THE PENNSYLVANIA STATE UNIVERSITY
SCHREYER HONORS COLLEGE

SCHOOL OF LABOR AND EMPLOYMENT RELATIONS

THE IMPACT OF THE INTERSECTION OF ANTITRUST AND LABOR LAWS ON COLLECTIVE BARGAINING IN U.S. PROFESSIONAL SPORTS

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SPRING 2015

A thesis
submitted in partial fulfillment
of the requirements
for a baccalaureate degree
in Labor Studies and Employment Relations
with honors in Labor Studies and Employment Relations

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ABSTRACT

This thesis analyzes the impact that the intersection of antitrust and labor laws has on collective bargaining in professional sports. Using the lockouts and litigation of the National Football League (NFL) and the National Basketball Association (NBA) in 2011 as case studies, this thesis will show how the convergence of antitrust and labor laws can provide a profound form of economic leverage for professional sports unions, because it exposes professional sports leagues to the possibility of antitrust litigation. It will examine a history of the relevant antitrust and labor laws, and will analyze an extensive of lawsuits relating to professional sports, to examine the development of the nonstatutory labor exemption. It will then detail the 2011 NFL and NBA lockouts, and the outcomes of the resulting collective bargaining agreements. By analyzing the use of antitrust litigation by both players unions, this thesis will conclude that dismantling the nonstatutory labor exemption through the renunciation and disclaiming of interest by professional sports unions is a powerful form of leverage that will likely shape the future of collective bargaining in U.S. professional sports.

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Chapter 1

Introduction

In 2011, contentious labor-management relations dominated two of the most profitable sports leagues in the United States. The collective bargaining agreements governing the National Football League (NFL) and the National Basketball League (NBA) with their respective unions expired following the completion of the 2010-2011 season, and both leagues were met with labor strife. Both leagues reacted similarly, and immediately locked out their players in an attempt to exert economic pressure and leverage on the unions to coerce a new agreement. Although the leagues acted similarly, the National Football League Players Association (NFLPA) and the National Basketball Players Association (NBPA) initially pursued different strategies in negotiating with the leagues and combating the lockouts.

The NFL players elected to renounce collective bargaining and disclaim future interest in bargaining, and the NFLPA reclassified itself as a player advocacy organization, and not a labor union. By renouncing and disclaiming interest, the players were exposing the League to antitrust litigation and the potential for treble damages, and the players filed a class action antitrust suit the very day that the League implemented its lockout. In contrast, the NBA players relied on traditional collective bargaining and negotiation processes, and relied on labor laws as it filed claims with the National Labor Relations Board. After months of negotiations with little progress, however, the NBA players too elected to renounce and disclaim, and an agreement was reached within two weeks (Grow, 2013, p. 473).

Both the NFLPA and the NBPA renounced their collective bargaining interests and rights, a counterintuitive tactic to be taken by a union, in order to utilize a form of leverage not found within traditional labor laws or collective bargaining. This leverage is created with the convergence of antitrust and labor laws. Antitrust laws were originally created to prevent anticompetitive behavior, and colluding between independent economic entities, while labor laws, in contrast, were created to encourage and legally protect collective bargaining between two economic entities – employers and employees. Courts have attempted to reconcile these opposing objectives through the development of the nonstatutory labor exemption, which protects employers and unions from antitrust violations in order to facilitate a meaningful collective bargaining process. Developed through case law, "courts shield the collective-bargaining process from antitrust scrutiny so long as the activity in question predominantly affects the relationship between management and the union" (Grow, 2013, p. 474).

This exemption has been developed in professional sports through numerous cases, which often arose after a breakdown in negotiations and the traditional collective bargaining process. The courts have determined that the exemption can be nullified if there is a "sufficient distance in time and circumstance from the collective bargaining process" (Brown, 1996, p. 5). In 2011, the players sought to dismantle this exemption, through renouncing and disclaiming interest, and pursue antitrust litigation against their respective leagues. Filing class action suits against the leagues creates the possibility for treble damages should the players win the suit, and provides a form of economic leverage that can counter the leagues' lockouts (Passer, 2012, p. 605). It was the strategic legal maneuver by both the NFL and NBA players unions to renounce and disclaim interest in collective bargaining in order to pursue antitrust litigation that profoundly impacted the negotiations and resulting collective bargaining agreement in 2011.

Chapter 2

Legal Background

The context of professional sports leagues and their respective unions is unique in that it is so strongly impacted by both labor and antitrust laws. For much of American history, the employer-employee relationship was predominantly governed by the idea of "freedom of contract," which was grounded in the due process clause of the Fourteenth Amendment, and was upheld in numerous cases. A prominent case is Lochner v. New York of 1905, in which the United States Supreme Court ruled that a New York law that sought to limit the number of hours worked per week was "unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract." (Lochner, 1905, p. 3). In the following decades, however, Congress sought to improve the vastly unequal balance of economic power between employer and employee, and enacted several laws to rectify this imbalance. These labor laws provide the legal rights and protections that make possible modern unions and effective and meaningful collective bargaining processes. The application of these laws, intersecting with antitrust laws, paved the way for professional sports unions to balance the power between leagues and players.

Antitrust Laws

The Sherman Antitrust Act of 1890 and the Clayton Act of 1914 are the predominant antitrust laws governing the United States. The Sherman Act prohibits anticompetitive structure, and the Clayton Act prohibits anticompetitive acts. The Sherman Act was enacted to "protect trade and commerce against unlawful restraints and monopolies" (Sherman Antitrust Act, 1890, prelude, p.1). Section 1 prohibits every contract, combination, and conspiracy in restraint of trade or commerce in interstate commerce, and Section 2 prohibits any person from monopolizing or attempting to monopolize, or any persons that combine or conspire together to "monopolize any

part of the trade or commerce among the States…" (Sherman Antitrust Act, 1890, S.1, p.1). The Clayton Act served as an amendment to the Sherman Act, and expands its jurisdiction and strength, as well as making important exceptions for labor unions. Section 6 of the Clayton Act states,

> The labor of a human being is not a commodity or an article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor…organizations, instituted for the purposes of mutual help…or to forbid or restrain individual members of such organizations from carrying out the legitimate purposes thereof; nor shall such organizations, or the members of such organizations, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws. (Clayton Act, 1914, S. 6)

This was a profound endorsement of labor organizations, and the value of a worker's worth, especially considering the first real piece of labor law legislation would not be enacted for another 18 years. The Clayton prohibits discriminatory price-fixing practices, or mergers and acquisitions that eliminate competition. It also provides for treble damages should there be a conviction of a felony violation of antitrust laws (Clayton Act, 1914, S.6).

Labor Laws

In addition to these two antitrust laws, there are numerous labor laws that impact the collective bargaining between professional sports leagues and their respective unions. The most relevant laws to the collective bargaining process in professional sports are the Norris La-Guardia Act of 1932, the National Labor Relations Act of 1935, the Taft Hartley Act of 1947, and the Landrum Griffin Act of 1959 (The Basic Labor Laws, 2008, p.1).

The Norris La-Guardia Act (NLGA) was the first real piece of legislation that granted legal rights and protections to unions. Prior to its enactment, employers often implemented yellow-dog contracts, which required, as a condition of employment, that an employee would never join a union. This law banned these types of contracts, creating a more neutral atmosphere for unions to exist. Additionally, employers could seek injunctive relief to end strikes, effectively eliminating any of the workers' economic leverage. Anti-injunctive legislation was repeatedly introduced in Congress between 1924-1931 but consistently failed to pass, until the new political composition of Congress in the New Deal era finally enacted the Norris La-Guardia Act in 1932 (The Basic Labor Laws, 2008, p.1).

This legislation formally recognized the imbalance of bargaining power that an individual worker has compared to an employer, and that this imbalance leads to substandard working terms and conditions.

> "…The individual worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor…though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association." (Norris La-Guardia Act, 1932, S. 102)

This act sought to promote this freedom of association by restricting an employer's ability to "interfere, restrain, or coerce" employees (through yellow-dog contracts, for example), and by restricting the courts' ability to use injunctions to sever the workers' and unions' economic weapon of striking (The Basic Labor Laws, 2008, p.1).

Three years later, Congress passed the National Labor Relations Act (NLRA) of 1935. This landmark piece of legislation guaranteed "employees the right to form unions, bargain collectively, and engage in concerted activity for mutual aid and protection" (National Labor

Relations Act, 1935, S.7). The NLRA also established the National Labor Relations Board to "resolve representation questions and adjudicate unfair labor practices" (National Labor Relations Act, 1935, S.3). The Act's unfair labor practice prohibitions preclude discrimination for union activity, interference in union formation or administration, and refusal to bargain in good faith, over mandatory subjects, or refusing to provide union with necessary information for bargaining (National Labor Relations Act, 1935, S.8). Further, the NLRA also established that unions have the exclusive jurisdiction to represent the bargaining unit when bargaining with an employer. This means that once a union is established (by a vote of majority support) to represent the bargaining unit, that union is the only representative for that unit. No other union can claim to represent members of the unit, and the representing union cannot divide employees within the unit and selectively represent some members based on skill, education, etc. Once the union is established, it is the exclusive representative for the bargaining unit that elected it, and it has the responsibility to represent all members of that unit (National Labor Relations Act, 1935, S.9).

The Taft-Hartley Act of 1947 amended the NLRA by establishing unfair labor practices, but its focus was on curtailing unfair labor practices of unions. It established that unions also could not refuse to bargain in good faith, nor could they charge excessive fees to their members (The Basic Labor Laws, 2008, p.4). In 1959, Congress passed another law that was restricted unions. The Labor Management Reporting of Disclosure Act (LMRDA) was enacted "o provide for the reporting and disclosure of certain financial transactions and administrative practices of labor organizations and employers, to prevent abuses in the administration of trusteeships by labor organizations, to provide standards with respect to the election of officers of labor organizations, and for other purposes" (The Basic Labor Laws, 2008, p.6).

Chapter 3

The Nonstatutory Labor Exemption

Interpreting the meaning of labor and antitrust laws, the federal courts have, in a series of cases, created what is known as the non-statutory labor exemption, which allows unions and employers to engage in meaningful collective bargaining and achieve an agreement. On its face, the language of the Sherman Act banning "every contract, combination or conspiracy in restraint of trade" could criminalize an agreement between individual economic entities, including workers combining into a union (Grow, 2013, p. 475). Thus, the Norris-LaGuardia Act was implemented to end the judicial practice of using the Sherman Act as the rationale for issuing injunctions against unions and strikes. This Act, in combination with Section 6 of the Clayton Act, and the wide breadth of the NLRA, are the statutory labor exemptions from antitrust law. While the statutory exemption allows for the basic formation, existence and operation of unions, courts have interpreted these laws to provide for a non-statutory labor exemption, which protects the agreement achieved between the unions and employers (Lock, 1989, p. 353). In *Brown v. NFL*, the Supreme Court further explained this concept by stating that it would be impossible to require employers and groups of employees to bargain together, but then forbid any agreements with mutually acceptable competition restrictions. The Court stated, "the implicit exemption recognizes that, to give effect to federal labor laws and policies to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process

must be shielded from antitrust sanctions" (Brown, 1996, p.2*).* Without the judicially derived non-statutory labor exemption, players, through their unions, could bargain for labor contracts that include anti-competitive practices (such as the draft, restrictions on free agency, and/or a salary cap), and then, after reaping the benefits of higher minimum salaries and better benefits from the agreement, could challenge these agreed-upon, but anticompetitive practices in antitrust litigation, exposing the owners to possible treble damages (Grow, 2013, p. 475).

This exemption has shielded professional sports leagues from claims by players of antitrust violations, and because the courts have never explicitly stated the definitive boundaries of the exemption, numerous cases have served to further narrow the parameters of the exemption (Lock, 1989, p.341). The first of these cases was *Radovich v. National Football League* in 1957, which was the first case to rule that football and other professional sports (except for baseball) were subject to antitrust laws. Prior to this case, courts had established that baseball was not subject to antitrust laws because it was not considered to be interstate commerce, and thus the Sherman Act did not apply (Federal Baseball, 1922, p.1). However, the decision in *Radovich* differentiated football from baseball and exposed professional sports leagues (with the exception of baseball) to legal challenges under the antitrust laws.

Radovich v. National Football League (1957)

Detroit Lions player William "Bill" Radovich had requested to sign with a Los Angeles team to be closer to his ill father. The Lions owner refused to allow him to sign with another team, yet Radovich broke his player contract to sign with a team in the All-America Conference, a rival league to the NFL, and a few years after this Radovich was offered a position on the San Francisco Clippers of the Pacific Coast League, which was affiliated with the NFL. However, the NFL blacklisted any team signing Radovich, and the Clippers refused to sign him. Radovich

asserted in his suit that this blacklisting cost him employment opportunities, and was a result of a conspiracy of the NFL to "monopolize commerce in professional football in the United States" (Radovich, 1957, p.1).

Radovich sued under the Clayton Act and claimed that the NFL had acted in an illegal group boycott, and was intent on ruining not only his career but the prosperity of the rival minor league. The league responded by arguing "the business of organized professional football was not intended by Congress to be included within the scope of the antitrust laws" (Radovich, 1957, p.2). The league relied on previous decisions exempting baseball, and argued that the principle of *stare decisis*[1] should compel the courts to issue a similar decision for football. However, in *Radovich,* the Supreme Court was careful to restrict the exemption to baseball, and stated that the baseball cases were precedent for baseball only, and "could not be relied upon as a basis of exemption for other segments of the entertainment business, athletic or otherwise" (Radovich, 1957, p.2). The Court essentially ruled that if such as exemption should be extended, then Congress should be the entity to make such an exemption, not the courts. With this statement, the Supreme Court had opened up all other sports leagues, including football, to antitrust laws. The Court ruled that Radovich was "entitled to an opportunity to prove his charges," and remanded the case down to the trial courts (Radovich, 1957, p.4). The league eventually settled the *Radovich* case, but this landmark case provided future cases with a legal basis to sue the NFL under antitrust laws.

Roberston v. National Basketball Association (1970)

[1] *Stare Decisis* is Latin for " to stand by things decided," and is the doctrine of precedent. Courts will rely on stare decisis when an issue has been previously decided, and will rule in accordance with the precedent.

Similar to the above case, which focused on the NFL and NFL Players Association, the National Basketball Association (NBA) and the National Basketball Players Association (NBPA) also had similar antitrust litigation relating to free agency. In the early 1970s, Oscar Robertson led a class action suit against the NBA under Sections 4 and 16 of the Clayton Act, and Sections 1 and 2 of the Sherman Act, on behalf of themselves and all future players of the NBA (Robertson, 1970, p.1). The players asserted, "since its inception, the NBA has engaged in a concerted plan, combination, or conspiracy to monopolize and restrain trade and commerce in major league professional basketball in the United States" (Robertson, 1970, p.1). The players brought suit in this case amidst rumors that the NBA was attempting to merge with a rival league, the American Basketball Association (ABA), and asserted that the college draft, the reserve clause, and the uniform player contract exemplified the NBA's conspiracy to restrain trade. The reserve clause combined with the uniform contract created a system in which a team could unilaterally extend a player's contract for one year, and could keep renewing and extending that year, which bound him to one team for the entirety of his career. If a team wanted to retain a player's services, he could not choose to sign a contract with another team when his contract expired (Robertson, 1970, p.1).

The NBA claimed that jurisdiction rested with the National Labor Relations Board (NLRB), not with the courts, because the claim made by the Players was also an unfair labor practice charge. The court relied on precedent that rejected a claim that primary jurisdiction of antitrust claims reside with the NLRB, namely because the Board primarily only deals with unfair labor practice charges (Robertson, 1970, p.4). The court cited a previous decision that held a court is not precluded from rendering a decision on an antitrust claim just because that could also be construed as an unfair labor practice under the NLRB (Robertson, 1970, p.4). The court

also dismissed the NBA's claim of the labor exemption from antitrust laws. The court held that the statutory exemption found in the Clayton Act only exempts labor and union activities, not the activities of employers. Moreover, the court found that the exemption could not be extended to an employer "as a shield against Sherman Act proceedings…and destructively wielded as a sword by engaging in monopolistic or other anti-competitive conduct" (Robertson, 1970, p. 11). This was a much different view than was taken in the NFL cases regarding the nonstatutory exemption, most likely due to the fact that this case occurred well before cases such as *Mackey v. National Football League* (discussed below).

Ultimately, the court found the NBA in violation of the Sherman Act, and the merger between the NBA and ABA was blocked, and the two leagues petitioned Congress to attain an exemption to enable the merger. This petition, and settlement between the League and Players, dragged on for years after the initial filing in 1970 (Robertson, 1970, p. 20). Finally, in 1976, the settlement included limited free agency, an elimination of the perpetual reserve clause under the uniform contract, and damages of over $4.3 million (Bradley, 2011, p.1).

Mackey v. National Football League (1975)

Exposure to antitrust laws waked by *Radovich* was exploited by the NFL players again twenty years later, when fifteen current and former players sued in a class action suit against the NFL over the Rozelle Rule.[2] The Rozelle Rule gave the League Commissioner full discretion to control the free agency system, and he could decide what players and/or draft choices would be

[2] The language of the Rozelle Rule: "Whenever a player, becoming a free agent…thereafter signed a contract with a different club in the League, then…the Commissioner may name and then award to the former club one or more players, from the Active, Reserve, or Selection List (including future selection choices) of the acquiring club as the Commissioner in his sole discretion deems fair and equitable; any such decision by the Commissioner shall be final and conclusive."

taken from a team signing a player whose contract with another team had expired (Winting, n.d., p. 633). The plaintiffs alleged that this rule was a *per se* violation of Section 1 of the Sherman Act, and that if the court did not find that it was a *per se* violation, then it was still an restraint of trade by virtue of the rule of reason test[3] (Mackey, 1975, p.1). The then current players sought injunctive relief, while the retired and former players sought monetary damages. Lawyers for the NFL argued that this was neither a *per se* violation nor a restraint of trade, but even if it was, that it was shielded by labor exemption from antitrust laws, and that the exclusive jurisdiction for this matter was the National Labor Relations Board, not the district court (Mackey, 1975, p.1).

The first issue the court decided was that of whether the non-statutory labor exemption could be applied to immunize the NFL. The NFL claimed that the benefit of the nonstatutory labor exemption applied, and argued that, since the Rozelle Rule was the subject of an agreement with the players union and that the proper accommodation of federal labor and antitrust policies required that the agreement be deemed immune from antitrust liability. The plaintiffs asserted that the Rozelle Rule was the product of unilateral action by the clubs and that the defendants could not assert a colorable claim of exemption (Mackey, 1975, p.2).

In determining whether the issue of the Rozelle Rule fell within the scope of the nonstatutory labor exemption, the court applied three "governing principles" to guide its examination. This three-prong test of the exemption was stated by the court as follows:

> First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor polity is implicated

[3] A *per se* violation is a violation "on its face," and plaintiffs must merely establish the existence of the prohibited conduct. The rule of reason test observes the effect that the conduct has on the market, and determines if the effect is anticompetitive. (Marquette).

> sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject[4] of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining. (Mackey, 1975, p. 6)

The court determined that the restraint on trade by the Rozelle Rule only affected the parties to the collective bargaining agreement, and passed that part of the three-prong test (Mackey, 1975, p.7). The court next found that, although the Rozelle Rule does not deal with mandatory subjects on its face, its effect depresses salaries and restricts player movement, and thus does constitute a mandatory subject within the meaning of the NLRA (Mackey, 1975, p.7). Despite winning these two prongs of the test, the League lost on the final prong – whether the issue was a product of bona fide bargaining. The League asserted that in the 1970 collective bargaining agreement, the union delayed to propose to change or eliminate the Rozelle Rule as a form of quid pro quo to attain better pension benefits, but the court did not find such a "quid pro quo" was established (Mackey, 1975, p.7). The court ruled that the union's acceptance of the status quo of the Rule in the previous negotiations "cannot serve to immunize the Rozelle Rule from the scrutiny of the Sherman Act," and that the labor exemption did not apply (Mackey, 1975, p.7).

Next, the court examined whether the Rozelle Rule was a violation of the Sherman Act. In this case, a *per se* violation of a group boycott was alleged by the players, and the lower district court found that there was a *per se* violation. The appellate court, however, chose to apply the Rule of Reason standard instead (Mackey, 1975, p. 8). The League relied on Section 6 of the Clayton Act as its defense, but the court found that the context and intent of the Clayton

[4] Under the National Labor Relations Act, mandatory subjects of collective bargaining include wages, hours, and other terms or conditions of employment.

act was to protect union activity. Further, the court cited numerous examples of courts applying the Sherman Act to owner-imposed restraints on competition in professional sports. Based on these findings, the court concluded that the Rule, as then constituted, violated the Sherman Act (Winting, n.d., p. 638).

Though the court conceded that the League needs to maintain a competitive balance and implement some restrictive policies, this Rule was "more restrictive than necessary to serve any legitimate purposes it might have in this regard" (Mackey, 1975, p.11). The court's finding that the Rozelle Rule unreasonably restrains trade in violation of Section 1 of the Sherman Act was a major victory for the players. The Rule was created by the League Commissioner and unilaterally implemented by all teams, and the players were able to overturn it through the strategic use of antitrust laws. The Rule's replacement was the First Refusal/Compensation system, which allowed a team to retain a veteran free agent "by exercising a right of first refusal and by matching a competing club's offer," which effectively prevented free agency (Powell, 1987, p.1). Ten years later, a lawsuit was filed by the NFLPA that not only contested these restrictions, but also resulted in further definition of the vague boundaries of the nonstatutory labor exemption.

Powell v. National Football League (1987)

In 1987, NFLPA President and former New York Jets offensive lineman Marvin Powell sued the NFL in a class action suit over the free agency restrictions after the expiration of the collective bargaining agreement (Powell, 1987, p.1). The League argued that the restrictions on free agency were a result of a bona fide, arms-length collective bargaining and are, therefore, governed by federal labor law, and shielded from antitrust violations (Powell, 1987, p.4). The players contended that the nonstatutory labor exemption ended when negotiations reached

impasse[5]. The lower district court agreed with the players, and agreed that the exemption ended with impasse. The League appealed to the Eighth Circuit Court of Appeals (the same court which heard the Mackey appeal), which overturned the lower courts decision (Powell, 1987, p.2). Its ruling provided more definitive boundaries of when the exemption ends.

The lower district court ruled that the "labor exemption from antitrust laws terminates with respect to a mandatory subject of bargaining when employers and a union reach a bargaining impasse…" (Powell, 1987, p.2). The court would not decide whether an impasse existed in this particular instance, and instead left that up to the NLRB. When the Board found that impasse was reached, the district court granted the players' motion for summary judgment that the parties had reached impasse, opening the doors for a trial on whether the League violated the Sherman Act by implementing the First Refusal/Compensation system (Powell, 1987, p.2).

The League appealed this ruling, arguing that "federal labor laws control exclusively where the challenged restraint relates to a mandatory subject of collective bargaining, the restraint has been developed and implemented through the lawful observance of the collective bargaining process, the employees are represented by a union vested with collective bargaining authority, and the restraint affects only a labor market involving the parties to the collective bargaining agreement" (Powell, 1987, p.3). Reminiscent of the test presented in the *Mackey* case, the League argued that these existing conditions rendered the antitrust laws inapplicable, and that using antitrust law as a recourse "is incompatible with the purpose and operation of federal labor laws" (Powell, 1987, p.3).

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[5] In negotiations in collective bargaining, impasse is known as "deadlock" in which no more progress can be made between the parties. According to the NLRB, "If after sufficient good faith efforts, no agreement can be reached, the employer may declare impasse, and then implement the last offer presented to the union."

In deciding the case, the court reviewed its decisions in the *Mackey* case, and noted that *Mackey* left the court with the question of whether the effect of an agreement, the labor exemption, extends beyond the expiration of the agreement itself. The First Refusal/Compensation System was a part of the 1982 collective bargaining agreement, and now that it has expired, the court had to determine if the exemption expired with it, or if it continued past expiration and impasse. The lower district court had ruled that it expired with impasse, but the League contended that this would create a motivation for the Players to "generate impasse to pursue an antitrust suit for treble damages" (Powell, 1987, p.6). The court then took an extensive look into the nature of impasse, and the players cited a previous decision in the NBA, that dealt with a similar issue, which stated that impasse is a plausible point to end the exemption, because the deadlock could imply that some employees' consent to the prior restraints of the old collective bargaining agreement has ended (Powell, 1987, p.6).[6]

Ultimately, the Court concluded that the nonstatutory labor exemption exists after the collective bargaining agreement expires, and that, in this case, the two parties had not yet reached a point in which to appropriately invoke action under the Sherman Act. The court acknowledged that Congress had provided numerous laws governing conduct after the expiration of a collective bargaining agreement that obliges parties to continue bargaining, and that a collective bargaining agreement is not always necessary to find that contested terms fall within the scope of the labor exemption (Powell, 1987, p.8). In its finding, the court stated,

> Federal labor laws provide the opposing parties to a labor dispute with offsetting tools, both economic and legal, through which they may seek resolution of their dispute. A union may choose to strike the employer…and the employer may in turn opt to lock out

[6] Bridgeman v. National Basketball Association, 675 F. Supp. 960.

> its employees. Further, either side may petition the National Labor Relations Board and seek, for example, a cease-and-desist order prohibiting conduct constituting an unfair labor practice. To now allow the Players to pursue an action for treble damages under the Sherman Act, we conclude, improperly upsets the careful balance established by Congress through labor law. (Powell, 1987, p.9)

Though this was a loss for the Players, and despite the vague language defining the outer limits of the nonstatutory labor exemption, it still gave the NFLPA an idea of how to attack the exemption in future cases. The court found that nonstatutory labor exemption survived impasse, so long as there was still a collective bargaining relationship. In this case, the court deliberately chose to avoid picking a "termination point for the labor exemption" to be used in the future, but lawyers for both the players and the League were now aware that impasse was not sufficient to the nullify the exemption (Powell, 1987, p.11). Following this case, lawyers for the players pursued a test case to explore what further action would be necessary to remove the exemption and expose the League to antitrust litigation.

McNeil v. National Football League (1992)

Five years after the Powell case, that further action to terminate the exemption was tested out in the case of McNeil v. National Football League of 1992. Eight players filed a lawsuit that challenged another restriction on free agency, the NFL's "Plan B" Rule (McNeil, 1992, p.1). After the Powell decision, the NFL had proposed two options to the NFLPA: Plan A, which was a continuation of the Right of First Refusal/Compensation system, or Plan B, which cut player benefits but granted free agency to a limited number of players per team. The NFLPA rejected both of these proposals, and the NFL warned the union of its intent to unilaterally implement

Plan B. The NFLPA promptly filed a suit seeking a preliminary injunction against Plan B, and ultimately launched a multi-party suit against the League (Rieger, 1992, p.50).

Prior to this lawsuit however, the NFLPA had taken steps to renounce its status as a collective bargaining entity that represented the Players. The Players voted to renounce the union as their bargaining representative, the NFLPA changed its bylaws to prohibit engaging in collective bargaining, filed a final LM-2 with the Department of Labor, and filed for a non-labor tax exempt status from the Internal Revenue Service (Rieger, 1992, p.51). After the decision in Powell, the Players had to choose between their union and collective bargaining rights and protections under federal labor law, or relinquish those rights to pursue litigation under antitrust laws. The Players elected to follow the latter, and the NFLPA reclassified itself as a player advocacy organization, not as a union. In persuading the players to renounce collective bargaining and disclaim further interest in bargaining, the union emphasized that the union was originally created to protect the players, but that the recent court decision in Powell created a situation in which the continuance of the union would only serve to protect the League from antitrust liability and treble damages (Rieger, 1992, p.52).

The players and the NFLPA were making a risky move by renouncing and disclaiming the NFLPA as the exclusive collective bargaining representative. The NFLPA would no longer be able to require dues payments from members, so it was financially constrained. Also, the League was now no longer legally obligated to bargain in good faith with one exclusive representative, and negotiations between players and teams could quickly become a race to the bottom in terms of benefits and salaries, or an even more competitive negotiations between agents and teams, without any guaranteed contractual benefits of a collectively bargained agreement, such as minimum salaries determined by years of service, for example (Rieger, 1992,

p.52). However, the players ultimately decided that these risks were worth the potential benefit of once again clearing the way for antitrust litigation, treble damages, and the dismantling of free agency restrictions altogether.

In the players' lawsuit against Plan B, the League again asserted the labor exemption as its defense against the antitrust charge, but the district court judge held that "because the NFLPA was no longer a labor union and thus there was no longer a collective bargaining relationship, the nonstatutory labor exemption had expired" (Rieger, 1992, p.54). The appellate court declined to review this decision, and thus the Players were able to proceed with the litigation based on its antitrust merits, and the renunciation and disclaimer strategy had served its purpose of exposing the League to antitrust liability (Rieger, 1992, p.54). A jury verdict decided that the Right of First Refusal/Compensation system under Plan B was a violation of antitrust law. The jury found that the Rule had a substantially harmful effect on competition for players' services, it was more restrictive than reasonably necessary, and that the Players had suffered economic injury as a result of its imposition (Reiger, 1992, p.56). The eight players were awarded treble damages of $1.6 million, and more importantly, the restrictions on free agency in the NFL's Plan B were declared illegal (Freeman, 1992, p.1). Following the *McNeil* case, a lawsuit was filed in Minnesota in 1993 by Philadelphia Eagles defensive end Reggie White that sought to enjoin any future implementation of Plan B, and sought damages for the previous imposition of Plan B, and other practices, such as teams' refusal to negotiate individual benefits packages while the NFLPA was still renounced and disclaimed. This case resulted in the establishment of the free agency and salary cap system, followed by the re-establishment of the NFLPA as a union, and the negotiation of a new collective bargaining agreement in 1993, that had been extended and renewed several times and resulted in labor peace in the NFL for 18 years (Rieger, 1992, p.57).

This case is a dramatic example of how antitrust litigation can have a strategic impact on the terms of a collective bargaining agreement. The NFLPA had attempted for years to secure free agency, and it was only after taking the risk of renunciation and disclaiming interest, and exposing the League to antitrust liability, was it able to secure a court decision to declare traditional free agency restrictions illegal. The collective bargaining process, and the traditional sources of leverage found in economic weapons such as strikes and in negotiation was not enough, but the antitrust litigation was a powerful piece of leverage that coerced the League into accepting a free agency system.

Brown v. Pro Football (1996)

In 1987, after the expiration of the 1982-1987 collective bargaining agreement, and prior to the renouncing of bargaining status, the NFLPA brought antitrust charges against the NFL after an impasse in negotiations led to unilateral implementation by the NFL of a uniform practice squad salary (Brown, 1996, p.1). Despite the ruling in *McNeil*, the appellate court in this case (which was determined in lower courts around the same time as *McNeil*) found the League was immune from antitrust liability, so long as the constraints on competition were imposed through a collective bargaining process and affected a labor market characterized by collective bargaining (Brown, 1996, p.1). This decision was appealed to the Supreme Court, who affirmed the lower court's finding of immunity, though it did narrow the scope of the exemption.

The Court reiterated the historical reasoning for the nonstatutory exemption, which is to limit an "antitrust court's authority to determine, in the area of industrial conflict, what is or is not a 'reasonable' practice" (Brown, 1996, p.2). The Court also cited the logic for the exemption, which is to prevent requiring employers and employees from bargaining together, but then subsequently ban any competition restricting terms they may both agree to. It also stated that the

exemption must apply to both employers and employees to allow the collective bargaining process to work as Congress has intended (Brown, 1996, p.2). This is a significant departure from the language present in earlier cases (such as *Robertson*), and shows the development that the nonstatutory exemption has gone through after two decades of litigation.

Because of this development, the Court focused its effort looking at the scope of the exemption, specifically whether it applies to "an agreement among several employers bargaining together to implement after impasse terms of the last best good faith offer" (Brown, 1996, p.2). The court held that in this particular instance, the conduct did not violate labor law or policy, and thus the nonstatutory exemption was applicable (Brown, 1996, p.5). This was a victory for the League, and created uncertainty for the Players who had (until this case) been successful with pressing further in antitrust litigation. The Supreme Court ruling in *Brown*, in combination with the history of cases revolving around the nonstatutory exemption, created a unique paradox in which, as the framework and limitations of the exemption became more developed, it became less certain how each case would be viewed in front of the court. An example of this is in the similar factual backgrounds of *McNeil* and *Brown*, and two very different decisions by the courts. Ironically, this volatility became a strong weapon for Players in both leagues in the 2011 CBA negotiations. After the successful renunciation and disclaiming interest, and victory in *McNeil*, the players had a known process that would negate the exemption. This meant that in the event of an antitrust lawsuit, the League would be faced with the possibility of treble damages at the discretion of a judge.

Chapter 4

The 2011 NFL Lockout

In 2011, the NFLPA exploited that legal uncertainty as it pursued antitrust litigation as the core strategy in bargaining with the League after the expiration of the collective bargaining agreement. The previous collective bargaining agreement (CBA) was signed in 2006, and was set to run through the end of the 2013 season. In May 2008, the owners decided to opt-out of that deal, "setting the stage for a potential work stoppage at the end of the 2011 season" (Grow, 2013, p.479). The deadline to secure a new deal was the expiration of the old CBA on at March 3rd, but both sides agreed to extend that deadline one week to March 11th (Grow, 2013, p.479). Despite this extension, the league and union were unable to reach a decision; the lockout was imminent. In a pre-emptive move, the NFLPA opted to disclaim interest just before the CBA expired, in accordance with stipulations of the previous agreement. Not surprisingly, the following day the League locked out the players, and the union filed an antitrust suit against the league (Grow, 2013, p. 479). This suit initiated a complex debate on court jurisdiction, and the ultimate decision left the league vulnerable to extensive antitrust damages.

Causes

Prior to the opt-out, there were shifts in leadership for both the NFL and the NFLPA. In 2006, Roger Goodell, who was hired in the 1980s by long-time commissioner Pete Rozelle, succeeded Paul Tagliabue as NFL commissioner (Staudohar, 2012a, p.31). For the NFLPA, Gene Upshaw died suddenly from pancreatic cancer in 2008, and he was replaced by DeMaurice

Smith, a trial lawyer who adopted a more adversarial stance than Upshaw (Staudohar, 2012a, p.31). This sudden shift in leadership on both sides strained the relationship between the league and union and created the environment for a combative negotiations process (Staudohar, 2012a, p.31).

In addition to the shift in leadership, there was also a great disparity between the demands of the league and union. The owners wanted, among other things, to gain a larger share of revenue, to add two extra games to the regular-season schedule, and to implement a salary cap on rookie players (Grow, 2013, p. 479). There were some issues with these demands however. The union staunchly opposed the core demands of the owners. Player safety had become a major concern, and a 2010 poll of NFL players showed that 82% opposed extending the regular season due to risks of violent hits, and increased risk of career-ending or interrupting injuries (Staudohar, 2012a, p.32). Additionally, the League had failed to demonstrate a financial need to warrant such a reduction in the players' share of revenue.

Brady v. National Football League (2011)

The 2006 CBA stipulated that if the union was to disclaim interest, it had to do so before the expiration of the agreement, or else wait 6 months to file an antitrust lawsuit. Because of this, once negotiations had broken down and it was apparent a new deal would not be made, the NFLPA elected to disclaim interest hours before the expiration (Grow, 2013, p.479). That same day, ten NFL players (specifically, nine players and one prospective player) filed a class action suit against the league and its 32 teams (Brady, 2011, p.2). The case, known as *Brady v. National Football League*, asserted that the owners intent to implement a lockout following the expiration of the CBA would be a group boycott of unrepresented employees and there in violation of the Sherman Antitrust Act.

Disclaiming Interest

The League had threatened to lockout the Players if there was no new agreement made. During the two-year negotiations between the league and the union following the opt-out, the League filed an unfair labor practice charge with the NLRB that claimed the union failed to bargain in good faith, which the union adamantly denied (Grow, 2013, p. 479).

The month following the NLRB charge, with the approaching CBA deadline, the NFLPA disclaimed interest -- an action that the league insisted was a "sham." (Brady, 2011, p.4). Despite the league's claim, the union took careful steps to ensure that the disclaiming of interest would be regarded as legally valid. The NFLPA amended its bylaws to prohibit collective bargaining with the league, filed a termination notice with the Department of Labor, and asked the IRS to reclassify the union as a professional association instead of a labor organization (Brady, 2011, p.4). The difference between an association and a labor union is that an association is simply a group of professionals with similar interests, but does not have the legal right to engage in collective bargaining with an employer, and the employer is not legally required to bargain in good faith with the association (Definitions, n.d., p.1).

This was a risky maneuver for the NFLPA, because without a labor representative, the players would be unable to negotiate collectively, especially on pressing economic issues. Also, the NFLPA would not be able engage in previous duties, such as the ability to process player grievances or jointly administer and monitor, with the League, the drug testing program. Moreover, by disclaiming interest, the NFLPA could not collect dues from its members,

significantly impacting and limiting its resources. This risk was heightened by the ensuing litigation, which could easily have taken years to unfold. (Staudohar, 2012a, p.33).

Lockout

The League's maneuver was not without its risks, either. Stopping work indefinitely not only prevented the players from practicing, but also threatened the upcoming season -- further threatening revenue from ticket sales, television contracts, and angering sponsors. Under the terms of the lockout, the players would receive any compensation or benefits, could not enter or use league facilities, nor could they perform any "employment duties" which ranged from making promotional appearances, practicing or working out, or attending meetings (Brady, 2011, p.5). There is a significant management leverage to implementing a lockout, much more powerful in football than in basketball. For example, NBA players have the benefit of playing in other leagues in other nations in Europe or even china. Moreover, the length of an average NBA player's career is significantly longer than that of an NFL player's career. Because of the restraint on a player's salary, and because of the brevity of a player's career, the NFL had a powerful weapon in the lockout, and could exude great pressure on the players and the Players Association to resolve the litigation and get a deal done (Lock, 1989, p. 355).

Brady Suit

It may seem counterintuitive for a union deep in negotiations and facing a major labor strife to relinquish its legal rights to collective bargaining, but there is a strategic value in this tactic that made it worth taking the risk. By removing its status as a collective bargaining representative, in accordance with the expiration of the CBA, the NFLPA was laying the foundation for an antitrust lawsuit. With no involved labor organization and no ongoing negotiations, the collective bargaining relationship is considered to no longer exist, and the

league was then exposed to antitrust litigation (Brady, 2011, p.5). The lure of antitrust litigation becomes even more appealing with the possible of treble damages should the players be successful.

The suit was filed in the US District Court for the District of Minnesota by lead plaintiff Tom Brady, New England Patriots' superstar quarterback and nine other players, as a class action suit on behalf of all current and future players (Brady, 2011, p.1). The suit made antitrust, tort, and contractual claims against the league, and asserted that the owners' lockout was an "unlawful, horizontal group boycott and price-fixing agreement" among competitors (Grow, 2013, p. 479). In addition to damages, the players sought to enjoin the lockout to prevent any further antitrust injury. The league responded by amending their NLRB charge to protest the validity of the disclaimer, and hired one of the nations' preeminent antitrust lawyers, David Boies (who ironically would later go on to represent the National Basketball Players Association during the NBA lockout) (Staudohar, 2012a, p.33).

According to the ultimate Eighth Circuit Court decision, the players argued that there was no longer a collective bargaining relationship between the league and the NFLPA (Brady, 2011, p.5). Using the *Brown* decision as precedent, the players asserted that with the dissolution of that relationship, the nonstatutory labor exemption no longer applied, and the league was no longer protected from antitrust liability. The alleged antitrust violations included the intent of the league to implement numerous anti-competitive practices, including a salary cap for recently drafted "rookie" players, a salary cap on current players, and a restriction on free agents' ability to join other teams (Brady, 2011, p.5). In addition to these alleged Sherman Act violations, the players also alleged, that the lockout violated state contractual law "by depriving players of contractually owed compensation," and violated state tort law "by interfering with players' existing contracts

as well as their opportunities to enter new contracts with NFL teams" (Brady, 2011, p.5). The League countered the players' claims by arguing that the league was immune from antitrust litigation under the nonstatutory labor exemption. Further, the league argued that the court did not even have the authority to issue any injunction, because the Norris La-Guardia Act prohibits injunctions arising from labor disputes, that such an injunction would violate the prohibition against injunctions arising from labor disputes, and that the issue should be deferred to the proper jurisdiction under NLRB (Brady, 2011, p. 5).

The case was argued in front of Judge Susan Nelson, who deliberated for three weeks before finding in favor of the players and issuing a preliminary injunction on the lockout. Judge Nelson relied on an interpretation from the Norris La-Guardia Act, which provides that injunctions will be issued only when "substantial and irreparable injury is threatened" (Staudohar, 2012a, p.33). Judge Nelson found that the plaintiffs showed that they would likely "suffer irreparable harm absent the preliminary injunction...and are suffering such harm now" (Futterman, 2011, p.B3). The League immediately appealed the decision to the Eighth Circuit Court, widely considered to be one of the most conservative and pro business courts, although a court that matters involving the NFL and its players, had in the past sided with the players (Schwartz, 2011, p. B11).

Ironically, Boies used the same law as his argument in his appeal for the League. He argued that the Norris La-Guardia Act prevented Judge Nelson, or any judge, from issuing an injunction to stop the lockout, and that the intent of the Act was to keep courts out of the business of issuing injunctive relief for either strikes or lockouts (Grow, 2013, p.480). The players' victory in the lower court was short lived, as the appellate court issued a temporary stay of the injunction, followed a few days by completely vacating the injunction. The decision rested

on jurisdiction, and the prohibitive language and intent of Norris La-Guardia Act that prevented the courts from issuing injunctions during labor disputes. Specifically, the court cited Section 4(a), which prohibits federal courts from issuing "any permanent or temporary injunctions in any case involving or growing out of a labor dispute" (Grow, 2013, p.480). Notably, the court rejected the player's argument that it could not be considered a labor dispute due to the dissolution of the union, and decided that the ongoing presence of a union was not required for there to be a labor dispute. Further, the court did not express any view on "whether the League's nonstatutory labor exemption from the antitrust laws continues after the union's disclaimer" (Brady, 2011, p.9).

Thus, while the injunction was vacated, the League was not given any decision on its antitrust liability, and it was still vulnerable to antitrust litigation. With this threat still looming over the League, the League and union resumed negotiations and reached a 10-year agreement on July 25, 2011, just three weeks after the final Brady decision from the Eighth Circuit (Grow, 2013, p 481). This agreement, which included concessions from both sides, and its outcomes and impact, will be discussed in [following chapters].

Chapter 5

The 2011 NBA Lockout

Just three months after the start of the NFL lockout, the National Basketball Association (NBA) found itself involved in its own lockout and antitrust litigation -- though it arrived at this situation differently than the NFLPA. The previous CBA was signed in 2005 without any work stoppages, with relatively few new changes in the terms (Staudohar, 2012b, p.29). That stability disappeared due to an abrupt attempt by the NBA to create a major change in the status quo. In 2010, the owners indicated they wanted to greatly reduce the players share of revenue, replace guaranteed contracts with annually renewed contracts, and implement a “hard” salary cap by eliminating most salary cap exemptions (Grow, 2013, p. 482). The desired reduction in revenue was speculated to be as high as a 14% reduction, and the hardening of the cap would further reduce player salaries by hundreds of millions of dollars (Staudohar, 2012b, p.30). Unlike the NFL, which sought to reduce players share of revenue without demonstrating the financial necessity to warrant such a reduction, the NBA owners had asserted they were losing up to $300 million per year, and that these concessions were necessary to keep the industry financially viable (Grow, 2013, p. 482).

The league had claimed that 22 of its 30 teams were no longer profitable, and that the league could not sustain itself financially under the current system. In the 2010-2011 season alone, teams supposedly incurred losses of over $370 million (Grow, 2013, p. 482). This financial hardship was the foundation of the leagues reasoning to reduce the players’ share of

revenue – a claim that was not made in the NFL[7]. In addition to the reduction in players share, the owners also wanted to reduce the level of power and control a player had to decide what team to paly for (Grow, 2013, p.482). In recent years, star players left smaller market teams and "forced them to trade to rich clubs," and in the example of the Miami Heat, were able to amass powerhouse teams (Staudohar, 2012b, p. 30). This led to an issue with the salary cap, and the owner emphasis in implementing a harder cap. Though there was a luxury tax[8] in place, bigger market (and thus wealthier) teams could more easily afford to pay that tax and keep star players. Thus, the league hardening the cap would narrow the gap between bigger and smaller market teams, and create a more stable, competitive league (Staudohar, 2012b, p.30).

In light of such strong economic positions of the league, it was expected that the owners would be willing to enter into a lockout, and a long one if necessary (Grow, 2013, p.482). To combat this, it was expected that the NBPA would follow the example of the NFLPA and disclaim interest to pursue antitrust litigation. However, the NBPA initially relied on the collective-bargaining process, and utilized only labor laws to gain leverage in negotiations. This hesitation to disclaim and pursue antitrust litigation stemmed from a few reasons.

First, the union filed an unfair labor practice charge with the NLRB in May of 2011 (Grow, 2013, p. 482). This charge alleged that the league had failed to negotiate in good faith, and if the union dissolved itself before a decision was reached, the NLRB would dismiss the charge altogether. This NLRB charge is also tied to the second reason the union may have

[7] The NFL never made explicit claims of financial hardship, because under the NLRA, if such claims are made, unions have the right to relevant financial information in collective bargaining. Essentially, the NFL was unwilling to open its books to the NFLPA, but the NBA was willing to open its books to the NBPA.

[8] In professional sports, a luxury tax is a "surcharge put on the aggregate payroll of a team to the extent to which it exceeds a predetermined guideline level set by the league" (the salary cap) (Dietl, 2010). It is used to prevent large market and wealthier teams from signing the most talented players, and to preserve competitive balance.

hesitated in disclaiming interest (Grow, 2013, p.482). The union ultimately hired David Boies, who had just represented the NFL in their fight against the injunction sought by the NFL players. Boies, and the NBPA, knew that that similar injunctive relief from the NBA lockout would likely not be available, but the NLRB was in a position to issue an injunction should it rule in favor of the union in the unfair labor practice charge (Staudohar, 2012b, p. 31). Thus, in order to secure an injunction from the lockout and stave off some of the league's leverage, the union figured its best bet was to stay within the realm of labor law.

Additionally, the league pursued an interesting lawsuit that also caused the union to hesitate disclaiming interest. In August of 2011, just one month after the start of the lockout, the League filed a suit that sought a declaration that the lockout did not violate antitrust law (Grow, 2013, p. 482). More significantly, that suit also sought a declaration that should the NBPA decide to dissolve itself through decertification or disclaiming interest, all player contracts would be void and unenforceable. The league essentially argued that all player contracts were "inextricably intertwined" with the CBA since it specifies most of the provisions in the contracts, and the dissolution would not only render the CBA null and void but also the player contracts (Grow, 2013, p. 482). Though this threat would have made the union at least hesitate pursuing disclaiming interest, should the league win such a declaration, it does show league's fear of antitrust tactics. "The preemptive lawsuit showed that [the League] believed the union dissolution – along with the leverage it would provide to the players in the form of potential treble damages – presented a significant threat to their bargaining position." (Grow, 2013, p.483).

As the union and league continued with the collective bargaining process, the league remained steadfast on receiving a 50-50 revenue split concession from the union (Staudohar,

2012b, p.31). After holding this position over a year of negotiations, the union finally offered a split that would give players close to 54%, and a reduction of $500 million over the span of five years. The owners rejected this offer, and the lockout began with the expiration of the CBA on July 1, 2011 (Staudohar, 2012).

Months after the lockout began, little progress was made by both sides. As training camp came closer, more pressure mounted to get a deal done, and more owners and players participated in the negotiations. The Federal Mediation and Conciliation Service was brought in to help facilitate a deal, and though this was credited with keeping negotiations focused and progressing on small issues, no real progress on the major issues was made (Staudohar, 2012b, p.32). By October, the threat of losing regular season games loomed, and the union progressed with offers and indicated that it would accept less that 53% of revenue. The league responded by insisting on the 50-50 split, stating that it was no longer negotiable – a statement and tactic that agitated the union. On October 10, the first two weeks of the season were cancelled, and the union again conceded to a reduction in revenue down to 52.5%, which the league again rejected (Staudohar, 2012b, p.32).

Commissioner Stern continued to cancel weeks from the season, until he issued an ultimatum: the union could accept the 50-50 split by November 9, or the league would lower the terms to a 47% split (Staudohar, 2012b, p. 32). The union responded that it would accept the 50% split if the league agreed to be less restrictive in its free agency demands. The league rejected this, wanting to pursue a more punitive luxury tax. Frustrated by the regressive bargaining by the league, and the lack of progress being made while the season continually became shortened, the union finally disclaimed interest to pursue more aggressive legal tactics

on November 14 (Grow, 2013, p. 483). The players filed separate simultaneous antitrust suits that were merged into one and heard in a U.S. District Court in Minneapolis.

Stern called this move a “charade” and warned of a “nuclear winter of the NBA” (Grow, 2013, p. 483). In response, the league filed an unfair labor practice charge with the NLRB, claiming that the union was not bargaining in good faith. The union pushed for a summary judgment from the lawsuit, but the litigation could have taken months or even years to reach an ultimate decision. In a last ditch effort to save the season, and preserve a 66-game season beginning on Christmas Day (a traditionally prominent game day for the sport), both sides pushed to get a deal done. On November 26 – just two weeks after the union disclaimed interest and filed an antitrust lawsuit – an agreement was reached (Grow, 2013, p. 483).

Sixteen games were lost, and it is estimated that around $400 million was lost for each side (Staudohar, 2012b, p.31). Fifty negotiating sessions spanning the course of two years, and a five month lockout, were all resolved just two weeks after the Players Association ceased functioning as a collective bargaining representative of the players and assisted the players in the pursuit of antitrust litigation (Grow, 2013, p. 483). Of course, there were other factors affecting eventual achievement of the agreement, but it is evident from both the NBA and NFL lockouts that disclaiming interest and antitrust lawsuits provide a profound form of leverage. It was the primary form of leverage utilized against the NFL, which had a much swifter lockout-to-agreement timeline than the NBA, which hesitated on its use. However, when the NBPA did decide to use this tactic, a deal was done in just two weeks. Moreover, the NBA preemptively sued to get a preliminary injunction to declare any ensuing antitrust litigation invalid, a move that that signified the League’s concern of the tactic of antitrust litigation and the strategic leverage renunciation and disclaiming of interest gave the tactic.

Chapter 7

Outcomes

National Football League

After over four months of the lockout, the NFL and NFLPA reached a 10-year agreement less than three weeks after the Eighth Circuit issued its decision in *Brady*. The Players conceded to some of the financial demands of the League, including a reduction in their share of revenue, and a stricter limit on rookie salaries. In return, the League accepted delaying talks of extending the regular season by two games for at least another three years, raising the minimum amount that teams must spend on player salaries each year, and increasing protection against injuries for players, by reducing allowed practices in the offseason and preseason (Staudohar, 2012a, p.34).

The length of the deal itself can be seen as both a positive and negative for both sides. After such a lengthy lockout, the prospects of a stable and peaceful continuous relationship for ten years, without the possibility of another work stoppage, is a relief to the players and the league, as well as the fans. However, the length can also be a detriment, because as new issues arise, these issues must be tabled until 2020. Given the brevity of a player's career, a particular issue may never be resolved during this time.

The major changes in the new CBA were the economic and financial issues, notably the revenue split. Under the prior agreement, the Players share was about 51%, which dropped as low as 47% under the new agreement. The salary cap was set at $120 million, and teams must spend at least 89% of that cap (Staudohar, 2012a, p.35). Thus, although the Players are receiving

a reduction in the overall share in revenue to players, the minimum teams must spend on player salaries has increased. Additionally, a rookie salary cap was established, which greatly reduced rookie salaries. The rookie cap includes a ceiling and floor limit a team can spend on draft picks, depending on the round and number of picks, and all first round draft picks must sign four-year deals with a fifth-year team option. The money that teams save by paying rookies lower salaries will be redistributed to veteran players (Staudohar, 2012a, p.35).

Based on the dramatic reduction in revenue share and in rookie salaries, certain media outlets reported that the NFL "obliterated" the Players, or that the "NFLPA absolutely failed the NFL players" (Volin, 2013, p.1). A dramatic example of the economic disparities between the previous and current CBA often cited was a comparison between No. 1 draft picks Sam Bradford versus Cam Newton. Bradford was drafted in 2010, and received a contract worth $78 million, and was guaranteed $50 million. After the new CBA, the Newton was expected to receive only $28 million (Staudohar, 2012a, p.35). In response to public criticism, NFLPA Executive Director DeMaurice Smith said, "We didn't get everything that either side wanted…but we did arrive at a deal that we think is fair and balanced" (Klopman, 2011, p.1).

That balance was achieved by keeping the regular season at 16 games instead of increasing it to 18, which was a major compromise by the League (Rosenthal, 2011, p.2). The Players also secured the elimination of two-a-day padded practices, limited full-contact practices, and a reduction in offseason practices. Moreover, $50 million was set aside for medical research, healthcare programs, and charities, and current players now have the option to remain in the medical insurance program for life if the players pay the premium cost (Klopman, 2011, p.1). Thus, while the Players may have lost on some financial issues, the safety and health of the game was increased, and this could possibly lead to longer and better careers for some players.

The Players also exchanged the lower salary cap for an increase in the minimum teams must spend. In addition to having to spend 89% of the cap, the CBA stipulated that 99% of the cap must be spent in aggregate in the first year, and after that 95% must be spent league-wide (Rosenthal, 2011, p.2). This part of the agreement ensures that teams that were previously spending much less than the cap are forced to spend more on players. Additionally, the new CBA provided for $900 million to $1 billion to be set aside for retired players' benefits, and $620 million to be used to create a "Legacy Fund" which would increase pensions for pre-1993 retirees (Rosenthal, 2011, p.3).

National Basketball Association

Two weeks after the NBPA decided to disclaim interest, NBA Commissioner Stern's warning of a "nuclear winter" proved to be short-lived and a deal was finally reached (Grow, 2013, p.483). A fifteen-hour negotiation ended the labor dispute, and settled the Player's lawsuit, and the resulting CBA had substantial changes in the economics of the league.

Under the 2005 CBA, Players received 57% of the Basketball Related Income (BRI), but under the new CBA, the Players only receive between 49-51%, with 1% being used to fund post-career benefits (Gould, 2012, p.4). This was the biggest win for the Association and owners, and the one that they were adamant about achieving. This was a major loss to the Players, especially since they would lose about 20% of their 2011-2012 salaries due to the missed games during the lockout (Staudohar, 2012b, p.32). Similar to the NFL, these financial losses to the Players were offset by other terms of the CBA.

First, the length of the agreement is ten years, with either side being able to opt out earlier in 2017. This is a powerful win for the Players, because television contracts with the NBA are up for renewal in 2016 (Coon, 2011, p.1). It is likely that the Players will opt-out to pressure the

NBA into getting a deal done as quickly as possible, in order to preserve the lucrative television deals. There were also increases in minimum team salaries, and teams must now spend at least 85% of the cap in the first two years after the CBA, and 90% for the remaining years, an increase from 75% under the old CBA (Coon, 2011, p.3). There is also a more punitive luxury tax, which the Players secured after successfully negotiating against a hard salary cap. Now, large market teams will pay much higher fines for a higher payroll, and will accrue higher fines for repeat offenses (Coon, 2011, p.3). This will help offset the likelihood of wealthier teams amassing too much talent in comparison to smaller market teams.

Chapter 8

Conclusions

In securing new collective bargaining agreements, both the NFLPA and NBPA relied on the successful and strategic use of antitrust litigation. After decades of case law, and supporting precedent, the two unions renounced and disclaimed interest as a collective bargaining representative in order to remove the nonstatutory labor exemption protecting the Leagues from antitrust law. Though the two unions implemented this tactic differently, namely with the NBPA hesitating its use of the tactic, it proved to be a vital and powerful source of leverage for both unions. The NBPA had pursued the traditional collective bargaining process, and pursued an unfair labor practice charge with the National Labor Relations Board, for months with little to no progress in negotiations. Yet, just two weeks after decertifying and filing an antitrust suit, a deal was made. As stated by Nathaniel Grow in the Vanderbilt Law Review,

> "Given the speed with which the owners retreated from their previous take-it-or-leave-it bargaining posture once the NBPA disclaimed interest, it certainly appears that the NBA Players' decision to finally pursue antitrust litigation against the League provided them with valuable new leverage in the negotiations." (Grow, 2013, p.483)

The NBA even demonstrated its own concern over the tactic as it preemptively sought a declaratory judgment from the court, that its lockout did not constitute an antitrust violation, and that any future dissolution of the NBPA would render any current player contracts void. Thus, the Association was so keenly aware of the potential power that an antitrust suit could have, it sought to stave off that tactic as early as possible from both ends: asserting that there was no

antitrust violation to begin with, and to gain legal leverage over the players to scare them from changing the status of the union. Moreover, despite Commissioner Stern's threat that the disclaiming of interest by the NBPA was provoking a "nuclear winter" between negotiations, once the players took that step, the League was forced into a 15-hour negotiation that finally resulted in an agreement (Staudohar, 2012b, 31).

The situation was similar in the NFL, who immediately pursued the decertification and antitrust strategy as soon as the collective bargaining agreement expired. Despite the fact that the *Brady* suit's decision did not specifically answer the substantive antitrust merits of the case, the appellate court's remanding to the lower court still allowed the possibility of another trial, evidentiary hearing, and potential violations. "Thus, even though the players had failed to convince the court to enjoin the NFL's lockout, the Brady suit still provided players with some leverage over the league in the form of the threat of continually escalating treble damages" (Grow, 2013, p. 481). This threat served as an impetus to achieve a deal, and an agreement was reached just three weeks after the appellate court's decision.

It can also be asserted that the aggressiveness with which the NFLPA pursued the antitrust litigation expedited its resolution of the labor dispute, and that the NBPA could have prevented a substantial part of its missed season had it pursued the strategy sooner. Because of the delay in its use, the NBPA cost its players 20% in salaries from lost games, and forced some athletes to play in other countries to find work (Staudohar, 2012b, p.31). Moreover, there was a resounding disdain for the eventual deal made by the players, and disdain over NBPA executive Billy Hunter's leadership, which led to his firing by the players soon after the deal was made.

The power of the disclaiming and antitrust strategy is also evident from the substantial risks that both the players and the union itself took in order to successfully pursue that strategy.

By voting to renounce the union as its collective bargaining representative, the players were also renouncing their own right to any protections afforded by labor law, including the right to assert unfair labor practice claims, such as the legal guarantee that an employer will bargain in good faith about mandatory subjects of bargaining and provide relevant bargaining information. The union also forgoes its right to collect dues from its members, and must finance any future operations through less conventional and consistent methods. The willingness by the union and the players renounce collective bargaining shows that the potential rewards significantly outweigh those risks.

Though both of these sports are protected from a lockout or strike for the next few years, it remains to be seen if this strategy will be pursued again. Some scholars argue that given the fleeting nature of disclaiming interest (as opposed to decertification, which requires a full twelve months before the union can be reinstated), it will likely be argued in future court cases that the disclaiming of interest by sports unions is simply to gain short term leverage, and therefore does not live up to the standard set forth in *Brown*. The actions of the Players in both sports in 2011 are clear examples, since not only were the antitrust suits dropped but the unions were also reformed once an agreement was reached (Grow, 2013, p. 484).

Despite this, some scholars argue that given its success in recent labor disputes, this practice could become the model for the future of collective bargaining in professional sports (Grow, 2013, p. 484). As shown by both the NBA and the NFL, who did not receive a winning decision from the courts, the mere filing of an antitrust suit itself is enough leverage to coerce the respective league to make progress in negotiations. The threat of disclaiming interest prompted the NBA to significantly improve its best offer, and secure a deal a few weeks after the suit was filed, and this can serve as an example that players can expect significant concessions from

owners through the leverage of disclaiming interest and antitrust litigation. Moreover, in the NFL, though the injunctive relief against the lockout was not granted in *Brady*, it still could be granted in future labor disputes and lockouts, and such an injunction would significantly weaken the economic leverage of the League.

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Education:

The Pennsylvania State University, University Park, PA — Expected Graduation: May 2015
Schreyer Honors College
Paterno Fellows Liberal Arts Honors Program
B.S. in Labor Studies and Employment Relations
Minor in Rhetoric
Honors Thesis: Collective Bargaining in Professional Sports – In Progress

University of Oxford, St. Catherine's College, Oxford, United Kingdom — Hilary and Trinity Terms, 2014
Direct Enrollment Study Abroad
Courses: Criminal Law, Public International Law, Business Ethics, Organizational Behavior

Achievements and Awards:

Publication of "Telling it From the Mountain: Fannie Lou Hamer and the 1964 Democratic National Convention" — February 2014
- Publication of research paper in the national journal Young Scholars in Writing
- Competitive process involving over a year of reviews from specialists in the field and in English research, peer reviews of previously published writers, and continual rounds of revisions

The Evan Pugh Scholar Award — March 2014
- Given to Junior students with a 3.99 GPA or higher, and are in the top 0.5 percent of their class

The President's Sparks Award — March 2013
- Given to Sophomore students with a 4.0 GPA

The President's Freshman Award — April 2012
- Given to Freshmen students with a 4.0 GPA

Academic Involvement:

The Florida State University Summer for Undergraduates, Tallahassee, Florida — **May – June 2013**
- Four-week pre-law program that included law classes, law firm and court visits, and mock trials
- Attended classes in Constitutional Law and Legal Writing, culminating in both an oral argument and mock law school exam
- Presented a 15-minute speech and slide show detailing the different areas of sports and entertainment law
- Received award for Best Oral Argument

Africana Research Center Scholar Exhibition, University Park, PA — **October 20, 2012**
- "Telling it From the Mountain: Fannie Lou Hamer and the 1964 Democratic National Convention"
- Competitive undergraduate research symposium for exemplary research on diversity and African culture
- Created a poster showing research, methodology, conclusions
- Gave extemporaneous speeches in response to audience questions about topic

Penn State University Explore Law Program, University Park, PA — **May 2012**
- Week-long seminar at Penn State Law School
- Focused on law school admissions, various courses in law school, and potential career paths within legal field
- Participated in mock trial, wrote two case briefs and attended mock law school classes

Internships:

Administrative Intern at Luzerne County Public Defenders, Wilkes-Barre, PA **May - August 2012**

- Interviewed clients and applicants daily to determine if they qualified for representation
- Interviewed incarcerated clients and applicants in person and via skype
- Shadowed attorneys in courtroom proceedings
- Worked primarily in investigative unit searching for relevant documents, witnesses, and police records
- Supervised two high school interns weekly, instructed them in computer systems and court procedures
- Input data into LegalEdge program and PA Unified Judicial System web portal

Literacy Intern, English as a Second Language Tutor, University Park, PA **September- December 2013**

- Held weekly meetings with an adult learner, to provide individual tutoring, and visited an adult learning center to tutor multiple students
- Tutored in English language, grammar, reading, and culture
- Participated in a university-wide book drive to raise awareness about literacy issues

Summer Intern at Alcaro and Maguire Law Firm, Kingston, PA **June 2011**

- Processed, organized, and filed cases
- Took notes on meetings with clients, shadowed attorney to court cases

Leadership Involvement:

Paterno Fellows Program Ambassador **September 2012 – Present**

- Facilitate discussions following a culturally controversial film by hosting question and answer panel
- Speak to prospective students about benefits of the Program and Penn State College of the Liberal Arts
- Meet with Liberal Arts Alumni Board of Directors to encourage scholarship funding and mentorships

Vice President of Society of Labor Employment Relations **September 2012 – Present**

- Work closely with department administrators and professors, and alumni to coordinate monthly meetings
- Maintain alumni relations, plan and administer student events such as alumni meetings, mock interviews, resume reviews, and student-faculty events, and provide academic support

Student Volunteer Coordinator for the Beaver Stadium Run **November 2012 – April 2013**
October 2014 - Present

- Attend monthly meetings with community members, Penn State University officials, and Special Olympics of Pennsylvania representatives to plan the event
- Serve as secondary coordinator, and assign other student volunteers to posts and tasks

Learning Edge Academic Program Mentor **June - August 2013**

- Worked with University administrators and other students to serve as a guide and mentor to incoming freshmen

Penn State Undergraduate Teaching Assistant, Introductory Psychology (PSYCH 100) **January – May 2013**

- Planned and organized exam reviews
- Worked with 5-10 students weekly to answer questions about material and help with class notes

Phi Alpha Delta Pre-Law Fraternity **September 2012 – Present**

- Member of the Penn State and National Chapters