year.

In its view, Ownership opted out early because it was an unreasonable fiscal obligation to spend more than half of NFL combined revenue on player expenses without getting some concession or cooperation from the Union in return. In particular the

---

165 This occurred after a majority of players signed authorization cards and the American Arbitration Association acknowledged the NFLPA. See White, 822 F.Supp. at 1435. NFLPA membership vote to ratify the new CBA was 952 for, and thirty-four against. NFLPA.com, supra note 162.


League was referring to costs associated with the massive stadium initiative undertaken in the late 1990s under Commissioner Tagliabue’s leadership. The League released a statement addressing its reasons for opting out, attributing it decision to the high cost of player salaries and having to spend significant on stadium construction, operations and improvements.168 According to the NFL’s statement, these facts along with the recession prevent Owners from wanting to invest in the game under the current CBA.169

Management takes issue with other material elements of the current deal. For example, the CBA effectively prohibits clubs from recouping bonuses paid to players who, after signing, breach their player contracts or refuse to perform. This issue was exemplified by the events surrounding the incarceration of former Atlanta Falcons’ quarterback and convicted dog fighting ring financier Michael Vick. Vick was able to keep most of his twenty million dollar signing bonus even though he was in prison and unable to play.170 The League now seeks to bargain over the handling this type of issue.

Owners are also dissatisfied with the rising salaries of rookie players. Some first year players make more money than veterans who have already proved their worth. This issue should have been resolved in the 2006 CBA negotiations. However in its urgency to sign a new CBA, Ownership failed to allocate ample time to examine how to curb rookie salaries during those negotiations. Now the NFL wishes to negotiate better terms for its member clubs and allocate more resources for players who prove themselves.

169 Id.
Although Mr. Upshaw strongly opposed a rookie salary scale\textsuperscript{171} many members of his constituency were in favor of a rookie pay scale.\textsuperscript{172} It was in the best interests of many players to have CBA mechanisms that curtail large rookie bonuses and other forms of guaranteed compensation in order to free up salary cap space for veteran contracts.\textsuperscript{173} Sadly, the NFLPA’s hard-line stance against a rookie salary scale changed, as Mr. Upshaw passed away on August 21, 2008\textsuperscript{174} after losing a short bout with pancreatic cancer.\textsuperscript{175} The successor to the iconic former all-pro and union leader would take a different viewpoint on many NFL-Union issues, including rookie wage scales.

After a lengthy and at times controversial\textsuperscript{176} search for a new executive director the Union settled on pro football outsider DeMaurice Smith. Each of the Union’s thirty-two player representatives voted in favor of Smith, a lawyer with no professional football ties and no labor law experience\textsuperscript{177}. Smith is a former partner at the Washington, D.C. based firm of Patton Boggs and is a former United States attorney with connections to many key government figures, including current Attorney General Eric Holder and President Obama.\textsuperscript{178} Smith pledged that he would use his substantial political

\textsuperscript{173} Deubert supra note 40, at 228.
\textsuperscript{174} A potential byproduct of Upshaw’s tragic death may be the erosion of any rapport the Union may have possessed with Goodell and other members of the Management Council.
connections to assist the players during negotiations.\(^{179}\) While Smith’s rhetoric initially took a conciliatory tone when referring to the lockout with the NFL, the language is now escalating and becoming pessimistic.\(^{180}\)

Formal negotiations between the parties began in summer 2009 but the verbal jousting began long before these discussions. While each side publicly approached these talks with the expectation that they would be productive, the opposite seems to be occurring. Smith notified his constituency that the NFL intends to lock out the players in 2011 and, although both sides continue to negotiate, players should begin to save at least one-fourth of their earnings during the next two years.\(^{181}\) The Union is further preparing for a labor stoppage by creating a strike/lockout fund.\(^{182}\) This fund will be established through a fifty percent increase in union dues for the 2009 and 2010 seasons.\(^{183}\) Another trend beginning to emerge in the early stage of bargaining is the League’s summary rejection of any and all NFLPA proposals, a tactic that is eerily familiar to the beginning stages of the NHL lockout. The Union believes that this familiar tactic is the work of League outside counsel Bob Batterman and, like the NHL labor stoppage, Owners will wait to engage in substantive negotiations until the current CBA has expired.\(^{184}\)

---


\(^{183}\) Liz Mullens of the Sports Business Daily reported that the NFLPA on September 21, 2009 “sent out a notice to agents that active NFL player dues for the ’09 and ’10 seasons are being increased from $10,000 to $15,000 per player in order to create a “dues lockout fund.” NFL player agents’ annual membership fees have not been affected, sources said. For players, in addition to the flat annual $15,000 dues, those who are eligible to receive the equal share licensing royalty payments due them by NFL Players, Inc will have their dues increased by that amount as well for ’09 and ’10. In past years that payment equaled approximately $10,000 per player — which means dues for those players will equal about $25,000. SPORTS BUSINESS DAILY, NFLPA Increasing Yearly Players Dues To Establish Lockout Fund, http://www.sportsbusinessdaily.com/article/133481 (last visited Jan. 2, 2010).

The NHL and NFL conflicts also share a common element in that the NFL and NHL labor stoppages involve attempts by both labor and management to gain leverage through use of the media. Although each denies their interest in utilizing the media to communicate their respective message, both Goodell and Smith are using such methods to transmit increasingly contentious messages\textsuperscript{185} to each other and the public. Both sides understand the importance of controlling and manipulating the media, as public support hinges on the information disseminated through various media outlets. As detailed in the next section, the most recent lockout in professional sports illustrates that either side can win a labor stoppage by influencing public’s view on the matter. Understanding this concept may provide some clues as to how both the NFL and the Union are going to proceed if there indeed is a lockout in 2011.

\textbf{Part III: Recounting the NHL Lockout}

\textbf{A: From Enjoying Unrivaled Success to Facing-Off Against Dire Financial Straits}

The NHL faced a financial crisis earlier this decade that is similar to the dilemma confronting the NFL. Professional hokey enjoyed a period of tremendous growth in the late 1990s, both economically and in fan viewership. However the NHL seemed to be in dire straits in the early portion of the new millennium. The majority of NHL franchises claimed an operating loss.\textsuperscript{186} Several franchises reported losses of at least thirty million dollars and four teams had recently filed for bankruptcy protection.\textsuperscript{187} NHL Commissioner Gary Bettman asserted that player salaries were the chief reason for each

\begin{footnotesize}
\textsuperscript{187}Id.
\end{footnotesize}
team’s financial losses and that a salary cap was the only solution. The NHL lobbied NHLPA Executive Director Bob Goodenow to consider a salary cap for the good of the game; however it also started accumulating a war chest in case of a work stoppage.

After the 2002-2003 NHL season, the NHL began using the media to publicly justify locking out players. Commissioner Bettman asserted that NHL player salaries were disproportionately larger when compared to other major US sports. He illustrated this point by saying that the NHL would “lose less money by not playing” hockey next season. To validate Bettman’s assertion, the league retained former SEC Chairperson Arthur Levitt to prepare a finances audit of NHL revenues and losses. The audit showed that NHL teams collectively lost $273 million during the 2002-2003 season; it further unveiled “an astounding 73% of NHL revenue was paid to players in the 2002-2003 season, significantly above” when compared with the other major sports in America. The NHLPA attacked the accuracy of the report, calling it “flawed” and asserting that the report was ‘simply another league public relations initiative [to blame

---

188 See Alan Adams, NHL and union reject new proposals, USA TODAY, Dec. 14, 2004, http://www.usatoday.com/sports/hockey/nhl/2004-12-14-labor-talks_x.htm (last visited Jan. 2, 2010) (quoting Bettman as saying “[w]e only know of really one approach to meaningfully address and fix our problems. And that means we need to forge an economic partnership [implement a salary cap]... We need to be together — teams and players, league and union — working together to grow this game and I don’t think there’s any substitute for that”).

189 Mr. Goodenow played college hockey at Harvard and after completing his brief NHL playing career, received his J.D. from the University of Detroit Law School. Mr. Goodenow assumed leadership of the NHLPA in 1992.

190 The NHL mandated that each club contribute ten million dollars ($10 million) into a “rainy day” fund, which would most likely be used to cover financial loses as a result of the looming labor stoppage. Roger I. Adams, Sports Law Issues Just Over the Horizon, 3 Va. Sports & Ent. L.J. 49, 61-62 (Spring 2003).

191 Bettman, prior to the lockout, continuously cited the report stating “players get 76 percent of all league revenues -- far more than the percentage for the other major team sports.” The 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 (last visited Jan. 2, 2010).


193 Lieberman, supra note 12, at 91-92.

194 Yoost, supra, note 186, at 491.


196 Associated Press, NHL lockout chronology, NHL Lockout chronology, Feb. 16, 2005, http://sports.espn.go.com/espn/print?id=1993004&type=story (last visited Jan. 2, 2010); but see Lieberman, supra note 12, at 92 (stating “Forbes Magazine conducted a study of league revenues and expenditures during the 2002-2003 season. Forbes reported that teams lost $123 million and that the league spent only 66% of its revenues on player salaries.”).
the players for hockey’s financial situation].”197 This report and the resulting exchange between the two sides helped sow seeds of distrust that eventually led to the longest labor dispute in professional sports.

B: 2004 Lockout

The NHL remained resolute in its necessity of achieving cost certainty. “We can’t live any longer under [this] CBA,” Commissioner Bettman maintained.198 Both sides knew the danger a labor stoppage posed; a prior lockout in 1994 had reversed years of fan development in North America. Television ratings had suffered as a result of the lost games. Despite the substantial risks associated with any labor stoppage, Bettman realized that curtailing player costs was paramount to the League’s financial viability. This meant securing a salary cap regardless of the consequences.

Bettman was determined to learn from the mistakes the league had made during prior labor stoppages.199 Ownership would stay disciplined and not make any concessions until players accepted a salary cap. The NHL’s strategy seemed to include a component of using the press to convince the public that a salary cap was necessary to save the game. This message put the NHLPA in a difficult public relations position, as it had already backed itself into a corner by refusing to accept any proposal with a salary cap. Goodenow’s steadfast refusal to even consider this cost control provision allowed the media to cast blame on the players for not making financial concessions necessary to save the game.

198 The Associated Press, supra, note 191.
199 In prior labor conflicts, NHL owners had lacked cohesion and conceded to player demands. For example, NHL owners locked players out in 1995 in order to secure a salary cap. However owners were unable to maintain a united front and ended up signing a new CBA that lacked a salary cap.
Sensing that the upcoming labor conflict would be long in duration, Goodenow attempted to prepare his side for a prolonged lockout. However, he was unsure whether players were willing to sacrifice one or two seasons of guaranteed salary in order to avoid a cap. NFL owners considered using replacement players as the lockout began in earnest. In response, Goodenow reportedly mandated that any player who chose to cross party lines would be obligated to pay back to the NHLPA all player benefits received during the work stoppage. This amount totaled between five thousand dollars and ten thousand dollars per each month of the labor stoppage. The NHL responded to this edict by filing an ULP against the Players Association, calling such a practice “coercive.” This ULP filing quashed any hope that both sides would quickly find common ground and work to save the season.

On February 16, 2005, the NHL canceled the season. As the lockout trudged on, players were the first side to exhibit signs of breaking solidarity. Players were not willing to sacrifice time from their career to fight a cap. Some players were reportedly communicating with general managers, owners and the media. This activity undermined Goodenow’s position. The owners, in contrast and unlike prior labor stoppages, did not break rank and presented a united front. It soon became evident to Goodenow that his union was neither united nor willing to sacrifice several seasons in

---

200 Sensing that the upcoming labor conflict would be long in duration, Goodenow attempted to prepare his side for a prolonged lockout. However, he was unsure whether players were willing to sacrifice one or two seasons of guaranteed salary in order to avoid a cap.

201 NHL owners considered using replacement players as the lockout began in earnest. In response, Goodenow reportedly mandated that any player who chose to cross party lines would be obligated to pay back to the NHLPA all player benefits received during the work stoppage. This amount totaled between five thousand dollars and ten thousand dollars per each month of the labor stoppage.

202 The NHL responded to this edict by filing an ULP against the Players Association, calling such a practice “coercive.” This ULP filing quashed any hope that both sides would quickly find common ground and work to save the season.

203 On February 16, 2005, the NHL canceled the season. As the lockout trudged on, players were the first side to exhibit signs of breaking solidarity. Players were not willing to sacrifice time from their career to fight a cap. Some players were reportedly communicating with general managers, owners and the media. This activity undermined Goodenow’s position. The owners, in contrast and unlike prior labor stoppages, did not break rank and presented a united front. It soon became evident to Goodenow that his union was neither united nor willing to sacrifice several seasons in

---

200 Avoiding a cap would benefit future NHL players.
202 Id.
203 Id. The National Labor the violation was of 8(b)(1) of the NLRB; see generally NLRB.gov, Overview of the National Labor Relations Act, http://www.nlrb.gov/about_us/overview/national_labor_relations_act.aspx (last visited Jan. 3, 2010).
204 SPN.COM, supra note 201. “The practice of conditioning the receipt of work stoppage benefits on a player's agreement not to return to the NHL without a new CBA was coercive, and in violation of the player's rights under the labor laws,” NHL chief legal officer Bill Daly said. Id.
205 Players were beginning to crack just months into the lockout, it seemed unreasonable to believe that they would last through 2006. Sheila Bloch and Lee Clark, Report to the NHLPA Executive Board and Members 40 (Aug. 29, 2007) (unpublished manuscript on file with the authors).
206 Players were not prepared for a prolonged strike or to sacrifice the only asset they have: their career. Id.
207 Id. at 39.
208 Id. at 41 (discussing how the critical part of the lockout was won by ownership due to Bettman policing management and maintaining a united front against the players).
order to avoid a salary cap.\textsuperscript{209} Bettman’s new NHL would involve a salary cap. Some leaders within the NHLPA realized the union needed to change its strategy since its membership was capitulating to a salary cap.\textsuperscript{210} Disagreement over the appropriate new strategy created a rift amongst the union’s leadership.

As more serious negotiations began, the NHLPA split into several factions: those who supported a salary cap (this strategy was led by Goodenow’s number two and NHLPA general counsel, Ted Saskin) and those still loyal to Goodenow, who would not vote for a cap.\textsuperscript{211} Whether it was a purposeful strategy by the NHL or just a fortunate occurrence, a wedge began to form between Goodenow and other senior union members.\textsuperscript{212} Goodenow’s control on the CBA negotiation process began to weaken.\textsuperscript{213} Saskin started to emerge as the more effective NHLPA negotiator. The NHL attempted to eliminate Goodenow from the negotiation process entirely by suggesting to Saskin that he “keep the lines of communication open” with Bettman’s number two, Bill Daly.\textsuperscript{214} Increasingly, both Saskin and Daly assumed the roles as negotiators of the new CBA. This isolation of Goodenow, in effect, allowed Saskin to legitimize himself as the de facto union leader.\textsuperscript{215}

Negotiations began progressing more smoothly once Goodenow became less of a factor. Saskin agreed to a salary cap and tension in the bargaining process began to ease. Eventually, the sides agreed to a new CBA in principle.\textsuperscript{216} One byproduct of the cap inclusive CBA was the resignation of Goodenow. The aftermath of the lockout left the

\textsuperscript{209} Id. at 46 (discussing the players’ trepidation toward a prolonged work stoppage in hockey).
\textsuperscript{210} Stating that union’s mantra of “no cap” was no longer an option. Id.
\textsuperscript{211} Id. and Clark, supra note 205, at 49.
\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
NHLPA in an extremely weakened state. Since the conclusion of the lockout, the union has gone through at least two different executive directors\(^\text{217}\) and is currently without an executive director, general counsel or outside legal counsel. Now, the National Football League has Bob Batterman currently serving as outside counsel for the League. Mr. Batterman was the architect of the NHL lockout, so understanding the history of the prior lockout may be helpful, as it seems that the NFL is implementing a similar strategy.

**Part IV: The Pertinent Laws, Positions and Possibilities of the Parties**

**A: Statement of the Case**

NFL ownership gravitated toward labor uncertainty in 2008 when it elected to opt out of the CBA extension signed only two years prior. The single biggest issue in need of renegotiation is the League’s rising labor costs. Initially, the Union’s leadership responded to this event by quipping that ownership “just don't like what they agreed to in March of 2006” and that if ownership locked out the players, the Union would decertify [thereby disabling labor law and enabling the Union to sue the NFL under antitrust law].\(^\text{218}\) However, as a year has passed and leadership has changed within the PA, a quick defusing of this potential lockout seems like wishful thinking. Both sides have done little bargaining and have instead opted to pad their respective war chests and prepare for a protracted, and potentially contentious, negotiation process.


B: Applicable Law

1. The National Labor Relations Act and Refusals to Bargain Collectively

The National Labor Relations Act\(^{219}\) (the “Act”) is the guidepost by which all collective bargaining exists. Central to the Act is the duty to bargain collectively in good faith, as this process is intended to be a tool to foster industrial peace:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement… and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession…\(^{220}\)

Section 158(a)(5) of the Act states that an employer’s refusal to bargain collectively with its employee representatives is grounds for an unfair labor practice\(^{221}\) and that a labor organization or its agent’s refusal to bargain collectively with the employer is also grounds for a ULP.\(^{222}\) The statutory language only states that there is a duty to bargain in good faith; the National Labor Relations Board (the “Board”) and the federal courts have rendered opinions establishing what is and what is not bargaining in good faith. Section 8(5) of The Wagner Act of 1935\(^{223}\) established an employer’s “refus[al] to bargain collectively with the representatives of his employees” as an unfair labor practice.\(^{224}\) In 1947, the Taft-Hartley Amendments added the requirement that unions must collectively bargain.\(^{225}\) As defined by the Supreme Court stated, the purpose of the Act is to provide a vehicle for the “free opportunity for negotiation with accredited

---

\(^{220}\) Id. at § 158(d).
\(^{221}\) This is subject to Section 159(a), which involves the construction industry and is outside the scope of this article.
\(^{222}\) § 158(b)(3).
\(^{223}\) This is the original version of the National Labor Relations Act.
\(^{224}\) § 158(a)(5).
\(^{225}\) §§ 141-144; see also Higgins, supra note 108, at 824.
representatives of employees...[to]...promote industrial peace.\textsuperscript{226} Hence the Act is paramount to promoting industrial peace.

2. The Bargaining Obligation

Primarily, the Act calls on the parties “to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”\textsuperscript{227} There is no mandate that the parties reach an actual agreement but there is a requirement that both sides attempt to reach an agreement.\textsuperscript{228} The requirements of the parties can be broken down as follows: the duty to meet, confer, and negotiate, and the obligation to deal in good faith.

(a). The Duty to Meet, Confer, and Negotiate

Nowhere in the Act does it state how many times or how often the parties must meet in order to satisfy its good faith duty.\textsuperscript{229} The requirement to meet at reasonable times was discussed in \textit{N.L.R.B. v. Highland Park Mfg. Co.}, where the Union was negotiating a draft proposal of an agreement with management.\textsuperscript{230} After the second negotiating session was cut short due to the company president’s illness, the vice president took over. He met with the union twice more and then stopped negotiating.\textsuperscript{231} The Fourth Circuit agreed with the Board that the company’s response to the union when taken collectively amounted to a refusal to bargain because the employer had no intent of reaching an agreement with the union.\textsuperscript{232} The court elaborated that the endgame in collective bargaining is not necessarily an agreement, but the desire to forge an accord.

\textsuperscript{226} \textit{Nat’l Labor Relations Bd. v. Jones & Laughlin Steel Corp.}, 301 U.S. 1, 45-47 (1937).
\textsuperscript{227} 29 U.S.C. § 158(d).
\textsuperscript{228} \textit{See generally} Higgins, \textit{supra} note 108, at 825.
\textsuperscript{229} \textit{Id.}
\textsuperscript{230} \textit{Nat’l Labor Relations Bd. v. Highland Park Mfg. Co.}, 110 F.2d 632 (4th Cir. 1940).
\textsuperscript{231} \textit{Id.} at 634.
\textsuperscript{232} \textit{Id.} at 637.
The mere act of meeting with no intention of ever agreeing to an accord is evidence of a lack of good faith. 233 “If some valid reason had been advanced for unwillingness to reduce agreements to writing, this conclusion would not necessarily follow; but in the absence of explanation, it clearly indicates respondent's hostility to the whole process of collective bargaining.” 234 The court likened the coming to terms of an agreement to “an industrial constitution of the enterprise;” if a party is not interested in coming to an agreement then there is no interest in industrial harmony. 235

(b). The Obligation to Deal in Good Faith

Like the duty to confer, meet, and negotiate, the obligation to deal in good faith is not exactly defined. The United States Supreme Court adopted this concept in 1940 when it decided National Licorice Co. v. N.L.R.B., 236 a case where the employer refused to acknowledge the union as the designated bargaining representative. 237 The employer’s president “declined to recognize the [u]nion as the bargaining representative of all the employees, and declared that he would negotiate with it only as the bargaining representative of the Union members, refusing to bargain with it as the representative of all the employees, a plain violation of the Act.” 238 The company president then refused to negotiate with the union altogether. 239 The Court concluded that the negotiations the employer entered into, “were not entered into by the [employer] in good faith, and were but thinly disguised refusals to treat with the Union representatives.”

233 Id. at 637-38.
234 Id. at 638.
237 The employer also attempted to circulate a petition amongst the employees to have an employer-dominated committee negotiate the CBA. Some employees signed and then subsequently cancelled their signatures. See Id.
238 Id.
239 Id.
240 Id.
The determinative issue was whether the employer had actually intended to negotiate with the union. More recent examples of an employer’s refusal to bargain in good faith are abundant. The decisions have in common the Act’s desire to have the parties negotiate with the vision of reaching an agreement. The employer’s conduct is generally evaluated under the totality of the particular circumstances. The alleged bad faith conduct in question may take place at or away from the bargaining table.

3. Subjects of Bargaining

The Act classifies the failure of the parties to meet at reasonable times and confer in good faith as to “wages, hours, and other terms and conditions of employment” as an unfair labor practice. These three areas are considered “mandatory subjects of bargaining,” and are subjects that the parties must negotiate in good faith in an attempt to reach an agreement. While the Act only classifies three items as mandatory subjects, the list of actual negotiation terms is much more expansive.

In N. L. R. B. v. Wooster Div. of Borg-Warner Corp., an employer’s insisted on a “ballot clause,” which called for a secret ballot election for employees as to the employer’s last pre-strike offer, and a “recognition clause” excluding the international union as the official bargaining representative of the union. At issue was whether this conduct amounted to a refusal to bargain over non-mandatory terms. The employer felt it had complied with its duties insofar as coming to terms on the mandatory three subjects, but its insistence on non-mandatory terms in the agreement was the basis of the

---

242 29 U.S.C. at 158(d).
244 Id.
alleged unfair labor practice.\textsuperscript{245} The Court’s analysis of the Act as well as the employer’s conduct supported the Board’s sustained ULP charge.\textsuperscript{246} The Borg-Warner decision created the distinction between mandatory and permissive subjects of bargaining.

Mandatory subjects of bargaining directly impact wages, hours and other terms and conditions of employment.\textsuperscript{247} These topics must be bargained for by the parties.\textsuperscript{248} Permissive bargaining subjects may be negotiated but are not obligatory on the parties.\textsuperscript{249} These subjects may include retiree benefits, internal union matters (such as how union representatives are elected, the amount of union dues, union officer structure, etc.), supervisors’ conditions of employment, interest arbitration, legal liability clauses, and the make-up of the employer’s board of trustees or directors.\textsuperscript{250} A unilateral change of a mandatory subject of bargaining falls into a certain category of violations. By virtue of this conduct, this type of action is considered a per se violation of the Act.\textsuperscript{251}

4. Per Se Violations

In \textit{N.L.R.B. v. Katz} the Court held that an employer’s unilateral change in granting merit increases, sick leave policy, and wage increases during its contract negotiations with the union (and prior to reaching impasse) evidenced a per se violation of its requirement to bargain in good faith.\textsuperscript{252} Even if the employer exhibited a “subjective good faith” in reaching an agreement, a unilateral change is nonetheless evidence of a

\textsuperscript{245} \textit{Id.} at 348-49.
\textsuperscript{246} \textit{Id.} at 349-50.
\textsuperscript{247} 29 U.S.C. § 158(d).
\textsuperscript{248} \textit{Id.} at 349-50.
\textsuperscript{249} Some examples of mandatory subjects in the NFL-NFLPA bargaining context include salary, holiday pay, bonus pay, step pay (including pay for rookies), vacations, discipline, union dues check off, grievance procedures (injury and non-injury), uniforms, and drug testing.
\textsuperscript{250} Higgins, \textit{supra} note 108, at 831.
\textsuperscript{251} There are also “illegal subjects of bargaining,” which include discrimination against certain groups of people, hot cargo clauses (allowing workers to refuse to handle materials/goods from a struck facility or on an “unfair” list), closed shop clauses (a provision that all employees are union members before being hired).
\textsuperscript{251} \textit{Katz}, 369 U.S. at 741-42.
violation because it circumvents the duty to negotiate. This circumvention frustrates the objectives of § 8(a)(5) and is tantamount to a flat refusal to bargain. Good or bad faith is determined through the conduct of the parties in a bargaining relationship.

5. Good Faith

In 1947, the “good faith” requirement was incorporated into Section 8(d) of the NLRA. This good faith requirement means employers and employee organizations must meet and confer with an open mind and with the intent of reaching an agreement. While there is no singular definition of good faith in the context of labor relations, ascertaining whether an individual bargained in good faith centrally involves evaluating a party’s subjective state of mind and asking whether there exists an inclination to engage in sincere negotiations with an intent to settle differences and arrive at an arrangement.

The NLRB and courts examine the facts of each case when dealing with a ULP charge. In N.L.R.B. v. General Electric Co., the court upheld the Board’s decision that General Electric’s “take it or leave it” attitude during negotiations, its dealings with individual locals instead of the international union, as well as a media blitz against the union constituted an unfair labor practice, despite the fact that the union signed a contract. In addition General Electric only furnished part of the information requested after the end of the strike. GE also switched its position several times as to union

---

253 Id. at 743.
254 See Id.
255 Higgins, supra note 108, at 832.
256 29 U.S.C. 158(d).
257 See Higgins, supra note 108, at 855-56.
258 See NLRB v. Biles-Coleman Lumber Co., 98 F.2d 18, 22 (9th Cir. 1938).
offers, which stifled the pace of negotiations.\textsuperscript{261} The court reasoned that the employer’s refusal to provide information within a timely manner forced the union into a position where it was “unable to bargain intelligently.”\textsuperscript{262} As to the charge that the employer failed to bargain in good faith, the court compared it to “a mosaic of many pieces, but depending not on any one alone.”\textsuperscript{263} However, a specific violation alone could also be evidence of a failure to bargain in good faith as well.\textsuperscript{264}

\textit{6. Examples of Good and Bad Faith}

A failure to bargain in good faith (which illustrates bad faith) is typically inferred from a party’s conduct at or away from the bargaining table because a participant’s intent to frustrate an agreement is rarely articulated.\textsuperscript{265} As such, a party’s conduct under the circumstances is highly probative. One example of a failure to bargain in good faith is surface bargaining. The term “surface bargaining” connotes “going through the motions” of negotiating as opposed to demonstrating a genuine desire to reach an agreement.\textsuperscript{266} Thus the requirement of conferring in good faith is more comprehensive than just meeting, or engaging in repetitive discussion of formalities that lack any meaning, thereby leading one party to declare an impasse or engage in some other anti-bargaining action.\textsuperscript{267}

An illustration of these principles in practice is \textit{Unbelievable, Inc. v. N.L.R.B.}\textsuperscript{268} In \textit{Unbelievable}, the employer engaged in a series of acts from pre-negotiation through the eventual strike that evidenced a desire to continuously goad the union into striking.\textsuperscript{269}

\begin{footnotesize}
\bibliography{references}
\end{footnotesize}
There never was any desire to actually negotiate with the union.\textsuperscript{270} The employer’s attorney scolded union representatives after the first bargaining session. Three sessions followed in five months.\textsuperscript{271} The employer never considered the union’s counter-proposal, and after the second meeting the employer’s attorney declared impasse.\textsuperscript{272}

In another demonstrative case, \textit{Atlanta Hilton And Tower v. International Brotherhood of Firemen and Oilers, AFL-CIO}, the Board set forth seven factors that signal a party’s refusal to bargain in good faith.\textsuperscript{273} In this case, the Board ruled that the employer did not negotiate in bad faith despite failing to honor the union’s request for certain financial information, because it was merely holding firm on its offer for a one year contract.\textsuperscript{274} The parties met thirteen times, and the overall conduct of the employer was justified as “hard bargaining, rather than surface bargaining.”\textsuperscript{275} Whether a party is engaging in hard bargaining instead of surface bargaining depends on the facts present in each case.\textsuperscript{276}

The Board and courts evaluate additional indicia of good faith when determining whether the sides have engaged in good faith bargaining or surface bargaining. The proposals and demands advanced by each side may be a factor.\textsuperscript{277} A proposal that one side might consider totally unacceptable is not definitive indicia of the other party’s absence of good faith. However, a proposal that is clearly meant to frustrate the

\textsuperscript{270} \textit{Id.}
\textsuperscript{271} The employer’s initial proposal to one union was a near fifty percent wage reduction, to which the union responded by saying it was “outlandish” and “that no union would agree to [such demands].” \textit{Id.}
\textsuperscript{272} \textit{Id.}
\textsuperscript{273} These factors include: (1) delaying tactics; (2) unreasonable bargaining demands; (3) unilateral changes in mandatory subjects of bargaining; (4) efforts to bypass the union; (5) failure to designate an agent with sufficient bargaining authority; (6) withdrawal of already agreed-upon provisions; and (7) arbitrary scheduling of meetings, \textit{Atlanta Hilton And Tower v. Int’l. Bhd. of Firemen and Oilers, AFL-CIO}, 271 NLRB 1600, 1603 (1984).
\textsuperscript{274} \textit{Id.}
\textsuperscript{275} \textit{Id.}
\textsuperscript{276} Higgins, \textit{supra} note 108, at 828; \textit{see also Nat’l. Labor Relations Bd. v. Fitzgerald Mills Corp.}, 313 F.2d 260, 264 (1963).
\textsuperscript{277} Higgins, \textit{supra} note 108, at 879.
negotiation process or is plainly unreasonable is evidence of bad faith.\textsuperscript{278} An employer’s withdrawal of its sole proposal that included existing conditions, withdrawing previously agreed-upon proposals or substituting new issues after the parties reached an agreement is generally considered evidence of a lack of good faith.\textsuperscript{279} An employer also violates Section 8(a)(5) if it unilaterally modifies mandatory subjects of bargaining (wages, hours, working conditions), as it illustrates a lack of good faith.\textsuperscript{280}

\textit{7. The Duty to Furnish Information}

During negotiations parties are required to furnish the other side with additional information so as to understand the position of the other. The Board has continually found that, in order to make informed decisions and engage in effective bargaining, there exists a duty to provide information.\textsuperscript{281} A refusal to furnish information could severely impede the bargaining process. A refusal may also change the characteristic of a strike from an economic strike to an unfair labor practice strike.\textsuperscript{282} Because this is such an important concept of labor law, one must understand when the duty to provide information arises and what type of information must be provided in those situations.

In \textit{N.L.R.B. v. Truitt Manufacturing Co.}, the employer committed a ULP when it refused to supply the union with information necessary to support its claim of not being able to afford a wage increase.\textsuperscript{283} The union asked the employer to provide evidence of its claim by allowing a certified public accountant to examine the company’s books and

\textsuperscript{278} See Unbelievable, 118 F.3d at 793.
\textsuperscript{279} See generally Higgins, \textit{supra} note 108, at 779-85.
\textsuperscript{280} Id. at 903-905.
\textsuperscript{281} See \textit{id}. at 958-59.
\textsuperscript{282} Id. at 920.
\textsuperscript{283} See \textit{Nat’l. Labor Relations Bd. v. Truitt Mfg. Co.}, 351 U.S. 149, 150 (1956) (stating that “it was undercapitalized, had never paid dividends, and that an increase of more than two and one-half cents per hour would put it out of business”).
financial data.\textsuperscript{284} The request was denied.\textsuperscript{285} In response to this refusal, the union requested the company submit “full and complete information with respect to its financial standing and profits” to verify its inability to pay for a wage increase.\textsuperscript{286} Again the company refused.\textsuperscript{287} The Board agreed with the union and ordered the company to provide the union with information to “substantiate the Respondent’s position.”\textsuperscript{288} After the Court of Appeals refused to enforce the Board’s order, the union appealed to the United States Supreme Court and eventually prevailed.

First the Court set aside any question as to whether the request to furnish information itself was overly burdensome on the company because the company never raised this point on appeal.\textsuperscript{289} The Court concluded that both parties considered the ability to pay as “highly relevant.”\textsuperscript{290} It also opined that claims made by either negotiating party must be honest claims.\textsuperscript{291} Further,

If an argument [made by a party] is important enough to be present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without the slightest effort to substantiate the claim...\textsuperscript{292}

The Court limited its holding.

We do not hold, however, that in every case which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. The inquiry must be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.\textsuperscript{293}

\textsuperscript{284} Id.
\textsuperscript{285} Id.
\textsuperscript{286} Id.
\textsuperscript{287} Id. at 150-51 (stating that the information was not pertinent to the negotiations and that the union had no legal right to the documents either.
\textsuperscript{288} Truitt, 351 U.S. at 151.
\textsuperscript{289} Id.
\textsuperscript{290} Id. at 152.
\textsuperscript{291} Id.
\textsuperscript{292} Id. at 152-53.
\textsuperscript{293} Truitt, 351 U.S. at 153-54.
This duty to furnish information extends during the life of the contract and not just to negotiations between the parties.\footnote{Higgins, supra note 108, at 921-22.} It also extends to the union; such a request must be made in good faith.\footnote{See Id. at 924-25, citing to Oakland Press Co., 233 NLRB 994, aff’d, 598 F.2d 267 (D.C. Cir. 1979).} A good faith request means that the information must at least be necessary and relevant to the relationship between the employer and the union in its capacity as employee representative.\footnote{Higgins, supra note 108, at 958.} If the request is considered too broad, the employer may request a reasonable clarification from the union to demonstrate the relevancy of the request, or the employer may comply with the request to the extent it believes it must under the law.\footnote{Id. at 927.} A pertinent example of this concept is illustrated in Unbelievable Inc., where the request for information was found to be directly related to the question of substantial wage cuts.\footnote{Unbelievable, 118 F.3d at 793} This issue was essential to the union’s representation of its members.\footnote{Id.}

A request for information may potentially be rendered moot by future events in a bargaining relationship if the employer no longer possesses the duty to furnish such information. But if the information in question could have aided the union in making a bargaining decision, signing an agreement will not render that duty moot.\footnote{Higgins, supra note 108, at 931.} An employer may avoid the duty to disclose financial documents by making it unmistakably apparent to the union that it has abandoned its plea of financial inability.\footnote{Int’l. Chem. Workers Union Council of the United Food & Commercial Workers Intern. v. Nat’l. Labor Relations Bd., 467 F.3d 742, 752-53 (9th Cir. 2006).} In examining the validity of this defense a court will examine the substance of the employer's bargaining position rather than the formal words used by it.\footnote{Id. at 749.}
Even if an employer presents partial information to the union after initially denying such a request, an unfair labor practice may still exist. In *Curtiss-Wright Corporation v. N.L.R.B.*, such events took place. The union asked for certain lists of employees because of concerns that the bargaining unit was slowly being outnumbered by positions outside of the unit and confidential employees. The employer first denied such requests but after the matter went to the Board it provided some requested information. The employer maintained that it had not committed an unfair labor practice because it complied with the request to furnish information. The Board and the U.S. Court of Appeals for the Third Circuit disagreed. The court held that the Board’s analysis in the matter was no different than that of the Supreme Court’s analysis in *Truitt Manufacturing*. The union had “successfully demonstrated the relevance of the data it requested,” according to the court. The requested information illustrated that the change made in the composition of the out-of-bargaining-unit employees was relevant as to the administration and policing of current agreements as well as the negotiation of future agreements. Although the parties eventually agreed to a contract the information would have been necessary and relevant to the union.

Furnishing information is paramount to the bargaining process. The duty to provide information, when established to be relevant, must be provided in a reasonable manner when this information is available, and in such a way that does not impede the

---

303 See *Curtiss-Wright Corp. v. Nat’l. Labor Relations Bd.*, 347 F.2d 61 (3rd Cir. 1965)
304 Id. at 65.
305 Id. 66.
306 Id.
307 Id. at 69; see generally *Truitt*, 351 U.S. at 151.
308 *Curtiss-Wright Corp.*, 347 F.2d at 69.
309 Id. at 70.
310 The information would have assisted in determining whether the union should have utilized another means in changing the composition of the ratio between bargaining and non-bargaining unit members. Id.
bargaining process of the parties.\textsuperscript{311} The employer should avoid furnishing information that contains deliberate inaccuracies or is incomplete, but the information can be provided in a way no more extensive than normal business practice dictates.\textsuperscript{312} Although an employer may defend against this duty by alleging that compliance would be too burdensome or expensive, defending through this argument has been met with little success.\textsuperscript{313} However, the employer does have other defenses against such requests.

8. Employer Defenses

The duty to furnish information does not foreclose an employer from alleging certain defenses. An employer may refuse to furnish certain information under certain circumstances.\textsuperscript{314} In \textit{Detroit Edison Company v. N.L.R.B.}, the Court was faced with the novel question of whether an employer's duty to provide relevant information included the disclosure of tests and test scores achieved by named employees in a employer administrated psychological aptitude testing program.\textsuperscript{315} The union was processing a grievance to arbitration and had requested the company provide the psychological aptitude testing program information.\textsuperscript{316} The employer replied that it could release all but three items to the union: (1) the actual test questions, (2) the actual employee answer sheets, and (3) the scores linked with the names of the employees who received the information.\textsuperscript{317} After filing an ULP charge against the employer, the arbitrator refused to grant the union’s demand for the three items due to the unresolved ULP charges.\textsuperscript{318}

\begin{itemize}
\item \textsuperscript{311} See \textit{Cincinnati Steel Casting Co.}, 86 NLRB 592, 593 (1949).
\item \textsuperscript{312} See Higgins, supra note 108, at 940-941.
\item \textsuperscript{313} \textit{Id.} at 941.
\item \textsuperscript{314} \textit{Id.} at 943.
\item \textsuperscript{315} \textit{Detroit Edison Co. v. Nat'l. Labor Relations Bd.}, 440 U.S. 301, 304 (1979).
\item \textsuperscript{316} See \textit{Id.} at 307-308.
\item \textsuperscript{317} \textit{Id.} at 307-308.
\item \textsuperscript{318} \textit{Id.} at 308.
\end{itemize}
Eventually the employer did provide the requested information. The raw scores of those who had taken the test were disclosed with the examinees’ names deleted. The company supplied the union with sample test questions and with detailed information regarding its scoring procedures.\footnote{Id. at 309.} Finally, the company also offered to turn over the scores of any employee who would sign a waiver releasing the company psychologist from his confidentiality pledge.\footnote{Detroit Edison, 440 U.S. at 309.} The union declined to seek such releases.\footnote{Id.} While the employer won the grievance, the Board sided with the union because the requested information was relevant and necessary to its policing of the parties’ agreement.\footnote{Id.} The ALJ agreed with the company’s recommendation that a qualified neutral psychologist be allowed to examine the information. However the Board and the Court of Appeals for the Sixth Circuit ordered all the information delivered to the union because it should be able to determine for itself if a psychologist needed to review the test results.\footnote{Id.}

On appeal the Supreme Court first addressed the Board’s remedial action against the company, holding that this decision to order all information to the union was incorrect.\footnote{Id. at 314-15.} In light of the company’s expense to prepare the questions there were serious concerns that such information if handed over to the union could easily be disseminated to the membership. This would compromise the exam and could harm test takers whose scores were lower than others.\footnote{Id. at 314-15.} Specifically the Court stated that no particular policy supported the union’s position.\footnote{Detroit Edison, 440 U.S. at 314-15.} Thus, it held that the Board abused its discretion. The Court opined:

\footnote{Id. at 309.}
\footnote{Detroit Edison, 440 U.S. at 309.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id. at 314-15.}
\footnote{Detroit Edison, 440 U.S. at 314-15.}
\footnote{Id.}
[a] union’s bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested. The duty to supply information under § 8(a)(5) turns upon “the circumstances of the particular case…and much the same may be said for the type of disclosure that will satisfy that duty.”

The Court also sided with the company on the ULP charges. First it addressed the relevance issue and that there is not an absolute right to any relevant information in light of the concerns for the confidentiality of the psychologist and the individuals’ scores. No evidence existed that the scores were protected to frustrate the union or serve some other devious position. The Court then turned to the company’s evidence that prior release of scores had resulted in the harassment of lower-scoring employees and illustrated that the union’s demands paled in comparison with the company’s concerns. The employer prevailed by providing more than just a generalized contention that the requested information was confidential, thereby meeting its burden of proof.

Combining Truitt and Detroit Edison, the duty to provide information begins with the signing of the collective bargaining agreement and continues for the life of the agreement to allow the parties the ability to properly police their agreement. An employer risks violating § 8(a)(5) by refusing to provide requested information to a union if that information is necessary for the union to properly discharge its duties as the bargaining representative. An employer must furnish information if the employer asserts a financial inability to grant the union’s demands.

328 Detroit Edison, 440 U.S. at 317-20.
329 Id. at 317-18.
330 Id. at 318-19.
331 Id. at 319-20.
332 Higgins, supra note 108, at 957-960, see also Truitt and Detroit Edison.
9. Financial Information

There is a distinction between an inability to pay and a competitive disadvantage, both of which are cited as concerns with respect to requests for financial information. Financial information is relevant and necessary in the context of an employer’s statement that it cannot financially support the union’s demands for wages or benefits.\textsuperscript{334} This proposition is illustrated in \textit{Truitt Manufacturing}, as the Court declared that good faith bargaining “requires that claims made by either bargainer…be honest claims,” and this applies to claims related to an asserted inability to pay an increase in wages.\textsuperscript{335} Arguments of this nature must be supported through proof of its accuracy.\textsuperscript{336}

If a party is claiming an inability to pay, it must be willing to support its contention with more than mere words.\textsuperscript{337} In the 2004 decision of \textit{AMF Trucking & Warehouse, Inc.}\textsuperscript{338} the High Court was forced to examine a company’s assertions made during negotiations to determine whether it had effectively stated that the employer could not pay for increases to the health insurance and pension fund. The Board discussed the company’s response to these requests in some detail:

The Respondent stated that the [u]nion was asking for ‘pie in the sky,’ that the Respondent had purchased the Company “in distress a year and a half earlier, and that the company was still in distress.” The Respondent also said that it was ‘fighting to [stay] alive,’ and was ‘weaker this year’ than it had been in previous years.\textsuperscript{339}

The Board concluded that the employer’s statements did not meet the threshold test because the statements neither explicitly stated that insufficient assets existed nor that

\textsuperscript{334} Higgins, \textit{supra} note 108, at 963.
\textsuperscript{335} \textit{Truitt}, 351 U.S. at 153.
\textsuperscript{336} See \textit{Id}.
\textsuperscript{337} In football, that might be akin to “walking the walk and talking the talk.”
\textsuperscript{338} \textit{AMF Trucking & Warehouse, Inc.}, 342 NLRB No. 1125 (2004).
\textsuperscript{339} \textit{Id}.
it would cause it to go out of business by agreeing to the union’s demands.\textsuperscript{340} The Board determined that the standard for “inability to pay” denotes “that the company presently has insufficient assets to pay or that it would have insufficient assets to pay during the life of the contract that is being negotiated. Thus inability to pay is inextricably linked to non-survival in business.”\textsuperscript{341} Furthermore, supplying financial information without allowing the union an opportunity to directly examine company records might be insufficient disclosure.\textsuperscript{342} However an employer may set parameters for the union to review and verify an employer’s inability to pay.\textsuperscript{343}

C. General Considerations

The collective bargaining process is based on several concepts, most principally being the cooperative negotiation process. This is founded upon the notions of mutual understanding and teamwork between the bargaining parties. However, while both sides endeavor to bargain in good faith in hopes of reaching a mutually amicable settlement, each party may exert economic pressure upon the other bargaining participant. These tools of economic pressure include the lockout,\textsuperscript{344} the unfair practice strike\textsuperscript{345} and the economic strike.\textsuperscript{346} The use of each of these activities may influence a bargaining party’s negotiation strategy and the disclosure of information between the parties. These tools assist the parties to bargain in good faith, which is the overall objective of labor law

\textsuperscript{340} Id.
\textsuperscript{341} Id.
\textsuperscript{342} Higgins, supra note 108, at 965.
\textsuperscript{343} Nat’l. Labor Relations Bd. v. St. Joseph’s Hosp., 755 F.2d 260 (2d Cir. 1985) (stating employer’s request was reasonably related to the audit, the qualifications were appropriate and the employer expressed willingness to discuss the qualifications, to which the union was opposed).
\textsuperscript{344} See generally, Am. Ship Bldg. v. Nat’l Labor Relations Bd, 380 U.S. 300, 310. (stating “there is nothing in the statute which would imply that the right to strike ‘carriers with it’ the right exclusively to determine the timing and duration of all work stoppages”).
\textsuperscript{345} In an unfair labor practice strike, strikers are to be reinstated to their former positions upon the conclusion of the ULP strike. The employer must reinstate the employee even if the organization had hired other workers during the strike. See Generally, Nat’l Labor Relations Bd. v. Int’l. Van Lines, 409 U.S. 48, 50-51.
\textsuperscript{346} In an economic strike, an employer is able to freely fire and higher employees or replacements and may without fear of legal recourse, refuse requests for reinstatement from a striker who was replaced during a strike. See Nat’l Labor Relations Bd. v. Mackay Radio & Tel. Co., 304 U.S. 333.
While the duty to bargain does not require each side to engage in marathon discussions, the parties must fully negotiate in good faith. However, even if the parties bargain in good faith, an impasse still may occur. This occurs when both parties are engaging each other with a sincere intent to reach an agreement but cannot find that necessary common ground to make such an accord. An impasse is defined as the point in time during negotiations when the parties are warranted in assuming that further bargaining would be futile.\textsuperscript{347} To determine whether an impasse exists, one must examine the totality of the circumstances\textsuperscript{348} and unique factors surrounding the parties’ bargaining relationship.\textsuperscript{349} Upon reaching this point, an employer may make unilateral changes in working conditions so long as the changes had been offered to the union during negotiations.\textsuperscript{350} In addition to the employer being able to implement his last offer, the participants may also look to other tools within labor law to assist in applying pressure to bring a mutually agreeable resolution.\textsuperscript{351} Upon reaching an impasse, the duty to bargain is not terminated. Instead it is suspended and may be reinstated upon the happening of a condition or circumstance that renews the possibility of fruitful discussion amongst the parties.\textsuperscript{352}

\textbf{Part V: Positions of the Parties}

The bargaining between the NFL and NFLPA is increasingly turning contentious. While some issues may raise less controversy than others, it appears that both sides are

\textsuperscript{347} Higgins, supra note 108, at 989.
\textsuperscript{348} Id. at 989-995.
\textsuperscript{349} Unique factors include the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations. Additional factors may include whether there has been a strike or the union has consulted the employees regarding this possibility, fluidity of the parties’ positions, continuation of bargaining, statements or understandings of the parties concerning impasse, union animus as evidenced by previous events, the bargaining history of the parties, the importance of the issues and the extent of the difference or opposition amongst the parties, the parties bargaining history, any willingness by the parties to further consider the issue, time between bargaining sessions and number of bargaining sessions amongst the parties. Id. at 990-995.
\textsuperscript{351} As mentioned above, these tools include the economic strike, ULP strike and lockout.
\textsuperscript{352} See Gulf States Mfg. v. Nat’l Labor Relations Bd., 704 F.2d 1390, 1399.
having problems finding common ground even on the less controversial non-economic issues. For the purposes of the upcoming collective bargaining process, and as articulated by Commissioner Goodell in his letter to Mr. Upshaw, major issues include (1) addressing those financial issues that the League perceives as being obsolete in the current NFL (the recalculation of League revenue as it applies to the salary cap and team allocation of player salaries) and the considerations as to whether the NFL has a duty to disclose its financial information to the Union, (2) curbing rookie salaries through a rookie wage scale and, to a certain extent, (3) addressing player discipline issues. Taking the above-mentioned topics together, and when considering the entire bargaining relationship between the parties thus far, it is also unclear whether the NFL is bargaining in good faith.

A. **The National Football League: The League is Not Disclosing Financial Information Because it is not Alleging an Inability to Pay and thus is Bargaining in Good Faith**

The NFL is not going to provide any financial information to the Union because it is not claiming an inability to pay. As such, there is no duty to open League financial information for review. Under the present CBA, Owners assume all of the risks and players reap the vast majority of the financial revenues. The NFL is the only sports

---

353 This viewpoint is portrayed by Jeffrey F. Levine.
354 Dennis Curran, Senior Vice President and General Counsel, Nat’l Football League, Panel Address at the Sports Lawyers Conference (May 19, 2009); see also NFLPA.COM, Smith Addresses Industry Lawyers, NFL Executives, in Chicago, May 19, 2009, http://www.nflplayers.com/USER/content.aspx?fmid=178&lmid=443&pid=3302 (quoting Mr. Curran as saying “[w]e are not claiming an inability to pay. We’re not going to open our books. We don’t have to open our books.”) (last viewed Jan. 3, 2010).
355 See Id.
356 Jim Corbett, NFL owners setting priorities for CBA negotiations, USA TODAY, Mar. 24, 2009, http://www.usatoday.com/sports/football/nfl/2009-03-23-owners-priorities_N.htm (last visited Jan. 3, 2010). Owners opted out in May 2006 because the deal paid players nearly 60% of revenues. This large percentage, coupled with rising operating costs, mounting stadium debt and a tough economy, caused NFL ownership to become more risk adverse. Thus, the NFL wants players to assume more of their risk in regard to rising player costs. Commission Goodell asserted that player costs increased by $500 million over 2008 and 2009, and that “[t]he risk falls entirely on the clubs here. We have to make sure we address that issue in a responsible fashion, including our partners.” The NFLPA responded by saying that players take plenty of risk already, by playing in each game each week. Interview with DeMaurice Smith, National Football League Players Association Executive Director, via the SPORTING NEWS TODAY, (Oct. 7, 2009) available at http://today.sportingnews.com/sportingnewstoday/20091007/?pg=20&pm=1&u1=friend&pg20 (last visited Jan. 3, 2010).
league in which every team has a player payroll in excess of one hundred million dollars; average player salary this year is two million dollars plus an additional three hundred thousand dollars per player in benefits.357 This is all occurring in the greatest economic downturn since the Great Depression. While the League can still exist under these conditions, it is time to balance its financial risk by working with the Union to create a new CBA that is foundationally sound.

Ownership opted out of the 2006 CBA because this accord altered how the NFL and its players divided League revenues.358 After the 2006 CBA’s ratification, players received a larger share of revenues. These revenues now include all stadium revenues related to football. Under the current Agreement, stadium revenues include concessions, parking, local advertising and promotion, signage, magazine advertising, local sponsorship agreements, stadium clubs and luxury box income. All of these revenue sources were excluded in prior CBAs.359 Thus, the current CBA casts significant financial risk on Ownership by substantially raising the likelihood of lucrative player salaries and also artificially inflates the salary cap.

As a result of this increase in revenue being directed to player salaries, the salary caps for each successive year are spiraling out of control. Small market teams cannot keep up with the burdensome costs forced upon them because of their comparatively small consumer base. Small market teams are not as financially well suited as large market teams to shoulder this financial burden. Consequently, the relative inequities between the

---

358 Deubert supra, note 40, at 181.
359 Id. (citing the NFL CBA).
NFL’s small market and large market teams exacerbate this player salary issue.\(^{360}\) Although the League agreed to the current CBA through good faith bargaining, allocating nearly sixty percent of league revenues to player salaries and benefits through a mechanism that was invented in 1993 is untenable. It is an obsolete manner of operating the NFL. This obsolete system gives Ownership no incentive to invest in the game.

The manner in which the NFL and the Union operated in 1993 is no longer valid. In the current economy, the PA needs to be an equal partner in the League’s recovery back to financial equilibrium. Although both sides have enjoyed a tremendous period of growth since 1993, it is time for both labor and management to make concessions for the betterment of professional football. In accordance with acting as stewards of the game, the League is consulting with every necessary party in hope of setting a foundation to ensure that the NFL will be as successful in the next century as it was in the twentieth century. It is the League’s intent to work with all necessary stakeholders to achieve cost certainty, including the Union.

1. The Disclosure of Financial Statements is not Necessary to Understand the League’s Bargaining Position that the Current CBA is Obsolete

In regard to financial issues, the NFL did not opt out of the 2006 CBA because it was unable to pay the players. Instead, the LEague opted out because this method of salary compensation is obsolete. The current CBA’s salary calculation and distribution is derived from a method that was created in 1993. Since then, League revenues have gone up extensively due to monies derived through the NFL’s stadium construction initiative and other initiatives. Now, team salary commitments are unreasonably inflated and are

---

pushing player compensation into an unhealthy realm. It is time to renegotiate the formula for salary cap calculation.

The NFL is bargaining in the best faith possible under the circumstances. Ownership seeks to engage in sincere negotiations with the Union with an intent to establish a system that fits the modern NFL revenue generation model.\(^361\) The League will not release any financial information because the PA knows the numbers down to every penny;\(^362\) the Union also is keenly aware that the NFL’s largest costs are player salaries, which are in excess of $4.5 billion this year.\(^363\) Further, Ownership is not under any obligation to furnish information because the League has not stated that it is unable to abide by the financial terms of the CBA. Despite this fact, the Union continues to argue in the alternative. However the duty to provide information under § 8(a)(5) does not turn on the bare assertions of the PA.\(^364\) Instead, one must examine the specific circumstances of this case.\(^365\) In other words, the information must be necessary and relevant to the bargaining relationship between the parties.\(^366\) Here, in addition to the League not pleading an inability to pay, the Union already knows this financial information. Thus there is no duty to furnish information.

If the NFLPA is so desperate to obtain a snapshot into League financials it should audit the corporate filings of the Green Bay Packers. The Packers are a publicly owned entity and thus the financial information is available. According to its financial statements, the Packers earned $20.1 million in operating profits during the 2008

\(^{361}\) *Biles-Coleman Lumber Co.*, 98 F.2d at 22.


\(^{363}\) *Id.*

\(^{364}\) See *Detroit Edison*, 440 U.S. at 301 (citing *Truit*, 351 U.S., at 153).

\(^{365}\) See *Detroit Edison*, 440 U.S. at 315.

\(^{366}\) *Higgins*, *supra* note 108, at 958.
This healthy profit substantiates the League’s argument that it did not opt out of the CBA because of financial inability. Since the profits of the Packers act as a bellwether reading into the financial health of the NFL as a whole, the League has no obligation to furnish financial information to the Union.\(^{368}\)

The NFL seeks to bargain with the NFLPA and come to an agreement ensuring that there will not be a work stoppage. The League is focusing on its priorities in the collective bargaining process, achieving cost certainty, and working with the Union to reach an agreement.\(^{369}\) However there is no need to engage in a “lock-in”\(^{370}\) or create artificial deadlines, as it will obstruct the natural development of negotiations between the parties. At this point, the League has instructed franchises to take preparatory measures for a possible work stoppage because this is prudent. One needs revenue in order to run a league; this is why signing deals such as the one with DirecTV\(^{371}\) was paramount regardless of whether or not there is a labor stoppage. While the parties are seeking to come to an accord, one must also prepare to face the potential scenario where football will not be played. Thus, cost containment is an important element to the NFL’s success.

\section*{2. Cost Containment Includes a True Rookie Wage Scale and Modifying Player Discipline Mechanisms to Recover Defaulted Signing/Roster Bonuses}

One element of cost containment paramount to establishing a solid foundation is the curbing of excess and unnecessary costs. The most effective method to effectuate this

\footnotesize{\begin{enumerate}
\item See generally Truitt, 351 U.S., at 149.
\item See Curran, supra note 362.
\end{enumerate}
change is through regulating rookie compensation. Both management and the Union must work together to curb rising salaries for those players that were selected in the early portion of the NFL Draft. The simple and most obvious way to rein in over-inflated rookie salaries is through the implementation of a rookie salary cap.

The League is proposing that a rookie wage scale and a mechanism that credits against NFL club owners’ expenses be implemented into the new CBA.\(^{372}\) Under this proposal, these expenses will be deducted from revenues that determine the NFL salary cap, thereby providing a cost savings.\(^ {373}\) It is in the best interests of the game and all of those involved to insert into the CBA cost containment mechanisms. One only needs to look at such mechanisms and how it helped restore the vitality of professional hockey after the NHL lockout.\(^ {374}\) Therefore it is paramount to include the proper mechanisms into the new CBA to stop the absurd escalation of salaries for players who have not even played one snap of football yet make vastly more money than players who have already proved that they deserve to be compensated as one of the NFL’s elite players.\(^ {375}\)

Player discipline is a serious issue. League franchises must possess the ability to recover the significant money that each organization invests in players as signing bonuses if that individual breaches his contract or refuses to perform. This issue is complicated by the fact grievances such as these are overseen by a judge who is overtly biased toward the Union. Pursuant to the 1993 consent decree, all labor-related issues between the parties fall under the supervision of the United States District Court for the District of Minnesota. While Judge Doty’s court has resolved disputes over the terms of the

---


\(^{373}\) Id.


Stipulation and Settlement Agreement and the parallel CBA over the last sixteen years, he is no longer impartial.  

A prime example illustrating both the League’s inability to recover signing bonus from players who breach and Judge Doty’s bias is the events surrounding the incarceration of Michael Vick.

After signing a contract that made him the highest paid player in the NFL, which included a twenty million dollar signing bonus, Vick was indicted on charges stemming from his financing of a dog-fighting ring. On August 27, 2007, Vick pled guilty to the charges and was sentenced to nearly two years in federal prison. Commissioner Goodell suspended Vick indefinitely without pay shortly thereafter. The NFL also initiated a non-injury grievance procedure on behalf of the Atlanta Falcons, Vick’s former team, in order to recuperate part of the $19.97 million in roster and signing bonuses the franchise had paid Vick, as he was still under contract with the team until 2014. Pursuant to the Consent Agreement and CBA, a Special Master presided over a hearing to determine whether Vick had to give the money back. Special Master Burbank ruled in favor of the Falcons, meaning that Vick needed to repay the bonus money. Vick appealed to the District Court of Minnesota, where Judge Doty reversed the Special Master’s ruling. The court ruled that Vick had already earned his bonus prior to his indefinite suspension. An appeal by the League resulted in the reaffirming of the district court’s decision. The Eight Circuit Court of Appeals found that based on the language used in the CBA, Vick’s bonus was fully earned prior to his legal problems.

---

378 “The Special Master is an arbitrator that has exclusive jurisdiction over disputes arising out of a wide range of articles in the CBA... As of 2009, the current Special Master is University of Pennsylvania Law School professor Richard Burbank.” Deubert, supra note 40, at 203.
380 White, 585 F.3d. at 1143.
Although Vick blatantly violated the terms of his contract, he was still able to keep the vast majority of his signing bonus. The parties must remedy the anti-forfeiture provision in the CBA that the arbiters relied upon. Changing this term will allow franchises to recover funds from a player who breaches his contract or engages in conduct that is contrary to the best interests of football. Both the district court and the appellate court misinterpreted the relevant provisions within the CBA, meaning that the parties must change this provision so that it unequivocally protects franchises that are injured by non-performing or breaching players.

The parties must also agree to extricate themselves from the supervision of Judge Doty. Throughout the latter portions of this CBA’s life, Judge Doty has demonstrated overt bias toward the Union through his comments about the bargaining process between the parties during the last twenty years.\textsuperscript{381} It is time to end the unnecessary dependence on the Federal District Court of Minnesota and instead work with all necessary stakeholders to establish a new foundation that will mutually benefit all parties involved. The League is confident that the NFL and the Union can continue to bargain in good faith without the unduly burdensome oversight of any court.

3. The System Needs to Change

It is clear that major provisions of this Agreement are obsolete. The NFL needs to work with all stakeholders to chart a new strategy so that the next century of professional football is as successful as the last decade. However a new strategy must be negotiated that equally distributes risk amongst the parties and bargaining must occur free from the

\textsuperscript{381} A January 28, 2008 issue of the Street & Smith's Sports Business Journal, and entitled "NFL's toughest official wields a gavel, not a whistle," Judge Doty stated that the "[NFL Owners] pretend they're getting beaten around. Well, they did, initially, but they had a position that was not legally sound...I think if you ask Tagliabue, he would say, 'The whole thing has come out our way.' Because, even though they complain about it...all they've done is make tons of money." White, 585 F.3d at 1139 (citing an article published in Street & Smith's Sports Business Journal).
supervision of a biased referee. Although the NFLPA alleges that the current system is mutually beneficial, this statement is erroneous and disingenuous. In fact, the system is broken.

With each passing year, the disparity between large market and small market clubs continues to widen. The chief constraint on each club’s finances is the enormous cost that player salaries embody. To this end, major stakeholders must work together to implement a system that curbs the NFL’s largest costs: player salaries. Thus a rookie salary cap will do much to ease the trend of skyrocketing rookie salaries, especially those taken in the early portions of the first round. In the meantime, the NFL must continue to find new ways to offset its substantial costs. While the NFL has negotiated deals that guarantee that revenues will be received in the event of a labor stoppage, any sort of disruption of games is contrary to the best interests of the game. The League made a substantive offer to the Union and is negotiating in good faith. Thus, the NFL is and has been bargaining in the best faith possible under the circumstances and therefore did not engage in any unfair labor practices.


Ever since the Owners unanimously voted on May 20, 2008 to opt out of the current CBA, the Union has repeatedly asked for the reason for this decision. The League’s continued response is that this deal is not affording all clubs a chance to be competitive. As professional football is a multi-billion dollar enterprise, it is difficult without viewing the NFL’s financial information to understand exactly how this current Agreement fails to foster competitiveness amongst the thirty-two franchises. Since the 2006 season, the

---

382 This viewpoint is portrayed by Bram Maravent.
most recent year the CBA was extended, seven different teams have appeared in the
Super Bowl.\textsuperscript{383} The financial state of the League has never been healthier. There is no
reason to change any element of the current financial structure without tangible evidence;
mere words do not suffice. The Union has presented its impression of the League’s
financial health in economic reports that were quickly rebuffed by Management. The
only justification the Union keeps hearing from Ownership is that the current deal is not
financially workable. Facts prove otherwise: teams are shelling out big money on player
contracts and, from an overall perspective, multiple television deals are already signed,
sealed, and delivered to the League’s coffers that guarantee payment even in the event of
a strike or lockout. If this is the case, then the natural train of thought is to have
Management demonstrate as to why this current CBA is not financially viable. As
Ownership is unwilling to provide any financial information despite the Union’s repeated
attempts to request and obtain these figures, the League is not bargaining in good faith.

1. The Disclosure of Financial Statements is Vital in Understanding the
League’s Bargaining Position

Ownership unanimously opted out of the 2006-2012 CBA in May 2008. In doing
so, the League released, in part, this statement:

A collective bargaining agreement has to work for both
sides. If the agreement provides inadequate incentives to
invest in the future, it will not work for management or
labor. And, in the context of a professional sports league, if
the agreement does not afford all clubs an opportunity to be
competitive, the [L]eague can lose its appeal.

The NFL earns very substantial revenues. But the clubs are
obligated by the CBA to spend substantially more than half
their revenues – almost $4.5 billion this year alone -- on
player costs. In addition, as we have explained to the
[U]nion, the clubs must spend significant and growing

amounts on stadium construction, operations and improvements to respond to the interests and demands of our fans. The current labor agreement does not adequately recognize the costs of generating the revenues of which the players receive the largest share; nor does the [A]greement recognize that those costs have increased substantially -- and at an ever increasing rate -- in recent years during a difficult economic climate in our country. As a result, under the terms of the current agreement, the clubs’ incentive to invest in the game is threatened.\textsuperscript{384}

A CBA has to work for both sides. The NFLPA is not disagreeing with this statement. What it is in disagreement with is Management’s declaration that costs are too high. This assertion must be supported by some kind of proof. The League insists that the Union has this information; some have stated off the record that these documents are protected by a strict confidentiality agreement, and as such are not available to the public. The League’s thirty-two teams have refused to provide financial data to support their collective cry that they are not earning enough to afford their labor costs.\textsuperscript{385}

The truth is that the NFLPA has some financial information insofar as (1) knowing what each year’s salary cap will be based on the total revenue of the League each year, and (2) it has the financial information for one of the League’s 32 teams, the Green Bay Packers. Because the Packers are publicly owned, this information was used by economists Kevin M. Murphy and Robert H. Topel, who issued “The Economics of NFL Team Ownership,” which was distributed by the NFLPA to the owners prior to the January 2009 Super Bowl. The study also compiled the League’s financial information, as it was provided to the authors by the NFLPA.\textsuperscript{386}


\textsuperscript{385} Kevin M. Murphy and Robert H. Topel, The Economics of NFL Team Ownership, (Jan. 2009) (presented by the NFLPA to the NFL Owners prior to Super Bowl XLIII in Tampa, FL.).

\textsuperscript{386} Id. at 3.
The results were astounding. The Packers’ revenue, when compared against the estimates of Forbes magazine (just under two hundred fifty million dollars), was slightly higher. The report noted that “the Green Bay Packers have been approximately in the middle of all NFL teams in financial performance as reported by Forbes [indicating that] the team is not an outlier.”387 Player costs and operating income were also similar.388

The NFL’s revenue, when the economists considered the Union’s data against the data of Forbes, was also higher (over seven billion dollars with the NFLPA’s documents to $6.5 billion as estimated by Forbes).389 Player costs were the same (four billion dollars).390 According to the study, estimated team values have risen from $288.1 million to $1.04 billion since the 1998 CBA extension; these figures were supported by data of the sale price of seven NFL franchises since 1998.391 Most recently, the economists used the December, 2008 sale of the Miami Dolphins to New York real estate billionaire Stephen Ross as proof that the current economic problems that many businesses encounter are not affecting the value of NFL franchises.392

The study also discussed one of the League’s reasons to renegotiate the current CBA, that the teams are carrying too much debt. To examine this statement, the economists utilized the average ratio of total debt to team equity value and the ratio of average total debt to average team equity value.393 Total debt has actually decreased since the 1998 CBA extension, total debt has increased slower than team value.394 Thus, as the economists put, “debt is less of an issue for NFL teams now than it has been in the

387 Id. at 4.
388 Id. at 5.
389 Id. at 6.
390 Murphy, supra note 385, at 6.
391 Id. at 9.
392 Id. at 9-11.
393 Id. at 12.
394 Id.
When taking into account both team value and operating income, the study states that between 2000 and 2008, the average return for an NFL owner is between “$49 million and $131 million per year depending on the year, with average financial returns in recent years that have typically exceeded $100 million per year,” proving that NFL team ownership is not a losing proposition.

Because of this information, Professor Murphy and Professor Hopel concluded “it is difficult to make a case that the owners are not earning enough to pay the players what they are due to make under the current CBA.” Only one team, according to the report (citing Forbes) had an operating loss over the last five years. The Detroit Lions had a net operating loss of $3.1 million in 2008, according to Forbes. Insofar as player salaries, the study found that the current salary cap/free agency system in place has only brought the player’s percentage of salaries to a level near the overall average since 1994, and that reducing salaries, as has been suggested by Ownership, would reduce players’ salaries to a level below the historical average since the 1994 CBA. The Agreement has a ceiling, making it so that the salary cap and player benefits cannot be more than 61.68 percent of projected revenues in any year; this provides “a substantial cushion” for Management.

In sum, team values have quadrupled over the last decade and franchises made on average twenty-five million dollars last year; these figures are a far cry from a system in need of significant change.

In response to this report, NFL Commissioner Goodell stated,
There’s a lot of fiction in that report. The [U]nion has very in-depth knowledge of our economics and they also know our largest cost is player costs. What’s happened is the system has changed and the environment has changed. … The model has shifted over the years and we will address that in negotiations.  

NFLPA Executive Director Smith has sent a letter to Commissioner Goodell asking for a more detailed explanation of the owners’ decision to opt out of the Agreement and has made repeated requests for financial information. Smith also demanded that the NFL “turn over all audited financial statements [and] profit-loss information” to the Union. Despite these good-faith demands, Goodell refuses to release this financial information, alleging that the Union “‘knows our revenue down to almost a penny’ because of revenue figures used to compute the league's salary cap.” Goodell’s statements are fraught with the idea that the current economics of the deal are not working; but the NFL will not provide financial statements to support its contention because the Union knows only one figure: that nearly sixty percent of League revenues must be spent on player salaries and benefits.

The League has postured in many ways that might indicate poor financial health, such as staff layoffs and allowing teams to opt out of the league-run pension, retirement, and 401(k) plans for club employees. However, no tangible information requested after repeated attempts have been delivered to the Union to support the contention that the current economic structure is not working. Under the precedent of Truitt Manufacturing, a request for information must be made in good faith; thus it must at least

405 Id.
be a request for necessary and relevant information necessary to the relationship between the employer and the union in its capacity as employee representative. 407 Surely financial information is both necessary and relevant insofar as determining how the current economic structure is or is not working. This is not a situation like Detroit Edison where the information would be considered a trade secret or harmful to the employees. 408 In AMF Trucking, the Board stated that an inability to pay means that an employer does not have the money to pay now or for the life of the contract the current wage and benefit terms in place. 409 The League insists that all of its clubs will not continue to remain competitive if the current economic structure exists and that the clubs’ incentive to invest in the game is threatened. The League must provide financial information to the extent it can support these statements. If it has not done so since it opted out of the current CBA, the League is not bargaining in good faith.

2. A Rookie Wage Scale Already Exists

Another reason Ownership opted out of the current CBA is that it feels that the current salaries for rookies are too high and are thus seeking a rookie salary cap. However, a rookie wage scale already exists in the form of a rookie wage pool 410 and it is up to the teams to spend their money properly. Second, the share of rookie salaries is wrongly considered by the League from a cumulative perspective and by the Union on a year-to-year basis. Third, rookies do not take money away from veteran players. Thus this issue already has mechanisms in place to address the situation.

The NFL allocates a maximum cap value to each of its thirty-two teams that may be devoted to all of a team’s draft picks. This amount is based upon the number of draft

407 Higgins, supra note 108, at 958.
408 See generally Detroit Edison, 440 U.S. at 301.
409 See generally AMF Trucking, 342 NLRB No. 1125.
picks, the round the player is selected, and the overall spot within the round in which the picks are made.\textsuperscript{411} This wage pool provides teams with a limit on the amount of money in base salaries they can allocate toward rookie salaries each year. A true rookie wage scale on the other hand, if implemented in the next CBA, would establish rigid and restrictive guidelines for rookie salaries based on where the players are drafted. A number would essentially be earmarked for players depending upon where they were drafted without exception. The current system, however, is based on the teams’ salary cap figure, and amounts to around four percent of all franchise salaries.\textsuperscript{412} The only difference between the current system and a wage scale is the assigning of a particular number to the slot that each player is drafted.

One reason the League is pushing the notion that a rookie wage scale is necessary is that such a system would shift the blame from the team to the player. Under a wage scale, the player cannot be upset with a set salary, only with the team that drafted him or the spot where he was drafted.\textsuperscript{413} A slotting system, such as the one within the National Basketball Association, would take any negotiating leverage away from the player and his team. Additionally, the League is trying to drive a wedge between rookies and veterans. The veterans, however, should be more upset with team owners who continue to perpetrate this massive financial feeding frenzy that has become the top half of the first round of the NFL Draft. The Union has no control over the money teams choose to spend on bonuses to rookies; oftentimes, rookies not drafted in the first couple of rounds do not get bonuses.

\textsuperscript{413} \textit{Id.}
The argument that veteran players are harmed by the current system is also misguided. After the wage pool money is allotted, which amounts to four percent of the total salary cap, there is ninety-six percent of the salary cap pie available to veteran players.\textsuperscript{414} The economists commissioned by the NFLPA to study NFL financials stated that Ownership’s argument that teams are paying more for rookies than for veterans is “without merit.”\textsuperscript{415} Furthermore, “the average rookie pool has declined relative to the per team salary cap from approximately seven percent in 1994 to just under four percent in 2008.”\textsuperscript{416}

Ownership argues that wages at the top of the draft, perhaps players chosen in the top half of the first round, are growing at an increasingly disproportionate rate.\textsuperscript{417} Others argue that those teams in need of the most help are actually penalized by the draft, as those teams must surrender large amounts of money to unproven players.\textsuperscript{418} Critics of these large contracts argue that perhaps the immediate riches these agreements afford create troublesome and disruptive players. Some veteran players have even spoken out against the current system.\textsuperscript{419} However, none of these critics have pointed to any information more tangible than the data provided by the economists commissioned by the Union. The truth of the matter is negotiating salaries is part of the business of football. It is also true that the average career of an NFL player might be less than a few seasons.\textsuperscript{420}

Ownership and the Union have already negotiated a very limited number as to the amount

\textsuperscript{414} Murphy, supra note 385, at 16.
\textsuperscript{415} Id.
\textsuperscript{418} Id.
of money a team may spend on rookies. A rookie does not possess much bargaining power because one way or another, the team can only pay its rookies what it is allotted by the League. After the small percentage from the rookie wage pool is paid, a large amount of money is available under the cap to sign veteran players. Any complaints veteran players may have should be taken to their respective teams for not doling out the remainder of the allotted salary cap money to players. Veterans might not want to do that though, as a rookie salary may also inflate the market for veterans.421

It is widely acknowledged the League will implement a rookie wage scale as a means to divide rookies and veterans. However, if the above-commissioned NFLPA report is taken under proper consideration (which the NFL has not provided data against), there is no reason for an intra-union dispute. The real issue is whether the League can police owners and front office personnel into drafting better, selecting smarter, and paying veteran players the entire remainder of the available space allotted to them under the salary cap.

3. The League’s Pockets Keep Getting Deeper

As discussed thus far, player salaries and benefits consist of roughly sixty percent of total league revenue. The CBA used to only include “Defined Gross Revenues,” which included a limited group of sources, but did include national television contracts, ticket sales, and NFL merchandise sales. Ownership’s argument that it does not have a system that can financially work for players and owners does not hold water when considering all of the revenue generated by advertising sales (which the players help

generate as the end product of the game of football) and television money, which is not contingent on a strike-free year or a lockout.


The NFL and DirecTV signed a deal that sends one billion dollars to the League every year, whether or not a game is played in 2011, the year when a strike or lockout might take place. Some have called this provision “lockout insurance.”\footnote{Peter King DirecTV deal is lockout insurance, SPORTS ILLUSTRATED, Mar. 24, 2009, http://sportsillustrated.cnn.com/2009/writers/peter_king/03/24/meetings/index.html (last visited Jan. 3, 2010); but see Mike Florio DirecTV “Guarantee” Would Likely Reduce Future Payments, PROFOOTBALLTALK.COM, Mar. 24, 2009, http://profootballtalk.nbcSports.com/2009/03/direc-tv-guarantee-would-likely-reduce-future-payments.php (last visited Jan. 3, 2010).} In other words, the League has a strike fund in place, and a much bigger one than the Union has tried to accumulate. The League also has enough money to wait for the deal it wants, instead of being under financial pressure to take any deal offered by the Union. During the last NFL strike, which occurred in 1987, the television networks dealt with replacement player games and scrambled to get whatever else on during the one week...
without games. A strike in 2011 could exhibit similar problems. The NFL has already
signed deals extending its current television partnerships with FOX and CBS.428 But for
Ownership, it can just sit back and continue to count the money rolling in, even if ticket
revenue might be down.

Additionally, the League is engaging in behavior that it had shied away from in
previous years. Examples include advertising on player practice jerseys and signing
deals with lotteries.429 Owners are now beginning to see the benefit of added revenue by
scheduling concerts, college football games, and other events at their venues. The
League also has the NFL Network and the Red Zone Channel; the former is now
broadcasting regular season NFL games and the latter has become widely popular on
DirecTV. Television contracts are a huge revenue producer for teams. Last year, the
contracts with NBC, CBS, Fox, and ESPN paid each team about $94 million.430 If all
other shared national revenue is included (such as road-game receipts plus other league-
wide sources), each NFL team made about $147 million in 2008.431 Because these
television deals are so lucrative, Ownership no longer has to worry about ticket sales as a
main factor in revenue, but players will have one less stream of revenue if they strike or
are locked out.

The NFL is immensely popular and profitable for all sides involved. “According
to the Nielsen ratings, in 2008, five of the top 10 single-event television broadcasts were

428 Daniel Kaplan and Daniel Ourand, NFL close to extensions with Fox, CBS, SPORTS BUSINESS JOURNAL May 18, 2009,
430 Pete Dougherty No NFL salary cap, no big deal for now, GREEN BAY PRESS-GAZETTE/PACKERSNEWS.COM Dec. 11, 2009,
431 Id.
NFL-related. Because of this, television networks pay a premium for NFL content.\textsuperscript{432} However, one must remember that players have to be playing in these contests in order for virtually all involved to enjoy those immense benefits. Ownership, on the other hand, is the only outlier. Under the above-mentioned contracts, the NFL is guaranteed some return even in the event of a strike or lockout because of these television contracts and other business ventures. These lucrative contracts give the League another reason to drag along negotiations as long as possible. The longer negotiations take, the more pressure is on the Union to agree to a deal or face the prospect of losing part of a revenue sharing arrangement. If no deal is struck before March of 2010, the players will only enjoy whatever percentage of the salary “pie” they can get, as there will be no salary cap based in part on these television contracts.

Ownership has taken the position that the current financial structure does not work. However, when presented with the very same information that the League says the Union has as part of its commissioned economic report, it called it “fiction.” The Union has in turn asked for audited financial statements of the NFL’s thirty-two teams to determine what, if any, part of the current financial structure is not working. The League has refused any such request. The NFL’s position regarding a rookie wage scale is purely based on an interest to remove any bargaining power from the top-tier rookies and to displace the solidarity of the Union. A pool of money is already set aside for rookies and has no effect on veteran salaries. The only agents affecting veteran salaries are the NFL teams themselves, as many teams are withholding some of the ninety-six percent of the pie left for veterans after rookies claim a miniscule four percent of the total cap space.

Finally, Ownership is already generating a steady stream of revenues, with more already in place in the event of a strike or lockout. The NFL can drag negotiations out for a significant period of time and never produce the information the Union has requested. Further, the League may be dragging out negotiations in the hope that it receives a favorable decision in *American Needle v. Nat’l Football League*, which could eliminate one of the Union’s negotiating tactics.\(^{433}\) If the NFL wins this case in front of the Supreme Court, the League will potentially be exempted from antitrust scrutiny, as it would be considered a single entity. This classification would make antitrust law not applicable. Thus, if this occurs, the NFLPA would be foreclosed from decertifying and filing an antitrust lawsuit like it did in 1993.\(^{434}\) This occurrence would then only leave the Union with the option of using labor law to come to an agreement. If this scenario is proven true, the League’s conduct amounts to a position that does not contemplate the intent of eventually coming to an agreement on a successor CBA. Thus, in this situation, the NFLPA contends that the NFL and its thirty-two teams are not bargaining in good faith.

**Part VI: Predictions – Implications of American Needle**

Prior to 2000, the NFL had freely granted non-exclusive licenses to outfitters to manufacturer League apparel. American Needle Inc. (“American Needle”) was one of these non-exclusive licensees and has been designing and manufacturing headwear for the NFL since 1970.\(^{435}\) This all ended in 2001 when, in an effort to strengthen the NFL brand by reining in the supply of merchandise, the League’s intellectual property arm,

---


“NFL Properties,” solicited bids from current-and prospective licensees to exclusively manufacture NFL headwear. NFL Properties awarded the single exclusive license to Reebok. Three years after Reebok received its exclusive license, American Needle filed suit against the NFL, thirty of the League’s thirty-two member teams, NFL Properties and Reebok (the “Defendants”). The lawsuit alleged that the NFL’s exclusive contract with Reebok granted three years ago violated Section One of the Sherman Antitrust Act as a concerted action operating to unreasonably restrain trade.

After limited discovery addressing whether the NFL was a single-entity, the District Court for the Northern District of Illinois entered summary judgment in favor of the Defendants, finding that the NFL’s member clubs’ “cooperative marketing does serve to promote NFL football.” The court opined “NFL teams have acted as one source of economic power—under the auspices of NFL Properties—to license their intellectual property collectively and to promote NFL football.” Thus, the “undisputed” facts “lead undeniably to the conclusion that the NFL and the teams act as a single entity in licensing their intellectual property.” A three-judge panel for the United States Court of Appeals for the Seventh Circuit unanimously affirmed the District Court’s decision. The appellate court found that “NFL teams can function only as one source of economic power when collectively producing NFL football.” Therefore it “follows that only one source of economic power controls the promotion of NFL football.”

436 NFL Properties owns the intellectual rights of each NFL club and the League as a whole. Each franchise owns an equal share of and receives an equal distribution from NFL Properties. Id. at 16.
437 American Needle “explicitly disclaimed any challenge to (i) the formation of the NFL or NFL Properties, (ii) NFL Properties’ acting as the exclusive licensor for NFL and member club intellectual property, and (iii) NFL Properties’ decision to offer that intellectual property for use on headwear only through a blanket license.” Brief for the NFL Respondents at 10, Am. Needle v. Nat’l Football League, 129 S.Ct. 2859 (2009) (petition for cert. granted) (No. 08-661).
439 Id.
440 Id.
442 Id.
appeals concluded that “NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams’ intellectual property,” and therefore the single entity argument applied to the NFL.\footnote{Id.}

As expected, American Needle appealed to the United States Supreme Court for relief. However, in a curious decision, the NFL also petitioned for certiorari. In appealing, the NFL hoped to expand this limited antitrust exemption that both lower courts have carved out for professional sports, specific to the pooling and licensing of intellectual property to become more inclusive. The League now hopes to move the Supreme Court to exempt professional sports leagues from being subject to antitrust laws. Their argument is member teams collaborate into a single entity to produce a product that, instead of competing with other football games, competes with other forms of entertainment. If this occurs, unions representing players in professional sports leagues will have no choice but to use labor law as a means to solve disputes between labor and management, as antitrust law will no longer be a viable option.

The League is chiefly relying on holdings from \textit{Copperweld Corp. v. Independence Tube Corp.}\footnote{See \textit{Copperweld Corp. v. Independence Tube Corp.}, 467 U.S. 752 (1984).} and \textit{Chicago Prof’l. Sports Ltd. P’ship v. Nat’l Basketball Ass’n}, (“\textit{Bulls II}”)\footnote{\textit{Chicago Prof’l. Sports Ltd. P’ship v. Nat’l Basketball Ass’n}, 95 F.3d 593 (7th Cir. 1996) (“\textit{Bulls II}”).} to support its position. In \textit{Copperweld}, the Supreme Court first opened the door for sports leagues to present an argument against being subject to antitrust scrutiny.\footnote{\textit{Copperweld}, 467 U.S. at 770-73; See Ryan P. Meyers, Comment, \textit{Partial Ownership of Subsidiaries, Unity of Purpose, and Antitrust Liability}, 68 U. CHI. L. REV. 1401, 1406 (2001).} Section One is intended to prevent concerted behavior amongst parties that in effect deprives the marketplace of the independent actors engaging in competition.\footnote{See \textit{Copperweld}, 467 U.S. at 769.} However, concerted behavior no longer exists if the competitors are now
considered as a single entity and its wholly owned subsidiaries acting with a “complete unity of interest.”448 Thus, if each actor’s “objectives are common,”449 they will not be subject to antitrust laws.450 The Supreme Court has already acknowledged that because they “depend upon a degree of cooperation for economic survival,” the NFL and its teams resemble an undefined “single bargaining employer.”451

Case law agrees that in certain circumstances, including broadcasting of contests and the licensing of intellectual property, sports leagues such as the NFL are single firms.452 The NFL wants to expand this viewpoint, arguing that a professional sports league is not collaboration among independent entities. Instead, as a form of entertainment, sports leagues produce a single product, “a structured series of athletic competitions leading to a championship, that no member club could produce on its own, and it competes as a unit against other entertainment producers.”453 Thus “a sports league,” the NFL argues, “should be regarded as a single entity for purposes of Section 1 in at least some aspects of its operations.”454

NFL Properties has existed since 1963 and separately oversees the NFL’s collective intellectual property. This extensive history of collective operation as a single competitive unit leads one to ignore the fact that clubs are separately owned/operated. Instead one can focus on the necessity of teams to act collectively in order to produce and promote each football contest, “a product that no member club can produce on its

448 Id. at 771.
449 Id.
450 “Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. . . . If a parent and a wholly owned subsidiary do “agree” to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.” Id. at 771.
452 Bulls II, 95 F.3d at 600.
453 Petition for Writ of Certiorari at 14, Am. Needle, 129 S.Ct. 2859 (No. 08-661).
454 Id.
own.”

Member clubs, the NFL argues, “though separately owned, ‘were not set up to be competitors’ except on the football field. The NFL’s franchises “were instead set up to ‘produce a single product’ as to which ‘cooperation is essential (a league with one team would be like one hand clapping).’” The teams compete on the playing field, but in an economic sense “they combine in a single firm.” Thus, because member clubs are interdependent on each other to produce NFL football, there is no concerted action, and therefore no antitrust scrutiny is required.

The labor-related ramifications of American Needle are vast. The NFL recognizes the opportunity that arguing in front of the Supreme Court embodies: a possible exemption from antitrust laws. Thus, it is quite possible that the NFL, in all of its posturing and negotiating, is really engaging in surface bargaining while its waits for the High Court to rule in its favor. A broad holding that the NFL is exempt from the Sherman Act would thwart the NFLPA from using antitrust law as a legal avenue if Ownership imposes harsh terms in a successor agreement. Worse yet, a broad antitrust exemption would cripple the Union’s ability to respond to a League-imposed lockout.

As detailed above, the NFLPA voted in the 1980s to decertify itself and followed that vote with a subsequent class action antitrust lawsuit, ultimately scoring a tremendous victory against Management. These legal maneuvers assisted in finally providing the Union with the bargaining leverage that it had lacked since the inception of the NFL labor-management collective bargaining relationship. Further, the seminal victory achieved through decertification led to both the revenue sharing and distribution models

---

455 Id. at 20.
456 Id. at 19 (citing Phillip Areeda, Intraenterprise Conspiracy in Decline, 97 Harv. L. Rev., 451, 461 (Fall 1983)).
457 Id. at 22 (citing Bulls II, 95 F.3d. at 598-99).

A source close to the League states that NFL attorneys believe the League will be convince the Supreme Court. This prediction is based on opinions written in prior Court rulings such as Brown v. Pro Football and Bulls II. Thus it is a legitimate possibility to believe that the NFL is essentially “waiting out” the Court’s decision in American Needle; the League is merely going through the motions of bargaining in hope of a more favorable position after the case’s conclusion.

If you recall from Part IV of this comment, the parties possess the duty to meet with the good faith view of reaching an agreement. If the League is just biding its time, then it cannot be bargaining in good faith, and the many months of negotiations are merely a rouse and a distraction. The real end game for the League under this scenario is to win an antitrust exemption and force the NFLPA into only using labor law to settle this dispute.

The NFL’s reasoning to wait for American Needle’s conclusion is simple and it relies on the relatively short career span of the average NFL player. Similar to the rationale of the NHL players who could not afford to sacrifice significant time due to a lockout, if the average life of an NFL player is around three and one-half years. That
player does not have the luxury of waiting out a lockout that could last multiple years.\footnote{See Dan Raley, New NFL Goal: A longer life, THE SEATTLE POST-INTELLIGENCER, May 9, 2008, http://www.seattlepi.com/football/362412_nflhealth09.html (last visited Jan. 4, 2010).} NFL players, who possess a shorter career life expectancy than NHL players, will more than likely acquiesce to Management’s demands in a shorter period of time, thereby making presenting a united front with the Union difficult. If the League is immune from an antitrust lawsuit, the only real option for the players is to negotiate the best deal it collectively can at the bargaining table and avoid a strike and/or lockout at all costs. If the legal position of the NFLPA is limited, then the NFL has all of the bargaining power just as it did in the early days of negotiations between the parties. However, under this set of circumstances, there is no alternative legal theory that has proven successful. Thus, it behooves the NFL to stretch the bargaining process as long as it can and await a decision from the Court so long as it can avoid a ULP charge for bargaining in bad faith.

\textbf{Part VII: Predictions – There will be a Lockout}

The rhetoric of both the NFL and NFLPA is intensifying. Judging from the behavior of the parties, it appears that both sides will deal with an uncapped 2010 season in preparation of a prolonged labor stoppage. The pace of negotiations has slowed.\footnote{Peter King recent wrote “I hear progress is virtually nil and the players are pessimistic that a new deal will get done in time for them to play the 2011 season.” SPORTSBUSINESS DAILY, Cowboys Owner Jerry Jones Discusses NFL Economics on “FNIA”, Dec. 28, 2009, http://www.sportsbusinessdaily.com/article/135834 (last visited Jan. 4, 2010).} The NFL seems content to take a wait and see approach with American Needle and engage in real negotiations only after the Supreme Court renders its decision. Even if the League does not receive a favorable ruling, the NFLPA is convinced that ownership will lock the players out.\footnote{NFL.COM, NFLPA director Smith convinced players will be locked out in 2011, http://www.nfl.com/news/story?id=09000d5d811f151d2&template=without-video-with-comments&confirm=true (last visited Jan. 4, 2010).} “Our players know the [L]eague has hired the guy [attorney Bob Batterman] that engineered the NHL lockout,” Smith said. “They look at these new TV
contracts that guarantee payment even in the event of a lockout. Thus, Smith surmises, the NFL hopes to implement a strategy similar to that engineered by Batterman during the NHL lockout and wait for the NFLPA to break solidarity all while relying on its guaranteed contracts from sponsors such as DirecTV. The only difference with this labor stoppage is that this time, the NFL hopes to avoid the possibility of Union decertification and antitrust scrutiny through a favorable American Needle decision. Instead of waiting for a lockout, Smith wants to negotiate a new deal, starting with addressing the financials. However, in reality, financial disclosure is not going to occur as the NFL is not alleging an inability to pay and the NFL is most likely not in a hurry to negotiate a successor agreement.

Both sides seem little concerned about how the NHL lockout did serious damage to the goodwill of professional hockey. It is unclear whether the parties are truly ready to sacrifice labor peace for the uncertainty of a prolonged labor conflict, especially after the NHL’s recent disastrous labor dispute. While professional football is immensely more popular than the NHL, it is difficult to imagine that a protracted labor dispute would not seriously damage the profitability and popularity of the NFL. The current composition of the NFL and the Union are not radically different from their respective predecessors. This bargaining relationship is decades long and possesses an emotional history checkered with heated conflicts. Given this past, one struggles to understand why either side wants to reopen the bitter feelings of the past by waiting till the expiration of the current CBA.

465 "The players of the National Football League are still in the dark about why this deal isn’t good enough,” Smith said. “And the easiest way to demonstrate any problem with the deal is the way any business in America demonstrates it: They turn over what the profit or loss numbers are. And if there’s a problem with the model, we’ll fix it.” Brown and Prine, supra note 367.
The nation's most profitable and most popular sport is at risk. Management has opted out of an agreement that has been carried forward for over a decade now, citing that it economically does not work. This CBA was responsible for billions of dollars in profits for both owners and players alike. However now, like a divorce, the Agreement is seemingly considered broken due to irreconcilable differences between the parties. It remains to be seen whether the 2010 season will be an uncapped/unfloored one and, more importantly, whether the parties can mend a relationship that from the late 1990s until mid-2008 was fairly calm. However labor peace, when examining the bargaining history of the parties, has been the exception rather than the rule. Taking this into consideration, the authors expect the Supreme Court to return a decision that in some manner sanitizes the NFL from antitrust scrutiny. This will likely lead to the NFL initiating a lockout, signaling the beginning of a protracted dispute that could be significant in duration.

An intense and long-lasting labor stoppage could also significantly impact the other major US sports. As one team executive posits, “[i]f the NFL has substantial labor issues, there will be a dramatic ripple effect -- good and bad dependent on where you sit - - throughout the sports industry.”466 Thus, the American Needle decision and other events in the coming year between the NFL and NFLPA will bear significant consequences for virtually all of professional sports.

---