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Huddle Up: Using Mediation to Help Settle the National Football League Labor Dispute

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Cover Page Footnote

J.D. Candidate, Fordham University School of Law, New York, NY, 2012; B.S., Sports Management, New York University, 2009. Special thanks to Professor Jacqueline M. Nolan-Haley of Fordham University School of Law for her guidance and assistance with this Note.

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Jeremy Corapi*

INTRODUCTION	790
I. THE OPENING KICK: ALTERNATIVE DISPUTE RESOLUTION IN SPORTS	793
II. PLAYING BALL: LABOR RELATIONS IN UNITED STATES PROFESSIONAL SPORTS LEAGUES	796
A. <i>Changing the Rules of the Game: Antitrust Law</i>	798
B. <i>Antitrust Law and its Impact on the Four Major United States Professional Sports Leagues</i>	800
C. <i>Labor Law, Labor Unions, and the Labor Exemption</i>	802
D. <i>The NFL</i>	803
E. <i>The NFLPA: The Blitz on Ownership Begins</i>	805
F. <i>“No Freedom, No Football”: The Rozelle Rule and Mackey v. NFL</i>	808
G. <i>Trying to Gain Yardage: The Growth of the NFLPA</i> ..	810
H. <i>Calling an Audible: Decertifying the Union</i>	813
I. <i>Keeping the Drive Alive: From Reggie White to the Current CBA</i>	814
III. DELAY OF GAME: THE CURRENT LABOR DISPUTE BETWEEN THE NFL’S MANAGEMENT AND THE NFL PLAYERS	816
A. <i>The Revenue Dispute</i>	816
B. <i>Rookie Salaries</i>	818

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790	<i>FORDHAM INTELL. PROP. MEDIA & ENT. L.J.</i>	[Vol. 21:789
	C. <i>The Eighteen-Game Season</i>	820
	D. <i>The NFL Personal Conduct Policy</i>	821
	E. <i>Player Discipline for Illegal Hits</i>	823
IV.	TOUCHDOWN: USING MEDIATION TO REACH A NEW CBA	825
	A. <i>Mediation Can Preserve and Foster Working Relationships</i>	826
	B. <i>Mediation Can Expedite a Resolution and Save Money</i>	828
	C. <i>Mediation Can Help Prevent a Public Relations Disaster</i>	829
V.	INSIDE THE HUDDLE: CONDUCTING THE MEDIATION	831
	A. <i>Picking a Referee: The Mediator</i>	831
	B. <i>Officiating the Game: The Mediator's Role</i>	834
	C. <i>The NFL's Management and The NFLPA: What Must Happen</i>	836
	CONCLUSION: THE POST-GAME SHOW	837

INTRODUCTION

Almost three years ago, the National Football League (“NFL” or “League”) team owners voted unanimously to opt out of the current NFL collective bargaining agreement (“CBA”)¹ between the NFL’s management² and the NFL’s players³ following the 2010 season.⁴ The opt-out has created the need for negotiation of a new CBA between the NFL’s management and the NFL’s players

¹ A Collective Bargaining Agreement (“CBA”) is a trade agreement between an employer and the representative(s) of a unit of employees (usually a union), that governs hiring, work, pay and dispute resolution. See *J.I. Case Co. v. Labor Bd.*, 321 U.S. 332, 334–35 (1944).

² The NFL’s management includes the NFL team owners, the NFL commissioner, and other NFL executives.

³ The NFL players include the individual NFL players and the NFL players’ union, the National Football League Players Association (“NFLPA”).

⁴ See Michael Silver, *Fans’ Guide to NFL Labor Battle*, YAHOO!SPORTS (Sept. 8, 2010), <http://sports.yahoo.com/nfl/news?slug=ms-laborquestions090810>.

and has set the stage for a labor dispute that has threatened the League's first work stoppage⁵ since 1987.⁶

On September 30, 2010, the Associated Press received a copy of a letter sent by the president of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), Richard Trumka, to the NFL commissioner, Roger Goodell, and the executive director of the National Football League Players Association ("NFLPA" or "Union"), DeMaurice Smith.⁷ In this letter, Trumka offered on behalf of the AFL-CIO to mediate the NFL's CBA negotiations in the hope that it would help bring about a resolution to the ongoing labor dispute between the NFL's management and players.⁸

The NFL's management rejected Trumka's offer,⁹ citing the potential for unfair bias against the NFL's management in any AFL-CIO conducted mediation.¹⁰ The Union took a different position.¹¹ NFLPA spokesman, George Atallah, wrote in an e-mail, "We welcome the AFL-CIO's initiative and accept Mr. Trumka's invitation."¹²

While the current CBA is set to expire in March 2011, the two sides remain far apart in reaching a new CBA.¹³ The crucial sticking point in reaching a new CBA is the revenue percentage that the League should distribute to the players at the end of each

⁵ A work stoppage occurs when there is either a lockout or a strike. *Labor Pains*, SPORTS ILLUSTRATED, http://sportsillustrated.cnn.com/baseball/news/2002/05/25/work_stoppages (last visited Nov. 12, 2010). A lockout occurs when, during labor negotiations, an employer attempts to put economic pressure on employees by refusing to allow them to work. Robert H. Lattinville, et al., *Labor Pain: The Effect of a Work Stoppage in the NFL on its Coaches*, 20 MARQ. SPORTS L. REV. 335, 337 (2010). A strike occurs when employees refuse to perform work for their employer in support of a bargaining position or in protest of some aspect of a previous labor agreement. *Id.*

⁶ See Silver, *supra* note 4.

⁷ See *AFL-CIO Prez Offers Help to NFL, NFLPA*, ESPN (Sept. 30, 2010), <http://sports.espn.go.com/nfl/news/story?id=5633268> [hereinafter *AFL-CIO Prez*].

⁸ See *id.*

⁹ *Id.*

¹⁰ *Id.* (explaining that the NFLPA is a member of the AFL-CIO and that Mr. Smith sits on the AFL-CIO's board).

¹¹ See *id.*

¹² *Id.*

¹³ See *NFL Owners to Meet March 3—The Day the CBA Expires*, TSN, <http://www.tsn.ca/nfl/story/?id=353883&asid=b5a23735> (last visited Feb. 15, 2011).

season.¹⁴ Under the most recent CBA, which was implemented in 2006, the players received 59.6% of designated League revenues.¹⁵ League owners say that if the League wants to remain profitable, that number must be decreased.¹⁶ The Union has refused to consider negotiating this decrease without proof of the League's financial hardship—something the League has been unwilling to offer.¹⁷ Labor talks have also been made more difficult because Goodell and Smith are conducting their first CBA negotiations as leaders of their respective organizations.¹⁸

The current NFL labor dispute and potential work stoppage could delay, or even worse, result in the cancellation of the 2011–2012 NFL season.¹⁹ A season-long work stoppage could “cost thousands of Americans their jobs and cities more than \$140 million in revenue.”²⁰ It could also cost the League \$1 billion in lost revenue.²¹ As the NFL labor dispute highlights, labor disputes can be detrimental not only to professional sports leagues, but to national economies as well.

This Note uses the current labor dispute between the NFL's management and the NFL's players as an example of how properly conducted mediation can help to resolve labor disputes between management and players in professional sports leagues. A collaborative approach to resolving this labor dispute is essential for NFL players and owners, who depend on one another for financial success. The NFL should be capable of resolving this dispute efficiently, effectively, and in a manner that strengthens relationships amongst the players, the owners, the League's business partners, and the NFL's fans.

¹⁴ Silver, *supra* note 4.

¹⁵ *Id.*

¹⁶ *AFL-CIO Prez, supra* note 7 (stating that huge debts from building stadiums and starting the NFL television network make it impossible to stay profitable).

¹⁷ *Id.*

¹⁸ Michael J. Redding & Daniel R. Peterson, *Third and Long: The Issues Facing the NFL Collective Bargaining Agreement Negotiations and the Effects of an Uncapped Year*, 20 MARQ. SPORTS L. REV. 95, 97 (2009).

¹⁹ See *AFL-CIO Prez, supra* note 7.

²⁰ *Id.*

²¹ Barry Wilner, *Lockout Could Cost NFL \$1-Billion*, GLOBE & MAIL (Oct. 13, 2010), <http://www.theglobeandmail.com/sports/football/lockout-could-cost-nfl-1-billion/article1755865/?cmpid=rss1> [hereinafter Wilner, *Lockout*].

Part I of this Note defines alternative dispute resolution (“ADR”) and discusses how ADR has been utilized to resolve labor disputes in professional sports. Part II of this Note covers the legal and factual background behind the NFL dispute. It discusses the history of labor relations within the four major United States professional sports leagues,²² with an emphasis on the evolution of labor relations and collective bargaining between the NFL’s management and the NFLPA. Part III summarizes the current NFL labor dispute, with a breakdown of the NFL management’s and the NFLPA’s respective positions on the critical components of the next NFL CBA. Part IV of this Note explains the ways in which mediation can help resolve the labor clash between the NFL’s management and the NFLPA so that a new CBA can be agreed upon before a work stoppage occurs. Lastly, Part V proposes specific mediation guidelines that could help these parties, and potentially other professional sports leagues with similar disputes, reach an agreement on a new CBA. This proposal recognizes “the significance of the bargaining history between the parties as well as the unique nature of the professional sports industry.”²³

I. THE OPENING KICK: ALTERNATIVE DISPUTE RESOLUTION IN SPORTS

Alternative dispute resolution is a method of using extrajudicial means, including arbitration and mediation, to resolve disputes.²⁴ It has been successfully used to resolve conflicts in a wide range of fields.²⁵

²² The four major United States professional sports leagues include Major League Baseball (“MLB”), the National Basketball Association (“NBA”), the National Hockey League (“NHL”), and the NFL. See Matt Cutler, *Big Four U.S. Sports Enjoy Sponsorship Hike*, SPORTSBUS. (Nov. 19, 2010, 9:25 AM), <http://www.sportbusiness.com/news/182615/big-four-us-sports-enjoy-sponsorship-hike>.

²³ Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 343.

²⁴ 2009 Annual Survey: *Recent Developments in Sports Law*, 20 MARQ. SPORTS L. REV. 497, 498 (2009).

²⁵ These include disputes involving employment, intellectual property, consumer, technology, health care, financial services, construction, and international trade conflicts.

Arbitration is a contractually agreed upon alternative to litigation in the event of a legal dispute.²⁶ It is a process whereby the parties to a contract present their side of a legal dispute to “one or more impartial persons— “arbitrators”—for a final and binding decision, known as an ‘award.’”²⁷ Awards are issued through written decision by an arbitrator and are prohibitively difficult to overturn.²⁸ The reasons contracting parties normally prefer arbitration to litigation is that it is time-effective, cost-effective, informal, confidential, and binding.²⁹

Mediation occurs when two or more disputing parties have been unable to resolve a conflict.³⁰ The parties use an impartial third party—a “mediator”—who lacks authority to force a settlement, to help them negotiate a settlement of their own creation.³¹ The mediator is often an expert in the legal area or industry in which the dispute occurs.³² Mediation is ideal for those who want to participate in “determining the outcome of a dispute because it provides an opportunity for parties . . . to work through issues with the assistance of an impartial third person trained to facilitate resolution.”³³ Similar to arbitration, mediation is often preferable to litigation because it is time-effective, cost-effective,

See Dispute Resolution Services, AM. ARBITRATION ASS’N, <http://www.adr.org/drs> (last visited Nov. 12, 2010).

²⁶ *Arbitration*, AM. ARBITRATION ASS’N, <http://adr.org/sp.asp?id=28749> (last visited Nov. 12, 2010).

²⁷ *Id.*

²⁸ Martin J. Greenberg, *Alternative Dispute Resolution in Sports Facility Leases*, 16 MARQ. SPORTS L. REV. 99, 102 (2005) [hereinafter Greenberg, *Sports Facility Leases*]; *see also* Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 1767 (2010) (“It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable.” (quoting Major League Baseball Ass’n v. Garvey, 532 U.S. 504, 509 (2001))).

²⁹ *See* Greenberg, *Sports Facility Leases*, *supra* note 28, at 101.

³⁰ *What is Mediation?*, AM. ARBITRATION ASS’N, <http://www.aaamediation.com/faces/index.jsp> (last visited Nov. 12, 2010).

³¹ *Id.*

³² *See* Cheryl Cutrona, *Considering Mediation? Looking for a Mediator? Some Information to Help You Select a Mediator*, PA. COUNCIL OF MEDIATORS, http://www.pamediation.org/archives/How_to_Select_a_Mediator.pdf (last visited Feb. 11, 2011).

³³ *What is Mediation?*, *supra* note 30.

informal, and confidential.³⁴ It is also important to note that “mediation is prospective rather than retrospective”;³⁵ instead of analyzing the parties’ past relationship, mediation tries to resolve how the parties can work together in the future to achieve common gains.³⁶

Given the unique characteristics of the twenty-first century sports industry, it is not surprising that alternative dispute resolution has become the predominant mechanism by which disputes get resolved within professional sports leagues.³⁷ Whereas the litigation process usually becomes protracted, in sports business, disputes must often be resolved quickly.³⁸ Alternative dispute resolution provides the sports industry with an effective means for fast and reliable dispute resolution. Moreover, because of the confidential nature of alternative dispute resolution, very little information is communicated to the public regarding the dispute.³⁹ “This is particularly valuable to an industry which on the one hand, is very conscious of its public image and, on the other hand, is subjected to the constant probing of the news media.”⁴⁰

Today, most CBAs between a professional sports league and a players’ union include a provision mandating arbitration in the case of certain types of disputes.⁴¹ Such disputes typically involve issues such as “injury grievances, employment grievances, and players’ salary arbitration.”⁴² Arbitration has also been used to resolve disputes over sports facility leases and the administration of “franchise, joint-venture, and partnership disputes . . . such as

³⁴ See *Benefits of Mediation*, MEDIATE, <http://www.mediate.com/articles/benefits.cfm> (last visited Nov. 8, 2010).

³⁵ *What is Mediation?*, *supra* note 30.

³⁶ *Id.*

³⁷ See Greenberg, *Sports Facility Leases*, *supra* note 28, at 100 (quoting MARTIN J. GREENBERG, *THE STADIUM GAME* 532 (2d ed. 2000) [hereinafter GREENBERG, *STADIUM GAME*]).

³⁸ See *id.* at 101.

³⁹ See *id.* at 101–02.

⁴⁰ See *id.* at 102 (quoting MARTIN J. GREENBERG, *SPORTS LAW PRACTICE* 73 (1993) [hereinafter GREENBERG, *SPORTS LAW*]).

⁴¹ See *id.* at 100 (quoting *Sports Arbitration Including Olympic Athlete Disputes*, AM. ARBITRATION ASS’N, <http://www.adr.org/sp.asp?id=22022> (last visited Nov. 14, 2005)).

⁴² *Id.*

disputes over partnership proceeds, termination of sports executives, the sale of a franchise, and payments under executive or partnership agreements.”⁴³

Mediation has also played a crucial role in resolving major disputes in professional sports. Cases have involved conflicts regarding facility cost,⁴⁴ coach compensation,⁴⁵ league television broadcast rights,⁴⁶ and team ownership rights.⁴⁷ Mediation has been integral in helping leagues and player unions reach agreements during the collective bargaining process as well.⁴⁸

II. PLAYING BALL: LABOR RELATIONS IN UNITED STATES PROFESSIONAL SPORTS LEAGUES

Labor relations in the four major United States professional sports leagues have been notoriously contentious since the creation of the first of the four major professional sports leagues during the “Robber Barron” era.⁴⁹ Starting with the inception of professional

⁴³ *Id.* (internal quotation marks omitted).

⁴⁴ See, e.g., *District of Columbia, MLB Reach Revised Agreement*, ESPN (Jan. 27, 2006, 7:52 PM), <http://sports.espn.go.com/mlb/news/story?id=2308920> (discussing a revised lease for a Washington Nationals baseball stadium).

⁴⁵ See, e.g., *Cuban-Nelson Dispute Headed to Mediation*, CBS SPORTS, <http://www.cbssports.com/nba/story/11310151> (last visited Nov. 3, 2010) (discussing former coach Don Nelson’s compensation package).

⁴⁶ See, e.g., John Ourand, *NFL Network, Comcast Hold Mediation Meetings Over Carriage*, STREET & SMITH’S SPORTS BUS. DAILY (Aug. 6, 2008), <http://www.sportsbusinessdaily.com/article/123010> (discussing the carriage dispute between Comcast and the NFL Network).

⁴⁷ See Greg Risling, *McCourt Divorce Trial: Mediation Scheduled for Friday*, HUFFINGTON POST (Sep. 22, 2010, 8:40 PM), http://www.huffingtonpost.com/2010/09/22/mccourt-divorce-trial-med_n_734827.html.

⁴⁸ See Liz Mullen, *Sports Labor is Familiar Ground for Mediator*, STREET & SMITH’S SPORTS BUS. J., Mar. 15, 2010, at 40.

⁴⁹ See Ethan M. Lewis, “A Structure To Last Forever”: *The Players’ League and The Brotherhood War of 1890*, ETHANLEWIS.ORG, <http://www.ethanlewis.org/pl/ch2.html> (last visited Nov. 2, 2010). A robber baron is “an American capitalist of the latter part of the 19th century who became wealthy through exploitation (as of natural resources, governmental influence, or low wage scales).” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1077 (11th ed. 2003), available at <http://www.merriam-webster.com/dictionary/robber%20baron>. The robber barons created monopolies, and the Sherman Act was enacted “as a response to the growth of monopolies that threatened to destroy competition in the marketplace.” Lawrence M. Salinger, *Introduction to*

baseball in 1871 when the National Association of Professional Base Ball Players was formed, professional baseball was initially a player-controlled enterprise.⁵⁰ However, this changed when the National League of Professional Baseball Clubs (“National League”)⁵¹ was founded in 1876.⁵² The founders of the National League considered it to be a “league of ball club owners, to whom the players were only employees.”⁵³

To help implement their vision of organized professional baseball, National League team owners created the “reserve clause” system.⁵⁴ This clause quickly became a part of every player contract that each individual player signed when joining a team and stated that upon the expiration of any player’s contract, the rights to the player were retained by the team to which he signed.⁵⁵ Essentially, this meant that although both the player’s obligation to play for the team and the team’s obligation to pay the player had ended, the player could never enter a contract with another team.⁵⁶ Thus, the player was forced to negotiate a new contract with the same team, request a trade, or quit playing professional baseball.⁵⁷ If the player refused to honor his existing contract due to the contract’s terms, he was blacklisted.⁵⁸ The reserve clause system represented an act of collusion by the owners and laid the ground work for a monopoly.⁵⁹ Professional baseball

ENCYCLOPEDIA OF WHITE-COLLAR & CORPORATE CRIME, at ix (Lawrence M. Salinger ed., 2005).

⁵⁰ See Lewis, *supra* note 49.

⁵¹ See Michael J. Hauptert, *The Economic History of Major League Baseball*, EH.NET (Feb. 1, 2010, 5:21 PM), <http://eh.net/encyclopedia/article/hauptert.mlb>. The National League was the older of two professional baseball leagues that would ultimately combine to form Major League Baseball (“MLB”). *Id.*

⁵² See Lewis, *supra* note 49.

⁵³ *Id.*

⁵⁴ *See id.*

⁵⁵ *See id.* The NFL, NBA, and NHL also adopted the reserve system or some variation of it. See Jonathan B. Goldberg, *Player Mobility in Professional Sports: From the Reserve System to Free Agency*, 15 SPORTS LAW. J. 21, 22–25 (2008).

⁵⁶ See Lewis, *supra* note 49.

⁵⁷ *Id.*

⁵⁸ This meant that all National League team owners collectively agreed not to offer the player a new contract. *See id.*

⁵⁹ *See id.*

players did not have a strong union during the nineteenth century, and as a result, did little to challenge the clause.⁶⁰

As professional baseball entered the twentieth century, National League owners increasingly imposed their will on National League players. Team owners had complete financial control over the players on their respective teams, with no realistic possibility of competition for player services from elsewhere.⁶¹ Whatever competition for signing players existed from other leagues was thwarted by the National League, either by way of crushing it with superior financial might or by merger.⁶² This was most evident in 1903 when the American League merged with the National League to form what eventually became Major League Baseball (“MLB”).⁶³ This agreement also tied independent contracts (those contracts that were not previously National League contracts) to the National League reserve clause system.⁶⁴

A. *Changing the Rules of the Game: Antitrust Law*

While team owners consolidated power over the players, important legislation was making its way through Congress that would not only severely impact labor relations in professional baseball, but ultimately, labor relations in the remainder of the four major United States professional sports leagues.

In response to the “Robber Baron” era, Congress developed antitrust law to promote competition between companies involved in interstate commerce. The Sherman Antitrust Act of 1890 (the “Sherman Act”) “preserves ‘free and unfettered competition’ in the marketplace, which ‘will yield the best allocation of economic

⁶⁰ See *History of the Major League Baseball Players Association*, MLBPLAYERS.COM, <http://mlbplayers.mlb.com/pa/info/history.jsp> (last visited Nov. 5, 2010) (“Opposed to baseball’s reserve clause and a growing movement led by Albert Spalding to cap players’ salaries, John Montgomery Ward and eight other players in 1885 formed the first players union in baseball—the Brotherhood of Professional Base Ball Players. . . . None of those efforts proved sufficient in bringing an end to the reserve clause, which bound players to their respective clubs.”).

⁶¹ *Id.*

⁶² See Hauptert, *supra* note 51 (discussing the National League’s buyout deal with the Player’s League and merger with the American Association).

⁶³ See *id.*

⁶⁴ See Goldberg, *supra* note 55, at 41.

resources of the country, the lowest prices, the highest quality and greatest material progress.”⁶⁵ Section 1 of the Sherman Act is designed to prohibit contracts, combinations or conspiracies that unreasonably restrain trade.⁶⁶ Section 2 prohibits monopolization.⁶⁷

Violations of Section 1 have been found to include horizontal price fixing,⁶⁸ market allocations,⁶⁹ and group boycotts.⁷⁰ These Section 1 violations are deemed per se illegal under the Sherman Act because “their pernicious effect on competition and lack of any redeeming value are conclusively presumed to be unreasonable.”⁷¹ Other restraints of trade are analyzed under the “Supreme Court’s ‘rule of reason’ [test], which weighs the procompetitive benefits and the anticompetitive effects of an agreement in order to determine whether it should survive antitrust scrutiny.”⁷²

In order to commit a Section 2 violation, an entity must both possess monopoly power and engage in anticompetitive conduct.⁷³

⁶⁵ Goldberg, *supra* note 55, at 27 (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (internal quotation marks omitted)).

⁶⁶ See 15 U.S.C. § 1 (2006).

⁶⁷ See *id.* § 2 (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”).

⁶⁸ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940). Horizontal Price Fixing refers to an agreement between two or more parties, generally considered to be competitors, to set, maintain, and charge a specified price for a particular product. See *id.* at 213.

⁶⁹ *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972). Market allocations are agreements in which competitors divide markets among themselves either by types of customers, products, or territories. See *id.*

⁷⁰ *Fashion Originators’ Guild v. Fed. Trade Comm’n*, 312 U.S. 457, 465 (1941) (citing *E. States Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600, 609–11 (1914)). A group boycott is a type of boycott in which two or more competitors in a relevant market refuse to conduct business with a firm. See *id.* at 461.

⁷¹ See Goldberg, *supra* note 55, at 28 (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

⁷² *Id.* (citing *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984)).

⁷³ See *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973) (“Use of monopoly power ‘to destroy threatened competition’ is a violation of the ‘attempt to monopolize’ clause of § 2 of the Sherman Act. So are agreements not to compete, with the aim of preserving or extending a monopoly.” (citations omitted)).

800 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* [Vol. 21:789

Monopoly power is often demonstrated by showing that the challenged entity has significant market share and has engaged in exclusionary behavior without a valid business reason.⁷⁴

B. Antitrust Law and its Impact on the Four Major United States Professional Sports Leagues

Initially, MLB was granted an antitrust exemption.⁷⁵ In *American League Baseball Club of Chicago v. Chase*,⁷⁶ the New York State Supreme Court held:

It is apparent from the analysis already set forth . . . that a monopoly of baseball as a business has been ingeniously devised and created in so far as a monopoly can be created among free men; but I cannot agree to the proposition that the business of baseball for profit is interstate trade or commerce, and therefore subject to the provisions of the Sherman Act.⁷⁷

The United States Supreme Court reinforced the New York Supreme Court's holding when in *Federal Base Ball Club of Baltimore, Inc. v. National League*,⁷⁸ it held that the National League was not subject to the Sherman Act "because major league baseball was not interstate commerce."⁷⁹ The Court stated that "the 'business of giving exhibitions' was 'purely state affairs,' and thus not interstate in nature."⁸⁰

The United States Supreme Court revisited the *Federal Base Ball Club* precedent in 1953.⁸¹ In *Toolson v. New York Yankees*,⁸²

⁷⁴ *Id.* at 377, 388.

⁷⁵ See Goldberg, *supra* note 55, at 29 (explaining that "baseball avoided antitrust liability because courts held that the business of baseball was not interstate commerce" (quoting *Am. League Baseball Club of Chi. v. Chase*, 149 N.Y.S. 6, 16 (N.Y. Sup. Ct. 1914))).

⁷⁶ 149 N.Y.S. 6, 16 (N.Y. Sup. Ct. 1914).

⁷⁷ See Goldberg, *supra* note 55, at 29 (quoting *Am. League Baseball Club of Chi.*, 149 N.Y.S. at 16).

⁷⁸ 259 U.S. 200, 208 (1922).

⁷⁹ See Goldberg, *supra* note 55, at 29 (citing *Fed. Base Ball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208 (1922)).

⁸⁰ *Id.* (quoting *Fed. Base Ball Club of Balt.*, 259 U.S. at 208).

⁸¹ See *Toolson v. N.Y. Yankees*, 346 U.S. 356 (1953).

the Court found that because Congress had not acted during the thirty years since *Federal Base Ball Club* to make professional baseball subject to antitrust law, Congress implicitly agreed with the Supreme Court's earlier finding that antitrust law does not apply to the business of professional baseball.⁸³ Accordingly, the court held, reserve clauses in player contracts were valid, regardless of their monopolistic tendencies.⁸⁴

In 1972, MLB's antitrust exemption was once again challenged in *Flood v. Kuhn*.⁸⁵ After reviewing both *Federal Base Ball Club* and *Toolson*, the Court held that baseball's reserve clause system enjoyed exemption from antitrust law, which made it "an exception and an anomaly."⁸⁶ However, while the Court recognized the incongruity of this past precedent with federal antitrust law, it refused to disturb its precedent, leaving it for Congress to remedy the situation.⁸⁷ Congress eventually did so in 1988 with the passage of the Curt Flood Act which significantly limited MLB's antitrust exemption.⁸⁸

To this day, no other major United States professional sports league has ever received a federal antitrust exemption. In *Radovich v. NFL*,⁸⁹ a professional football player brought an antitrust suit against the NFL alleging violations of Sections 1 and 2 of the Sherman Act.⁹⁰ The NFL argued that because professional baseball was exempt from federal antitrust law, professional football should be exempt as well.⁹¹ The Supreme Court, however, decided to limit the exemption to organized professional

⁸² 346 U.S. 356 (1953).

⁸³ *See id.* at 357.

⁸⁴ *Id.*; *see supra* notes 48–56 and accompanying text.

⁸⁵ 407 U.S. 258 (1972).

⁸⁶ Goldberg, *supra* note 55, at 31 (citing *Fed. Base Ball Club of Balt.*, 259 U.S. at 282).

⁸⁷ *See id.*

⁸⁸ *See* Curt Flood Act of 1998, Pub. L. No. 105–297, § 2, 112 Stat. 2824. The Curt Flood Act's purpose was to remove Major League Baseball's antitrust exemption, but it largely reaffirmed it. *See* Goldberg, *supra* note 55, at 31.

⁸⁹ 352 U.S. 445, 446 (1957).

⁹⁰ *Radovich v. NFL*, 352 U.S. 445, 446–47 (1957).

⁹¹ *Id.* at 449–50.

baseball.⁹² Following the *Radovich* precedent, district courts went on to hold that the National Hockey League (“NHL”) and the National Basketball Association (“NBA”) were subject to federal antitrust law.⁹³ The holding of *Radovich* was recently reinforced when the Supreme Court found that the NFL’s licensing activities are not exempt from antitrust scrutiny under Section 1 of the Sherman Act.⁹⁴

C. Labor Law, Labor Unions, and the Labor Exemption

Unlike MLB, the players in the NFL, the NBA, and the NHL have always been able to challenge the reserve system and other anticompetitive league practices under federal antitrust law.⁹⁵ However, an important subsequent development has effectively allowed for league exemption from antitrust liability in most cases.⁹⁶ This has occurred because players in all four of the major United States professional sports leagues “unionize[d] and designate[d] representatives of the players associations to negotiate with team owners.”⁹⁷

The National Labor Relations Act grants employees the right to self-organize and to bargain collectively with their employer.⁹⁸ If employees elect a labor union to represent them, they lose their right to bargain individually.⁹⁹ By joining their economic strength and acting through a labor union, employees have the best chance of bargaining for improvements in wages, hours and working

⁹² See *id.* at 451–52 (confining the scope of the antitrust exemption because the business of baseball fell “outside the scope of the [Sherman] Act” and not other businesses as well).

⁹³ See Goldberg, *supra* note 55, at 30–31 (citing *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972)).

⁹⁴ See *Am. Needle, Inc. v. NFL*, 130, S. Ct. 2201, 2206–07 (2010).

⁹⁵ See Goldberg, *supra* note 55, at 31.

⁹⁶ See generally Jeffrey Hoffmeyer, *Fourth Down and an Appeal: The Nonstatutory Exemption to Antitrust Law in Claret v. National Football League*, 13 SPORTS LAW. J. 193 (2006) (discussing *Claret v. Nat’l Football League*, 369 F.3d 124 (2d Cir. 2004)).

⁹⁷ *Id.* at 199.

⁹⁸ See National Labor Relations Act of 1935, Pub. L. No. 93–360, 88 Stat. 395 (codified as amended at 29 U.S.C. §§ 151–69 (1974)).

⁹⁹ See Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 7 (1971).

conditions.¹⁰⁰ However, as discussed above, Section 1 of the Sherman Act prohibits certain agreements which restrain trade in interstate commerce.¹⁰¹ Labor unions, by their very nature, often engage in trade restriction when they make agreements with management for better working conditions.¹⁰² Therefore, to shield unions from antitrust liability, a statutory “labor exemption” was created under the Clayton Act and the Norris-LaGuardia Act.¹⁰³

This statutory labor exemption was later expanded by the addition of a nonstatutory labor exemption.¹⁰⁴ The nonstatutory labor exemption is a judicially derived expansion of the statutory labor exemption that protects good faith union-management interaction from antitrust scrutiny.¹⁰⁵ Thus, the Supreme Court has explained that any term of a league-player union agreement that is the product of arm’s-length negotiation (e.g., the terms of a league CBA) will receive protection from antitrust law, regardless of the agreement’s collusive or anticompetitive nature.¹⁰⁶

D. *The NFL*

The NFL began operating in 1920¹⁰⁷ and is an unincorporated association comprised of member clubs which own and operate professional football teams.¹⁰⁸ Mainstream America began to follow the NFL during Bert Bell’s tenure as League Commissioner.¹⁰⁹ However, “professional football truly began to make strides with the rise of Commissioner Pete Rozelle.”¹¹⁰

¹⁰⁰ See *id.* at 8 (quoting *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967)).

¹⁰¹ See Sherman Antitrust Act of 1890, 15 U.S.C. § 1 (2006).

¹⁰² See generally Goldberg, *supra* note 55, at 32 (“[L]abor and antitrust laws are in conflict, as one promotes and the other discourages combinations . . .”).

¹⁰³ See Hoffmeyer, *supra* note 96, at 195–96.

¹⁰⁴ *Id.* at 196 (citing *United States v. Hutcheson*, 312 U.S. 219 (1941)).

¹⁰⁵ See *id.*

¹⁰⁶ See *Brown v. Prof'l Football, Inc.*, 518 U.S. 231, 235 (1996) (holding that the non-statutory exemption is applicable to good-faith bargaining between the NFL and NFL players).

¹⁰⁷ See *Mackey v. NFL*, 543 F.2d 606, 610 (8th Cir. 1976).

¹⁰⁸ See *id.*

¹⁰⁹ Jeffrey F. Levine & Bram A. Maravent, *Fumbling Away the Season: Will the Expiration of the NFL-NFLPA CBA Result in the Loss of the 2011 Season and Beyond?*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1419, 1426 (2010).

¹¹⁰ *Id.*

Commissioner Rozelle developed the concept of “league think,” an initiative aimed at convincing large market owners to “forego lucrative local television contracts in favor of a deal that equally benefited every franchise.”¹¹¹ Over time, national television contracts with NBC and CBS provided financial security for member franchises.¹¹² They also facilitated a business model that allowed the NFL to promote “economic and competitive parity amongst its clubs.”¹¹³ However, it was the NFL’s strongest business competitor, the American Football League (“AFL”), that first demonstrated the economic effectiveness of a cooperative television plan for professional football.¹¹⁴

Interleague tensions peaked in 1966. After former AFL Commissioner and current Oakland Raiders owner, Al Davis, actively recruited players from NFL teams, the two leagues spent a combined \$7 million to sign their 1966 college draft choices.¹¹⁵ While Davis and other members of AFL management intended to enhance interleague competition, some AFL and NFL owners saw this volatile situation as detrimental to both leagues.¹¹⁶ As a result, after a series of secret meetings between both sides, the AFL merged to become a part of the NFL on June 8, 1966.¹¹⁷ Congress approved the merger, passing legislation exempting the agreement from antitrust scrutiny on October twenty-first of the same year.¹¹⁸ With that, the modern day NFL was born.

¹¹¹ *See id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *See id.* at 1427.

¹¹⁵ *See* NFL, THE OFFICIAL 2010 NATIONAL FOOTBALL LEAGUE RECORD AND FACT BOOK 359 (2010) [hereinafter NFL], available at <http://static.nfl.com/static/content/public/image/history/pdfs/History/Chronology.pdf> (stating that Al Davis became Commissioner of the AFL in 1966 after the resignation of Commissioner Joe Foss); *see also* B. Duane Cross, *The AFL: A Football Legacy*, CNN SPORTS ILLUSTRATED (Jan. 22, 2001, 2:57 PM), http://sportsillustrated.cnn.com/football/news/2001/01/22/afl_history_2.

¹¹⁶ *See* Michael Schulze, *How Al Davis Just Saved the NFL—Again*, BLEACHER RPT. (Feb. 27, 2009), <http://bleacherreport.com/articles/131186-al-davis-just-saved-the-nfl-again>.

¹¹⁷ *See* NFL, *supra* note 115, at 359.

¹¹⁸ *Id.*

E. The NFLPA: The Blitz on Ownership Begins

The formation of the NFLPA began at a meeting before the start of the 1956 NFL Championship game.¹¹⁹ Annoyed that the owners had rejected a player proposal that included a minimum yearly player salary, a player per diem, and a rule requiring payment of salary to injured players, the NFL players sought out Creighton Miller¹²⁰ to become their legal counsel.¹²¹ Eventually players signed authorization cards which allowed Miller to become their leader in 1956.¹²² For the first time in history, the NFL players formed a united labor front, calling their organization the “NFLPA.”¹²³

NFL ownership initially refused to acknowledge the new association.¹²⁴ However, in 1957, Detroit Lions lineman Bill Radovich brought suit under the Sherman Act, and as discussed above, the Supreme Court held professional football to be subject to antitrust law.¹²⁵ As a result of the legal leverage that the players gained over the owners from this decision, the owners had no choice but to acknowledge the NFLPA and to agree to several of the players’ earlier proposals.¹²⁶

While the Radovich decision signaled a major victory for the NFL players, the NFLPA remained in a precarious position due to the 1966 merger of the AFL with the NFL.¹²⁷ The NFLPA represented the sixteen NFL teams that were a part of the NFL

¹¹⁹ See Goldberg, *supra* note 55, at 39.

¹²⁰ Creighton Miller was the first general manager for the Cleveland Browns, a former University of Notre Dame football player, and an attorney. See *History: The Beginning—1956*, NFL PLAYERS ASS’N, <http://www.nflplayers.com/About-us/History> (last visited Nov. 7, 2010).

¹²¹ See *id.*

¹²² See *id.*

¹²³ See *id.* (“Their first meeting took place at the Waldorf-Astoria Hotel in New York in November of 1956 . . .”).

¹²⁴ See *id.*

¹²⁵ See *Radovich v. NFL*, 352 U.S. 445 (1957).

¹²⁶ See *History: The Beginning—1956*, *supra* note 120.

¹²⁷ See Levine & Maravent, *supra* note 109, at 1432 (stating that player solidarity became a significant issue of concern for the Union in 1956).

prior to the merger.¹²⁸ However, after the merger, the ten additional AFL teams that joined the NFL continued to be represented by the American Football League Players Association (“AFLPA”)¹²⁹ rather than the NFLPA.¹³⁰ Player unity became a significant cause of concern.¹³¹

As the NFL players’ lack of harmony weakened their ability to negotiate with the League, players sought help from the AFL-CIO in creating a formal labor union.¹³² Although the AFL-CIO was not interested in helping, the Teamsters Union was and wanted to represent the players in collective bargaining with the League.¹³³ Nevertheless, Creighton Miller refused to consider it.¹³⁴ As a result, a split occurred between the AFLPA and the NFLPA which would significantly hurt the players, as it enabled the league to pit one group against the other in its negotiation strategy.¹³⁵

The NFL’s management refused to negotiate with the divided players and also orchestrated an ownership lockout in 1968.¹³⁶ This resulted in a short work stoppage.¹³⁷ While this incident ultimately produced the first NFL management-NFLPA CBA,¹³⁸ it was clear that the players’ lack of unity left them with less than they had hoped for from the NFL’s management.¹³⁹

The NFLPA turned a corner in 1970. After years of fighting amongst the players, the AFLPA and the NFLPA merged, as

¹²⁸ *History: The 1960’s—AFL/NFL Competition*, NFL PLAYERS ASS’N, <http://www.nflplayers.com/About-us/History> (last visited Nov. 7, 2010) [hereinafter *History: The 1960’s*].

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *See History: The 1960’s*, *supra* note 128.

¹³³ *See id.* (“Bernie Parrish of the Cleveland Browns asked George Meany of the AFL-CIO to help form a union of professional athletes.”).

¹³⁴ *Id.*

¹³⁵ *See id.*

¹³⁶ Levine & Maravent, *supra* note 109, at 11.

¹³⁷ *History: The 1960’s*, *supra* note 128.

¹³⁸ *Id.*

¹³⁹ *Id.*

2011]

HUDDLE UP

807

collective bargaining with the NFL owners loomed.¹⁴⁰ John Mackey of the Baltimore Colts was named NFLPA President.¹⁴¹

Owners were willing to negotiate a new collective bargaining agreement with the newly formed union, but only if several conditions were met.¹⁴² Among those conditions was that no NFLPA or NFL lawyers, other than each party's respective General Counsel, be present at the negotiations.¹⁴³ Despite the potential for abuse of such a condition, the negotiations were held.¹⁴⁴ When Mackey arrived at the negotiations, he was greeted by nine NFL attorneys.¹⁴⁵ Mackey's own attorney then proceeded to advise Mackey to sign a document that would have resulted in the NFLPA being bound to the owners' offer "in perpetuity."¹⁴⁶ Realizing that he was being ambushed (and poorly counseled), Mackey briefly suspended negotiations and sought the help of the labor law firm, Lindquist & Vennum.¹⁴⁷ The firm advised the players to file a petition with the National Labor Relations Board ("NLRB") to become a recognized union.¹⁴⁸ Player representatives ultimately agreed and the NLRB granted certification to the NFLPA.¹⁴⁹

In addition to recommending that the players petition the NLRB, Lindquist & Vennum assigned Ed Garvey to work with Mackey.¹⁵⁰ Strengthened by the newly formed union, the players opted to challenge the most controversial labor issue between the players and owners: the Rozelle Rule.¹⁵¹

¹⁴⁰ *History: The 1970's—AFL and NFL Players Associations Merge*, NFL PLAYERS ASS'N, <http://www.nflplayers.com/About-us/History> (last visited Nov. 7, 2010) [hereinafter *History: The 1970's*].

¹⁴¹ Levine & Maravent, *supra* note 109, at 1433.

¹⁴² See *History: The 1970's*, *supra* note 140.

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ Levine & Maravent, *supra* note 109, at 1433.

¹⁴⁷ See *id.* He also fired his attorney. *Id.*

¹⁴⁸ See *History: The 1970's*, *supra* note 140.

¹⁴⁹ *Id.*

¹⁵⁰ Levine & Maravent, *supra* note 109, at 1433. Garvey ultimately left the firm and became the Union's first Executive Director. *Id.*

¹⁵¹ See C. Peter Goplerud III, *Collective Bargaining in the National Football League: A Historical and Comparative Analysis*, 4 VILL. SPORTS & ENT. L.J. 13, 16 (1997).

F. “No Freedom, No Football”¹⁵²: *The Rozelle Rule and Mackey v. NFL*

The Rozelle Rule “allowed a player to change teams at the conclusion of his contract if he could negotiate a new deal with a new club; however, the new club was required to compensate the old club for the loss of the player.”¹⁵³ The two teams involved in the player transaction were to determine the terms of compensation, either in the form of players or cash.¹⁵⁴ “If the teams could not reach an agreement, the compensation was to be set by [Commissioner Rozelle].”¹⁵⁵ The apparent purpose and effect of this rule was to limit free agency¹⁵⁶ and player movement.¹⁵⁷ Commissioner Rozelle believed that “if players were given complete freedom to negotiate their services, the League would be dominated by a few rich teams and would eventually lose both fan interest and revenue.”¹⁵⁸

As a result of the Rozelle Rule, the first major NFL work stoppage occurred in 1974.¹⁵⁹ Outraged by the restrictions that the Rozelle Rule placed on player services, the players went on a strike that lasted forty-four days.¹⁶⁰ However, the strike left the union sharply divided, underfunded and unable to defeat the League’s implementation of the Rozelle Rule.¹⁶¹ After another failed strike attempt in 1975, the Union sought help from the court.¹⁶² The result was *Mackey v. NFL*.¹⁶³

In *Mackey*, Mackey and several other NFL players filed suit against the League, claiming that the Rozelle Rule was an

¹⁵² “No Freedom, No Football” was the NFL players’ rallying cry as collective bargaining with the owners began in 1974. See *History: The 1970’s*, *supra* note 140.

¹⁵³ Goplerud, *supra* note 151, at 16.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ A “Free Agent” is a professional athlete who is “free to negotiate a contract with any team.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 498 (11th ed. 2003), available at <http://www.merriam-webster.com/dictionary/free%20agent>.

¹⁵⁷ Goplerud, *supra* note 151, at 16.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Levine & Maravent, *supra* note 109, at 1435.

¹⁶³ *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

2011]

HUDDLE UP

809

unreasonable restraint of trade and thus violated Section 1 of the Sherman Act.¹⁶⁴ Given the Supreme Court's establishment of the nonstatutory labor exemption, the Eighth Circuit used a three-part test to determine when a management-player union agreement would be granted a nonstatutory labor exemption from antitrust scrutiny:

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 policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject 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 a product of bona fide arm's-length bargaining.¹⁶⁵

In applying this test, the court found for Mackey.¹⁶⁶ The court found that the provision passed parts one and two of its test, but that it failed part three.¹⁶⁷ The court reasoned that the Rozelle Rule had "not been the subject of bona fide arm's-length bargaining for either the 1968 or the 1970 [collective bargaining] agreement, because the provision imposed significant restrictions on the players to which they would never have agreed in good faith bargaining."¹⁶⁸ This meant that "the Rozelle Rule did not fall within the non-statutory labor exemption and was therefore, subject to antitrust review."¹⁶⁹

¹⁶⁴ *Id.* at 609.

¹⁶⁵ *Id.* at 614.

¹⁶⁶ *Id.* at 614 (citing *Local 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676 (1935)).

¹⁶⁷ *Id.* at 616.

¹⁶⁸ Jessica Cohen, *Sharing the Wealth: Don't Call Us, We'll Call You: Why Revenue Sharing is a Permissive Subject and Therefore the Labor Exemption Does Not Apply*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 609, 626 (2002).

¹⁶⁹ *Id.*

Mackey was a significant win for free agency and signaled a crucial gain for the NFLPA against the League's management. However, the Union was still far from strong and proceeded to bargain away most of what it had gained from *Mackey*.¹⁷⁰ As the new collective bargaining agreement took shape in 1977, instead of unlimited free agency, the two sides agreed to a system whereby a right of first refusal was coupled with compensation for players lost to another team.¹⁷¹ Much would have to change before the League's management considered the NFLPA a force to be reckoned with.

G. *Trying to Gain Yardage: The Growth of the NFLPA*

In 1982, the 1977 collective bargaining agreement was set to expire and the relationship between the NFL's management and the NFLPA was tense.¹⁷² A work stoppage was imminent.¹⁷³ After several failed CBA negotiations, the players went on strike on September 21, 1982.¹⁷⁴

Several issues divided the owners and the players. Following an NFLPA convention in Albuquerque, New Mexico, the players adopted a proposal that "called for players to be paid 55% of the clubs' league-wide revenues."¹⁷⁵ The revenues were then to be divided among the players "based on years of service, playtime and individual and team performance."¹⁷⁶ Outraged by the terms of this proposal, the owners refused to accept the players' offer.¹⁷⁷ The other sticking point was free agency.¹⁷⁸ The owners vehemently opposed free agency, as they viewed it as "destructive" to league competition.¹⁷⁹

¹⁷⁰ Goplerud, *supra* note 151, at 23.

¹⁷¹ *Id.* at 24.

¹⁷² *See id.*

¹⁷³ *Id.*

¹⁷⁴ *See id.*

¹⁷⁵ *History: The 1980's—Era of Change*, NFL PLAYERS ASS'N, <http://www.nflplayers.com/About-us/History> (last visited Nov. 7, 2010) [hereinafter *History: The 1980's*].

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Goplerud, *supra* note 151, at 24.

¹⁷⁹ *Id.* (noting that the league owners were particularly mindful of the "destructive consequences" of free agency).

The strike continued for almost two months.¹⁸⁰ Owners resisted any modification to the first refusal scheme.¹⁸¹ Eventually, however, the players and owners would settle as both realized “the season would be canceled unless regular season games resumed in early November.”¹⁸² As part of the settlement, the owners agreed to a guaranteed player salary/benefit package “worth at least \$1.28 billion over the 1983–1987 seasons.”¹⁸³ Ultimately, the owners got the better end of the bargain in the new agreement.¹⁸⁴ The agreement “did not include free agency, but rather it merely fine tuned the right of first refusal system.”¹⁸⁵ Moreover, this proved to be the beginning of the end of Ed Garvey’s tenure as NFLPA executive director.¹⁸⁶

In 1983, following Garvey’s departure from his post as executive director, the NFLPA unanimously elected Gene Upshaw¹⁸⁷ to fill the position.¹⁸⁸ Upshaw’s first objective was to meet with the players and find out what they wanted from management when the 1982 CBA expired in 1987.¹⁸⁹ Most agreed that free agency was of the utmost importance.¹⁹⁰ Unmoved by the Union’s persistence, the owners rejected the players’ demands for free agency when collective bargaining for the 1987 CBA began.¹⁹¹ The players ultimately responded by going on strike again during the 1987 season.¹⁹² However, instead of continuing negotiations during the strike, the owners sought out and hired replacement players¹⁹³ to fill their empty roster spots.¹⁹⁴

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *History: The 1980’s, supra* note 175.

¹⁸³ *Id.*

¹⁸⁴ Goplerud, *supra* note 151, at 25.

¹⁸⁵ *Id.*

¹⁸⁶ Levine & Maravent, *supra* note 109.

¹⁸⁷ *History: The 1980’s, supra* note 175. Upshaw was NFLPA President during the 1982 CBA negotiations and Strike. *Id.*

¹⁸⁸ Goplerud, *supra* note 151, at 25.

¹⁸⁹ *See History: The 1980’s, supra* note 175.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* The replacement players were mostly comprised of players already cut during the 1987 preseason. *Id.*

¹⁹⁴ Levine & Maravent, *supra* note 109.

Additionally, some veteran players crossed the picket line due to financial concerns and a lack of belief in the free agent system.¹⁹⁵ It was clear to the Union that a strike would not work if the owners were willing to replace the NFL players with second-class talent and if some Union members continued to play in NFL games. Thus, the Union ended the strike on October 15, 1987.¹⁹⁶ Refusing to give up its fight completely, however, the Union also filed an antitrust suit against the NFL challenging the League's right of first refusal system.¹⁹⁷ The lawsuit was *Powell v. NFL*.¹⁹⁸

In *Powell*, the district court ruled in favor of the players in January 1988.¹⁹⁹ The court held that the 1987 collective bargaining impasse ended the nonstatutory labor exemption that the owners and Union otherwise enjoyed while the 1987 CBA was in effect.²⁰⁰ As a result, the court found that the first refusal system was subject to antitrust scrutiny and did in fact violate antitrust law.²⁰¹

The owners appealed the ruling, hoping for a reversal of the decision.²⁰² However, as a precaution, the owners also executed "Plan B," a system which released players at the bottom of the roster from the first refusal system.²⁰³ Under the "Plan B" system, each club could restrict the free agency movement of thirty-seven players from their respective rosters and continue to subject them to the first refusal system.²⁰⁴ "Players who were not restricted

¹⁹⁵ *History: The 1980's*, *supra* note 175.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Powell v. NFL*, 678 F. Supp. 777 (D. Minn. 1988). The named plaintiff was NFLPA President, Marvin Powell. *Id.*

¹⁹⁹ *Id.* at 789.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989).

²⁰³ As a precaution, the owners implemented "Plan B," which freed players at the bottom of the roster from the first refusal/compensation system. Under the Plan B system, which was implemented in 1989, clubs could restrict thirty-seven players and continue to subject them to the first refusal system. Players who were not restricted could sign with other clubs between February 1 and April 1 without restriction. See Ari Nissim, *The Trading Game: NFL Free Agency, the Salary Cap, and a Proposal for Greater Trading Flexibility*, 11 SPORTS LAW. J. 257, 260 (2004).

²⁰⁴ *Powell*, 930 F.2d at 1304.

could sign with other clubs between February 1 and April 1 without restriction.”²⁰⁵

On November 1, 1989, the owners got what they were looking for on appeal: the Eighth Circuit reversed the district court’s holding.²⁰⁶ The circuit court found that the nonstatutory labor exemption protected the owners beyond impasse and that as a result, the Union could not bring an antitrust suit against the owners for implementation of a rule that was the product of good faith bargaining.²⁰⁷ The Eighth Circuit’s holding sent the Union back to the drawing board.

H. Calling an Audible: Decertifying the Union

While the Union had little to show for its latest legal battle with the League’s management, it took notice of Judge Gerald Heaney’s dissent, which suggested a brave move: break up the Union so that the nonstatutory labor exemption no longer applies.²⁰⁸ Realizing that Judge Heaney’s advice might be the only way to prevent the League’s management from continuing to restrict free agency, the Union formally disbanded on December 5, 1989.²⁰⁹ In place of the Union, the players formed the NFLPA as a professional association.²¹⁰ The goal of the new organization was to pursue litigation on behalf of individual players and challenge the “Plan B” system.²¹¹

In 1990, a lawsuit was filed on behalf of New York Jets Running Back Freeman McNeil. In this case, *McNeil v. NFL*,²¹² McNeil argued that “Plan B” rules restricting free agency violated antitrust law and that the “Plan B” system was not immune from antitrust scrutiny.²¹³ After the district court found that the

²⁰⁵ *History: The 1980’s*, *supra* note 175.

²⁰⁶ *Powell*, 930 F.2d at 1293.

²⁰⁷ *Id.* at 1304.

²⁰⁸ *Id.* at 1304–07 (Heaney, J., dissenting).

²⁰⁹ *History: The 1980’s*, *supra* note 175.

²¹⁰ *History: 1990’s—The Growth of the Union*, NFL PLAYERS ASS’N, <http://www.nflplayers.com/About-us/History> (last visited Nov. 7, 2010) [hereinafter *History: The 1990’s*].

²¹¹ *Id.*

²¹² Civ. No. 4-90-476, 1992 WL 315292 (D. Minn. 1992).

²¹³ *See Goplerud*, *supra* note 151, at 30.

NFLPA's change in status meant that the owners were no longer exempt from antitrust law, a jury trial ensued.²¹⁴ The players finally got the result they were looking for. The jury found that the "Plan B" system violated antitrust law in that it: "(1) had a substantially harmful effect on competition, (2) significantly contributed to competitive balance in the NFL, (3) [was] more restrictive than necessary to achieve competitive balance in the NFL, and (4) the players would be economically damaged as a direct result of 'Plan B.'"²¹⁵

Having dealt a heavy blow to the League's management in *McNeil v. NFL*, the players sought a restraining order to stop the NFL's management from enforcing the "Plan B" system. In *Jackson v. National Football League*,²¹⁶ the court found that "Plan B" prevented the players from becoming free agents and that as a result, they were likely to suffer irreparable harm.²¹⁷ Accordingly, the court granted the injunction against the League management's enforcement of "Plan B," signaling a turning point in the players' relationship with the NFL's management.²¹⁸

I. Keeping the Drive Alive: From Reggie White to the Current CBA

With the owners' antitrust protection greatly diminished, the players intensified their attack. The NFLPA's leaders filed yet another lawsuit in 1992, *White v. NFL*,²¹⁹ seeking true free agency and monetary relief.²²⁰ Realizing that the players had obtained increased bargaining leverage from *McNeil* and *Jackson*, the owners began settlement talks with the players involved in *White*.²²¹ Ultimately, a settlement was reached in 1993 after both sides compromised.²²² This settlement would shape the foundation

²¹⁴ *See id.*

²¹⁵ Nissim, *supra* note 203, at 261 (quoting *McNeil*, 1992 WL 315292, at *1).

²¹⁶ 802 F. Supp. 226 (D. Minn. 1992).

²¹⁷ *See* Nissim, *supra* note 203, at 261 (citing *Jackson v. Nat'l Football League*, 802 F. Supp. 226, 226 (D. Minn. 1992)).

²¹⁸ *Jackson*, 802 F. Supp. at 228.

²¹⁹ 836 F. Supp. 1458 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994).

²²⁰ *Id.*

²²¹ Levine & Maravent, *supra* note 109, at 1445.

²²² *Id.*

of the 1993 CBA as the players and owners came to a consensus on a league-wide salary cap,²²³ free agency, revenue sharing, and the rookie pool system.²²⁴ Having achieved labor peace, the NFLPA became a certified union once again.²²⁵

Between 1993 and 2010, the NFLPA and the NFL's management have extended their 1993 CBA five times.²²⁶ During this time period, the NFL was the only league of the four major United States professional sports leagues not to experience a work stoppage due to a labor dispute. Most recently, a CBA extension took place in March 2006 when both sides voted to extend the CBA through the 2011 season.²²⁷

However on May 20, 2008, League owners unanimously voted to opt out of this agreement.²²⁸ At the time, the reasons given for the early termination included high labor costs, cost problems with the rookie system, and the owners' inability to recoup the bonuses of players who subsequently breached their contracts or refused to perform.²²⁹ Under the terms of the 2006 CBA, the 2010 season operated as the agreement's final year because the NFL's management had opted out.²³⁰

²²³ The salary cap is an adjustable calculation that sets a team's maximum payroll for a league year. Redding & Peterson, *supra* note 18, at 98.

²²⁴ Nissim, *supra* note 203, at 261. Rookie contracts are limited under the CBA by a salary cap within the overall league salary cap referred to as the "rookie pool." *Facts About NFL Rookie Contracts*, NFL PLAYERS, <http://www.nflplayers.com/Articles/Public-News/Facts-about-NFL-Rookie-Contracts> (last visited Feb. 1, 2011).

²²⁵ See *History: The 1990's*, *supra* note 210.

²²⁶ Levine & Maravent, *supra* note 109, at 1446.

²²⁷ *Id.*

²²⁸ See Daniel Kaplan, *NFL Owners Feel No Choice but to Opt Out of Current CBA Deal*, STREET & SMITH'S SPORTS BUS. DAILY (May 20, 2008), <http://www.sportsbusinessdaily.com/article/121003>.

²²⁹ John Clayton, *NFL Owners Vote Unanimously to Opt Out of Labor Deal*, ESPN (May 20, 2008), <http://sports.espn.go.com/nfl/news/story?id=3404596>.

²³⁰ See NFL, *NFL Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association*, Art. LVIII § 3(a) (Mar. 8, 2006).

III. DELAY OF GAME: THE CURRENT LABOR DISPUTE BETWEEN THE NFL'S MANAGEMENT AND THE NFL PLAYERS

During the current NFL labor dispute, the NFL's management and the NFLPA have continuously tried to negotiate toward a new CBA. However, the parties face numerous obstacles that may prevent them from reaching an agreement. The primary issue between the two bargaining parties relates to the current revenue split between players and owners.²³¹ Secondary issues include decreasing the cost of rookie salaries through a rookie wage scale,²³² changing the length of the regular season from sixteen to eighteen games,²³³ the NFL Personal Conduct Policy (the "Policy"),²³⁴ and the League's policy regarding player discipline for on-field actions.²³⁵

A. *The Revenue Dispute*

The biggest issue separating the NFL's management and the NFLPA is the revenue split between the players and the owners.²³⁶ Under the current CBA, the players receive almost 60% of total league revenue²³⁷ leaving owners with the remaining roughly 40%.²³⁸ The owners want to amend the revenue split agreed to in the 2006 CBA by increasing their allocation of revenue. The NFL team owners argue that the current distribution is unsatisfactory because they are "losing money per game due to the increased

²³¹ See *NFL, Union to Discuss New CBA Today as Sides Remain Far Apart*, STREET & SMITH'S SPORTS BUS. DAILY (Jan. 5, 2010), <http://www.sportsbusinessdaily.com/article/135943>

²³² See Levine & Maravent, *supra* note 109, at 1475.

²³³ See *Roger Goodell: Owners Want 18 Games*, ESPN (Aug. 26, 2010), <http://sports.espn.go.com/nfl/news/story?id=5497448> [hereinafter *Owners Want 18 Games*].

²³⁴ Redding & Peterson, *supra* note 18, at 100–01.

²³⁵ Barry Wilner, *Football Big Hits: Players Want More Say in Discipline for Illegal Hits*, HUFFINGTON POST (Nov. 11, 2010, 5:05 PM), http://www.huffingtonpost.com/2010/11/11/football-big-hits-players_n_782315.html?ref=tw [hereinafter Wilner, *Football Big Hits*].

²³⁶ See Redding & Peterson, *supra* note 18, at 98–100.

²³⁷ See *id.* at 98.

²³⁸ *Id.*

2011]

HUDDLE UP

817

expenses of operating a franchise²³⁹ (e.g., stadium development).”²⁴⁰

Conversely, “the NFLPA claims that the owners are not only earning a profit each year, but that the values of the NFL franchises are increasing at a rapid rate.”²⁴¹ In support of this point, it has been pointed out that “the NFL’s revenue has increased 43 percent since 2006 to \$9.3 billion.”²⁴² Complicating matters is the fact that the League will not release any related financial information, arguing that the NFLPA knows the League’s financial situation and is aware that the NFL’s largest costs are player salaries.²⁴³

In response to the League’s unwillingness to reveal its financial data, many players have begun giving the NFLPA their backing to decertify the Union in the event of a labor lockout.²⁴⁴ By disbanding the Union, the labor exemption to antitrust law would no longer apply to the NFL owners and the NFL players could sue the League under antitrust law, arguing that the labor lockout constituted a group boycott by the owners.²⁴⁵

Public scrutiny and pressure have also intensified the negotiation process. On August 6, 2010, two senators weighed in on the labor dispute, urging the NFL’s management and the NFLPA to come to some sort of resolution before a work stoppage

²³⁹ In recent years, “the cost of building stadiums for professional sports franchises has increased beyond the ability for owners or even public entities to pay for them alone.” See *Cost of Building Sports Stadiums Skyrockets*, SAN DIEGO 6, <http://www.sandiego6.com/news/local/story/Cost-of-Building-Sports-Stadiums-Skyrockets/InsCySsu10CXmNkV5JT6g.csp>.

²⁴⁰ Redding & Peterson, *supra* note 18.

²⁴¹ *Id.*

²⁴² Sally Jones, *NFL Owners Want Guarantees that no Other Business Provides*, WASH. POST (Feb. 17, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/16/AR2011021603846.html>.

²⁴³ See Levine & Maravent, *supra* note 109, at 1475 (“The NFL is not going to provide any financial information to the Union because it is not claiming an inability to pay.”).

²⁴⁴ See, e.g., *Steelers Players Vote to Decertify the Union if Needed*, YAHOO!SPORTS (Oct. 6, 2010, 4:48 PM), <http://sports.yahoo.com/nfl/news?slug=txsteelersnflpa> (explaining that the Steelers are at least the tenth group of players to vote to decertify if necessary, joining players from the Packers, Bengals, Bills, Colts, Cowboys, Saints, Eagles, Redskins and Giants).

²⁴⁵ Liz Mullen, *NFLPA Seeks Authority to Decertify*, <http://aol.sportingnews.com/nfl/feed/2010-09/nfl-labor-talks/story/nflpa-seeks-authority-to-decertify>.

occurs.²⁴⁶ Senator George LeMieux (R-FL) argued that the country cannot afford the more than 125,000 layoffs that would come with an NFL lockout.²⁴⁷ A spokesman for the Union responded that the “[p]layers recognize that the business of the NFL impacts the businesses of America in a profound way. A lockout puts jobs at risk. We continue to work diligently to prevent a lockout.”²⁴⁸ While several NFL owners and executives finally expressed hope this past October that the CBA could be renewed before expiring, the actions of the NFL and the NFLPA tell a different story.²⁴⁹ For example, the NFL’s management is building a nearly \$900 million lockout fund financed from its savings.²⁵⁰ Similarly, the NFLPA is building its own reserves to cope with the effects of any future work stoppage.²⁵¹

B. Rookie Salaries

While player contracts in other United States professional sports leagues are guaranteed,²⁵² the NFL’s player contracts traditionally have not been.²⁵³ This trend, however, has recently changed, especially for top NFL rookies.²⁵⁴ “While the top five draft picks in 2002 secured an average of twenty-seven percent of their compensation guaranteed, the top five picks in 2010 got fifty-

²⁴⁶ See Eamon Javers, *Two Senators Urge NFL to Resolve Labor Disputes*, CNBC (Oct. 13, 2010, 3:13 PM), <http://www.cnbc.com/id/39655215>.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ See Daniel Kaplan, *NFL Pools \$900M for Labor Fight*, STREET & SMITH’S SPORTS BUS. J., Nov. 1, 2010, at 01, available at <http://www.bizjournals.com/dallas/news/2010/11/01/nfl-pools-900m-for-labor-fight.html?s=print> (reporting that both the NFL and the Union are saving funds in case they fail to agree to a new CBA).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² When a contract is “guaranteed,” it means that regardless of whether the player performs well or gets injured during the course of the contract and cannot perform, he still receives the full value of his contract. Rachel Bachman, *Trend in Guaranteed Money in NFL Contracts Pays Big for Ndamukong Suh, Other Potential Stars*, OR. LIVE (Aug. 6, 2010, 10:30 AM) http://blog.oregonlive.com/nfl/2010/08/trend_in_guaranteed_money_in_n.html.

²⁵³ *Id.*

²⁵⁴ *Id.* (explaining that when news of 2010 NFL draft pick Ndamukong Suh’s contract broke, the most important part of it was not the total compensation of the contract (\$68 million) but that \$40 million of the contract was guaranteed).

nine percent.”²⁵⁵ Reining in inflated rookie salaries is one of the issues on which both the League and the NFLPA can come to an agreement.²⁵⁶

The owners would like to see rookie salaries capped or reduced in some way due to the unprecedented cost that owners are incurring to obtain top college talent.²⁵⁷ Veteran players, making up a large portion of the NFLPA, would also like to see rookie salaries managed in a more cost-effective way out of respect for seasoned NFL players.²⁵⁸ Nevertheless, the League and the Union remain apart on what should be done to remedy this problem.

“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. Under this proposal, these expenses will be deducted from revenues that determine the NFL salary cap, thereby providing cost savings.”²⁵⁹ Alternatively, “the NFLPA has put forth the idea of a ‘Proven Performance Plan,’ which would shorten the duration of standard rookie contracts from four years to three,” but would make rookies unrestricted free agents after their contracts expire.²⁶⁰ The League argues that the unrestricted free agent provision would render the NFLPA’s proposal ineffective because although rookie salary costs would be reduced due to shorter contracts, unrestricted free agency would destroy the League’s “competitive balance.”²⁶¹

²⁵⁵ *Id.*

²⁵⁶ See Mawae: *Big Rookie Contracts Like Ryan’s ‘Disheartening,’* ESPN (May 21, 2008, 4:43 PM), <http://sports.espn.go.com/nfl/news/story?id=3406508&source=NFLHeadlines> (quoting NFLPA President Kevin Mawae as saying that Matt Ryan’s six-year, \$72 million rookie contract with the Atlanta Falcons was “a little disheartening” because a “young guy” who had never stepped on a NFL football field was getting “paid that kind of money”).

²⁵⁷ *Id.*

²⁵⁸ *Id.* NFLPA president Kevin Mawae explaining that “[a]s a guy who has been in the league for 14 now going on 15 years and being around other veteran guys, for a young guy to get paid that kind of money and never steps foot on an NFL football field, it’s a little disheartening to think of.” *Id.*

²⁵⁹ Levine & Maravent, *supra* note 109, at 1479–80.

²⁶⁰ Doug Farrar, *The Real Story Behind the Rookie Wage Scale*, YAHOO!SPORTS, http://sports.yahoo.com/nfl/blog/shutdown_corner/post/The-real-story-behind-the-rookie-wage-scale?urn=nfl-260642 (last visited Nov. 2, 2010) [hereinafter Farrar, *Rookie Wage Scale*].

²⁶¹ *Id.*

Augmenting the divide is the fact that many NFL fans across the country have become incensed that as most Americans continue to suffer through the worst recession in decades, NFL rookie contracts and player contracts in general have continued to inflate. While the press has criticized both the NFL's management and NFLPA for this phenomenon, both parties have publicly placed the blame on each other.²⁶² This has only made negotiations more difficult.

C. *The Eighteen Game Season*

The NFL's management would like to increase the number of regular season NFL games from sixteen to eighteen.²⁶³ This is because the addition of two regular season games would allow the NFL team owners to generate more revenue over the course of a season from ticket sales, merchandise, etc.²⁶⁴ To implement this plan, owners propose keeping the season at its current twenty-week length, but "reducing the number of preseason games from four to two"²⁶⁵ and adding two of those games to the regular season schedule.

Across the League, however, "many players question the wisdom of making an already grueling season even longer," while also limiting regular season preparation time.²⁶⁶ Players propose that an eighteen-game regular season should include "changes in the rules governing injured players" and "an extra bye week"²⁶⁷ to deal with the added hardship of a longer regular season.²⁶⁸ The players feel that while the season would still be twenty weeks long, additional regular season games pose a greater risk of injury

²⁶² *Id.*

²⁶³ *Owners Want 18 Games*, *supra* note 233.

²⁶⁴ *See id.* (quoting Bob Kraft, owner of the New England Patriots, as saying, "I think it's a win-win all around").

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ A "bye week" is a week during which a team does not have to play a game. Tom Stryker, *Inside Look at NFL Bye Weeks*, SPREAD, <http://www.thespread.com/forum/topic/Inside-Look-at-NFL-Bye-Weeks/74233/?p=214345> (last visited Jan. 31, 2011). Currently, each team is given one bye week over the course of an NFL regular season. *Id.*

Id.

2011]

HUDDLE UP

821

because regular season games are more competitive than preseason games.²⁶⁹

In response to the players' proposal, Miami Dolphins owner, Stephen Ross, publicly defended the League's eighteen-game plan:

[T]he studies [on additional regular season games] show [that it] will not really increase injuries. We're still playing 20 games. We're eliminating two preseason games and adding two regular season games, which is really what helps with the revenues, and make[s] the fans a lot happier and those games will be a lot more meaningful. But in terms of the players, they're still playing 20 games.²⁷⁰

The NFLPA quickly fired back on Twitter saying, "this is the kind of statement that drives players crazy. Every game is a risk of injury . . ."²⁷¹

Critically, New England Patriots owner Robert Kraft explained, "I really think going to an 18-game season is critical to us getting a labor deal. There's not a lot [of] ways in this economic environment we can generate incremental revenues. That's the best way."²⁷²

D. The NFL Personal Conduct Policy

The NFL Personal Conduct Policy states that "[a]ll persons associated with the NFL are required to avoid "conduct detrimental to the integrity of and public confidence in the National Football League."²⁷³ This requirement applies to players, coaches, other

²⁶⁹ *Longer Season Carries Injury Risks*, SPORTS & STARS (Nov. 24, 2010, 1:40 PM), <http://www.ibtimes.com/articles/85304/20101124/longer-season-carries-injury-risks-nfl-players.htm>.

²⁷⁰ Sarah Talalay, *Dolphins Owner Irks Players Union with Comments on 18-Game Season*, BUS. OF SPORTS—SUN SENTINEL BLOGS (Nov. 18, 2010), http://blogs.trb.com/sports/custom/business/blog/2010/11/dolphins_owner_irks_players_un.html.

²⁷¹ *Id.*

²⁷² *Owners Want 18 Games*, *supra* note 233.

²⁷³ Casinova O. Henderson, *How Much Discretion is Too Much for the NFL Commissioner to Have Over the Players Off-the-Field Conduct?* 17 SPORTS LAW. J. 167, 170 (2010).

team employees, owners, game officials, and all others working for the NFL.²⁷⁴ The Policy gives the NFL's Commissioner the ultimate authority to discipline any violator of the Policy and the power to review any appeal.²⁷⁵ The Commissioner's authority to discipline players flows directly from the CBA, the NFL Player Contract, and the NFL Constitution and Bylaws.²⁷⁶

In 2007, the Policy underwent a massive overhaul when Commissioner Goodell extended it to include players' off-the-field conduct.²⁷⁷ In defending this change, Commissioner Goodell stated, "We hold ourselves to higher standards of responsible conduct because of what it means to be part of the National Football League . . . this policy is a further step in ensuring that everyone who is part of the NFL meets that standard."²⁷⁸

However, Commissioner Goodell's implementation of the new conduct policy was arguably a "unilateral change in employment terms and conditions" of the CBA because the Union did not have the opportunity to negotiate or engage in collective bargaining with the League over the Policy's changes.²⁷⁹ Thus, the Policy has become a sticking point for the players. The Union and its leaders believe that Commissioner Goodell's implementation of the Policy reaches too far and "provide[s] no guidelines in the application of fines and/or suspensions due to off-field behavior."²⁸⁰ The NFLPA would also like to have an independent arbitrator hear appeals of League discipline.²⁸¹

Complicating negotiations, Commissioner Goodell's decision to extend the Policy to off-the-field conduct has been largely vindicated by several players' high profile off-the-field

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 170–71.

²⁷⁶ *Id.* at 175.

²⁷⁷ See Redding & Peterson, *supra* note 18, at 100.

²⁷⁸ *Goodell Issues Memo Enforcing Player Safety Rules*, NFL.COM (Oct. 20, 2010, 5:51 PM), <http://www.nfl.com/news/story/09000d5d81b7b9ef/article/goodell-issues-memo-enforcing-player-safety-rules>.

²⁷⁹ Henderson, *supra* note 273, at 185–86.

²⁸⁰ See Andrew Brandt, *Roethlisberger, Favre and the NFL's Personal Conduct Policy*, FORBES (Oct. 13, 2010, 1:09 PM), <http://blogs.forbes.com/sportsmoney/2010/10/13/roethlisberger-favre-and-the-nfls-personal-conduct-policy>.

²⁸¹ *Id.*

transgressions.²⁸² Since the Policy's extension, Commissioner Goodell has suspended players such as Marshawn Lynch for three games for carrying a concealed firearm,²⁸³ punished Michael Vick for his role in a dog fighting operation for up to six regular season games,²⁸⁴ suspended Donte Stallworth indefinitely for killing a man while driving intoxicated,²⁸⁵ and suspended Ben Roethlisberger for four games after a twenty-year-old female college student accused him of sexually assaulting her in a Georgia nightclub.²⁸⁶

One of the more interesting facets of this issue is that team owners are caught somewhere in between Commissioner Goodell's policy extension and the players' respective positions. Owners do not want to see their players get suspended, but they also do not want team patrons to think that they condone crude and sometimes criminal behavior. For this reason, some team owners have advocated for the greater use of a team-enforced, rather than league-enforced, personal conduct policy.²⁸⁷

E. Player Discipline for Illegal Hits

An emerging issue between the League and the players has been the League's cracking down on what constitutes an illegal hit during the course of a football game. Following a series of devastating plays in games played on October 17, 2010, that left multiple players seriously hurt with head, neck, and other related

²⁸² Redding & Peterson, *supra* note 18, at 100–01.

²⁸³ *Id.* at 100.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Roethlisberger Suspended by NFL*, ESPN (Apr. 22, 2010), <http://sports.espn.go.com/nfl/news/story?id=5121614>.

²⁸⁷ *See NFL to Announce Tougher Player Conduct Policy Next Week*, STREET & SMITH'S SPORTS BUS. DAILY (Mar. 22, 2007), <http://www.sportsbusinessdaily.com/article/110530> ("It looks strange to the public when a player misbehaves and nothing happens.").

injuries,²⁸⁸ the League ramped up its regulation of helmet-to-helmet hits.²⁸⁹

Commissioner Goodell explained:

One of our most important priorities is protecting our players from needless injury. In recent years, we have emphasized minimizing contact to the head and neck, especially where a defenseless player is involved. It is clear to me that further action is required to emphasize the importance of teaching safe and controlled techniques, and of playing within the rules. It is incumbent on all of us to support the rules we have in place to protect players.²⁹⁰

Following Commissioner Goodell's statement, the League imposed a \$75,000 fine and three \$50,000 fines on four players who committed fouls under the revamped discipline system.²⁹¹

Many NFL players believe they should have a greater voice in handing out fines and suspensions for illegal hits.²⁹² Currently, all plays are reviewed by the League's officiating and operations offices.²⁹³ The players are interested in making sure that some of those reviewers are their peers.²⁹⁴ Commissioner Goodell said the League is opposed to player reviewers, emphasizing that he is not part of the fines process; appeals are heard and decided by Hall of Fame player Art Shell and former NFL coach Ted Cottrell.²⁹⁵ The

²⁸⁸ *Helmet-to-Helmet Hits Draw Ire of NFL's Former VP of Officiating*, AOL NEWS (Oct. 18, 2010, 6:00 AM), <http://www.aolnews.com/2010/10/18/helmet-to-helmet-hits-draw-ire-of-former-vp-of-officiating>.

²⁸⁹ *Id.* A helmet-to-helmet hit occurs when the defensive player leads with his helmet to strike the offensive player's helmet in the course of making a tackle on the offensive player. *Id.*

²⁹⁰ Danny Cox, *NFL Notifies Teams of New Illegal Hit Discipline with Letter and Video*, EXAMINER (Oct. 21, 2010, 6:47 PM), <http://www.examiner.com/nfl-international/nfl-notifies-teams-of-new-illegal-hit-discipline-with-letter-and-video>.

²⁹¹ Wilner, *Football Big Hits*, *supra* note 235.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

2011]

HUDDLE UP

825

NFL's management and the NFLPA jointly pay their salaries.²⁹⁶ Nevertheless, players have expressed concern about the subjective nature of the appeals system.²⁹⁷

Buffalo Bills safety George Wilson views all of these issues as intertwined with negotiations for a new CBA.²⁹⁸ Wilson explained: "It's imperative for the [U]nion to feel like they have a voice in the disciplinary process, at least have a voice at the table. I know that can come in a lot of capacities and aspects, but guys just want to feel like their voices are heard."²⁹⁹

IV. TOUCHDOWN: USING MEDIATION TO REACH A NEW CBA

Positive working relationships are vital in all businesses, including professional sports.³⁰⁰ Thus, "bitter negotiations in sports labor disputes can lead to unique problems."³⁰¹ This is especially true when the labor dispute involves collective bargaining.

While both the NFL's management and the NFLPA have a mutual interest in each other's success and should work together to reach a new CBA, parties involved in these types of labor disputes often become entrenched in their positions and publicly fight caustic and financially draining labor battles.³⁰² Indeed, NFL team owners have already declared that the players should not receive as much revenue as they are currently receiving.³⁰³ In retaliation, the players have publicly questioned the integrity of the owners' claims that they are financially strapped, threatened to decertify the Union, and threatened to sue the League in the event of a

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ Peter Kupelian, *The Use of Mediation for Resolving Salary Disputes in Sports*, KUPELIAN ORMOND & MAGY, <http://kompc.com/289/articles/the-use-of-mediation-for-resolving-salary-disputes-in-sports> (last visited Nov. 12, 2010).

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ See Redding & Peterson, *supra* note 18, at 98–100.

lockout.³⁰⁴ The effect of these actions is that two parties that otherwise need each other to thrive have publicly humiliated one another, alienated their fan base, and made it harder to work together toward reaching a new CBA.

Mediation is an ideal remedy for resolving labor disputes in professional sports and helping the NFL's management and the NFL players reach a new CBA. It provides the best forum for open communication, which can be used to preserve and advance the parties' working relationship, it offers an expedited and financially rewarding way to come to a resolution, and it offers both parties a sense of privacy.³⁰⁵

A. *Mediation Can Preserve and Foster Working Relationships*

Mediation takes into consideration the human toll of conflict and fosters healthier communication between disputants.³⁰⁶ It also allows for the parties' collaboration in the decision making process and mutual satisfaction in the outcome.³⁰⁷ This is critical for resolving the NFL labor dispute because as Buffalo Bills safety George Wilson explained, "Guys just want to feel like their voices are heard."³⁰⁸

The ability to foster positive outcomes and mutual decision making can be realized through the use of a mediator.³⁰⁹ This person, chosen by both parties, is trained to bring about collaborative resolution by providing an environment of neutrality.³¹⁰ Therefore, given the NFL management's view that AFL-CIO President, Richard Trumka, could not provide for a

³⁰⁴ See *Union Head Says Owners Set for Lockout*, ESPN (Oct. 5, 2010, 6:51 PM), <http://sports.espn.go.com/nfl/news/story?id=5652700>.

³⁰⁵ Kupelian, *supra* note 300 ("[M]ediation remains a relatively cheap first step at attempting to resolve a dispute that may potentially reach tens of millions of dollars. A mediator's pay can be analogized to the fee for visiting of psychiatrist, or perhaps preventive investments in a tangible good.").

³⁰⁶ Kathleen C. Wallace, *A Proposal for the United States Olympic Committee to Incorporate Formal Mediation Within its Grievance Process*, 16 MARQ. SPORTS L. REV. 59, 65 (2005).

³⁰⁷ *Id.* at 69.

³⁰⁸ Wilner, *Football Big Hits*, *supra* note 235.

³⁰⁹ Wallace, *supra* note 306.

³¹⁰ Kupelian, *supra* note 300.

2011]

HUDDLE UP

827

neutral environment as mediator, Trumka's offer to mediate the NFL CBA negotiations was flawed in a critical respect.

However, while Trumka might not be the ideal candidate to mediate this dispute, he has the right idea. The infusion of a neutral mediator into a hostile labor dispute can make a great difference in the dispute's outcome. This is especially true when the parties have a long and tumultuous negotiation history, as the NFL's management and the NFLPA do. The mediator can help identify and address each party's key issues and goals, while keeping each party focused on building a brighter future, rather than focusing on a bitter past.³¹¹

The mediator can also encourage positive working relationships by engaging each party in private discussions during the mediation.³¹² During the course of a negotiation, disputants do not always feel comfortable sharing their private issues and/or negotiation goals with one another. Typically when this occurs, negotiations will either stall or reach an impasse.³¹³ However, in the mediation setting, the mediator can call a private caucus to prevent this from happening.³¹⁴ A private caucus occurs when the mediator talks with each party and its lawyers in confidence.³¹⁵ During the private caucus, the mediator will listen to each side's concerns and agree not to divulge any of this information until clearance is received from each party.³¹⁶ In the meantime, this information can help the mediator shape negotiations and encourage good-faith bargaining aimed at creating a resolution that meets both parties' needs.³¹⁷

Here, caucusing could assist with the production of critical NFL financial information relating to the League's profitability.³¹⁸

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ See *AFL-CIO Prez.*, *supra* note 7.

This, in turn, would be an enormous step toward helping the parties reconcile their differences and reaching a new CBA.³¹⁹

B. Mediation Can Expedite a Resolution and Save Money

Not surprisingly, when high-profile disputes arise and communications begin to break down, it can be difficult to get negotiations back on track.³²⁰ Rather than working together, parties will often resort to insulting each other in the media, stockpiling assets to fund a protracted conflict, and adopting a wait-and-see approach to negotiations.³²¹ The conflict drags on and reaches a juncture where multiple egos become involved in the dispute, making a joint resolution unlikely.³²² The time and money spent on defending each party's position also becomes significant and irretrievable.³²³

The NFL labor dispute has already begun to resemble this unproductive model of conflict resolution.³²⁴ As this conflict continues, the likelihood of both parties suffering through long, costly, and publicly bitter litigation greatly increases.³²⁵ It also increases the likelihood of both parties experiencing enormous financial losses due to game cancellations.³²⁶

What both parties need to realize is that not only will mediation be far more sensible in resolving their dispute, it will also be faster and cheaper.³²⁷ These are crucial benefits as the current CBA ends in March 2011 and the tentative start of the 2011–2012 season is less than a year away.

³¹⁹ *Id.*

³²⁰ Kupelian, *supra* note 300.

³²¹ See, e.g., Darrelle Revis Contract Talks with Jets to be Kept out of Public Eye, NESN.COM (Aug. 12, 2010, 2:49 PM), <http://www.nesn.com/2010/08/darrelle-revis-contract-talks-with-jets-to-be-kept-out-of-public-eye.html>; see also Kaplan, *NFL Pools \$900 for Labor Fight*, *supra* note 249.

³²² See Wallace, *supra* note 306, at 64.

³²³ See *id.*

³²⁴ See Kaplan, *NFL Pools \$900M for Labor Fight*, *supra* note 249.

³²⁵ See, e.g., Liz Mullen, *NFLPA Seeks Authority to Decertify*, DALLAS BUS. J. (Sept. 13, 2010, 9:11 AM), <http://www.bizjournals.com/dallas/stories/2010/09/13/daily1.html> (stating that the NFLPA intends to decertify so that it may file an antitrust challenge).

³²⁶ Wilner, *Lockout*, *supra* note 21.

³²⁷ Wallace, *supra* note 306, at 64.

Mediation offers the parties a set mechanism for early engagement with one another and an opportunity to take control of their problems before they become unsolvable. The parties can elect to have the right and ability to control the identity of the mediator, the timing and scheduling of the sessions, the nature of discussions, and the confidentiality of the negotiations.³²⁸ In addition, the cost of having to pay a mediator is negligible in comparison to the cost the parties would incur if the 2011 season were cancelled and/or this dispute were to be litigated.³²⁹

For the NFL's management, the reduced expenditure on labor negotiations increases funds available to support other League initiatives and promote the game of football. For the players, the increased time and money allows for better offseason training and a greater focus on the upcoming season.

C. Mediation Can Help Prevent a Public Relations Disaster

Public relations are important in any industry. However, professional sports leagues are especially dependent on public reaction.³³⁰ A professional sports league's inability to gauge public reaction can lead to negative effects on business and must be reversed as early as possible to stop irreparable harm and loss of public confidence.³³¹ While many professional sports leagues have traditionally been sluggish in reacting to public outcry and negative publicity, the NFL has been quite adept in the past at responding to its fans' demands and promulgating socially responsible initiatives and policies.³³² These include NFL Play 60,³³³ the NFL and United Way Hometown Huddle,³³⁴ and

³²⁸ Kupelian, *supra* note 300.

³²⁹ *Id.*

³³⁰ See Greenberg, *Sports Facility Leases*, *supra* note 28, at 101–02.

³³¹ Kupelian, *supra* note 300 (explaining that both MLB and the NBA have suffered for failing to take fan interest and public concern into account).

³³² See, e.g., *Goodell Issues Memo Enforcing Player Safety Rules*, *supra* note 278 (“[A]s an employee of the NFL or a member club, you are held to a higher standard and expected to conduct yourself in a way that is responsible, promotes the values upon which the league is based, and is lawful.”).

³³³ NFLRUSH, <http://www.nflrush.com/play60> (last visited Jan. 31, 2011). NFL PLAY 60 is a national youth health and fitness campaign focused on increasing the wellness of young fans by encouraging them to be active for at least sixty minutes a day. *Id.*

League-enforced sanctions against teams for employee misconduct.³³⁵

Although labor disputes are only a part of the public relations puzzle, long and drawn out public CBA negotiations between the NFL owners and the players will negatively impact the NFL's overall public perception, and ultimately, its business.³³⁶ This is especially the case when during a national recession, the majority of the parties' negotiations center on which party should receive the greater share of billions of dollars in revenue.³³⁷ Further adding to the public relations concern is that if the parties do not come to a resolution and a work stoppage does occur, many American cities will lose millions of dollars and thousands of jobs.³³⁸

Mediation will offer the public hope that this dispute could be resolved at an earlier stage, while also limiting the parties' public display of greed and pettiness during negotiations.³³⁹ Even though mediation may not resolve the dispute immediately, ground rules could be established requiring confidentiality during the course of, and in between mediation sessions. This would minimize adverse media commentary on the NFL labor dispute's status and thereby limit negative public reaction. It would also prevent either party from misrepresenting the other's proposals in the press and from using the court of public opinion to try hotly contested labor issues, which only fuels interparty animosity and makes negotiating a new CBA nearly impossible.³⁴⁰

³³⁴ *NFL and United Way*, UNITED WAY CAPITAL AREA, http://unitedwaycapitalarea.org/partners/nfl_and_united_way.php (last visited Jan. 31, 2011). Hometown Huddle is a national day of community service, during which NFL players and representatives from each of the thirty-two NFL teams lend aid and assistance to members of their communities. *Id.*

³³⁵ See *Goodell Issues Memo Enforcing Player Safety Rules*, *supra* note 278 (explaining that as a result of negative league publicity stemming from player incidents, NFL teams will be disciplined when their employees, including players, violate the league's personal conduct policy).

³³⁶ Kupelian, *supra* note 300.

³³⁷ *AFL-CIO Prez*, *supra* note 7.

³³⁸ *Id.*

³³⁹ Kupelian, *supra* note 300.

³⁴⁰ Farrar, *Rookie Wage Scale*, *supra* note 260.

Ultimately, nothing can limit the public relations headache that the NFL will experience if there is a work stoppage next season. However, mediation can help put a cap on the negative publicity that the NFL's management and the NFLPA receive as labor negotiations continue and can increase the likelihood that the public relations nightmare of an NFL work stoppage never materializes.

V. INSIDE THE HUDDLE: CONDUCTING THE MEDIATION

Having realized the benefits that mediation affords the parties, the NFL's management and the NFLPA agreed to enter into mediation on February 17, 2011.³⁴¹ Choosing mediation is an important step toward saving the 2011–2012 NFL season and avoiding the significant job and money losses that could occur in the event of a work stoppage.³⁴² However, now that the NFL's management and the NFLPA have opted for mediation, the mediation sessions must be structured and conducted in a way that will encourage consensus between the parties. Otherwise, any mediation session that the parties hold will prove futile in resolving this labor dispute.

A. *Picking a Referee: The Mediator*

As the NFL's management correctly states in its response to Richard Trumka's September 30, 2010, letter, any mediator that is going to mediate the NFL's CBA negotiations must be a mutually agreed upon neutral third party.³⁴³ For several reasons, this is a fundamental precept of mediation³⁴⁴ that both the NFL's management and the NFLPA have followed in appointing the Federal Mediation and Conciliation Service ("FMCS"), an independent United States government agency, to oversee the

³⁴¹ *NFL, Players Union Agree to Mediation in Labor Negotiations*, SPORTS ILLUSTRATED (Feb. 17, 2011, 3:55PM), <http://sportsillustrated.cnn.com/2011/football/nfl/02/17/nfl-union-mediation.ap/index.html>.

³⁴² *See AFL-CIO Prez*, *supra* note 7.

³⁴³ *Id.*

³⁴⁴ *See What is Mediation?*, *supra* note 30.

mediation.³⁴⁵ FMCS director George H. Cohen³⁴⁶ will be the mediator.³⁴⁷

First, having a mutually agreed upon mediator makes both the NFL's management and the NFLPA responsible for the role that the mediator plays in conducting the mediation and gives each party an equal stake in how the mediation process is managed.³⁴⁸ This assures both parties' interest and commitment to having a productive mediation.³⁴⁹ Furthermore, agreement over the mediator can often be symbolic of a change in tone between disputing parties and signal the first of several compromises to come.³⁵⁰ This would be particularly true in the case of this labor dispute as both the NFL's management and the NFLPA have refused to concede any ground on all key labor issues and continue to have vitriolic exchanges.³⁵¹ Lastly, having a neutral third party mediator is the primary way to ensure that both the NFL's management and the NFLPA trust each other and the mediation process.³⁵² This is crucial because successful mediation hinges on the parties being comfortable with exchanging their respective bargaining positions and willingness to work together to achieve mutual gains.³⁵³ The parties will not do this if they do not trust each other or if the mediator is being coercive and fails to protect the parties' interests adequately and equally.³⁵⁴

Given the unique nature of the professional sports industry and this labor dispute, it is also important that the mediator have

³⁴⁵ See *NFL, Players Union Agree to Mediation*, *supra* note 341.

³⁴⁶ George H. Cohen has extensive sports labor relations experience having been involved in the NBA's, the NHL's, MLB's and Major League Soccer's past CBA negotiations. *See id.*

³⁴⁷ *Id.*

³⁴⁸ ROBERT FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 27 (Bruce Patton ed., 2d ed. 1991).

³⁴⁹ *Id.*

³⁵⁰ Jeff Carlisle, *A Glimmer of Hope in the CBA Talks*, ESPN, <http://soccernet.espn.go.com/columns/story?id=751412&sec=mls&root=mls&cc=5901> (last visited Feb. 9, 2011).

³⁵¹ Jim Corbett, *Analyst Sees Way to Avert Stoppage*, USA TODAY, Jan. 31, 2011, at 7C.

³⁵² Kupelian, *supra* note 300.

³⁵³ See JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL* 74–75 (3d ed. 2008).

³⁵⁴ See *AFL-CIO Prez*, *supra* note 7.

significant experience mediating comparable types of labor negotiations.³⁵⁵ Having a mediator with professional sports league labor relations expertise, such as George H. Cohen, provides many advantages that would not otherwise be afforded to the NFL's management and the NFLPA.

First, a mediator with this type of experience is likely to already comprehend the extensive labor relations history and current struggle between the parties.³⁵⁶ This will allow the mediation process to move swiftly and efficiently which is vital because the parties do not have long before the current CBA expires.³⁵⁷ Second, as often is the case with professional sports league CBA negotiations, here, the parties to the dispute are large organizations, with sizable labor relations teams made up of attorneys, businesspeople, and former players.³⁵⁸ A mediator with Cohen's experience understands how to manage the different personalities and egos that will inevitably accompany any mediation session(s) and that would otherwise threaten the productivity of the mediation process.³⁵⁹ Third, the consequences of failing to reach a new CBA could be devastating.³⁶⁰ This will likely create a pressure-packed atmosphere during mediation and as negotiations move forward.³⁶¹ A mediator such as Cohen, who has been in this position before, is in the best position to handle this hostile atmosphere and can exert a calming influence over the

³⁵⁵ Kupelian, *supra* note 300.

³⁵⁶ *History*, NFLPA, <http://www.nflplayers.com/About-us/History> (last visited Feb. 5, 2011).

³⁵⁷ Kupelian, *supra* note 300.

³⁵⁸ Greg Rosenthal, *NFLPA: "Any Suggestion We Want a Lockout Is Coming From Outer Space,"* NBCSPORTS (Jan. 13, 2011, 1:28 PM), <http://profootballtalk.nbcsports.com/2011/01/13/nflpa-any-suggestion-we-want-a-lockout-is-coming-from-outer-space>.

³⁵⁹ See Edwin P. Ahrens, *Why Should I Care?*, MEDIATE, <http://www.mediate.com/articles/ahrens30.cfm> (last visited Feb. 4, 2011).

³⁶⁰ See *AFL-CIO Prez*, *supra* note 7 (explaining that a lockout could cost thousands of Americans their jobs and cities more than \$140 million in revenue).

³⁶¹ Doug Farrar, *Ochocinco Grills Goodell During Commissioner's Press Conference*, YAHOO!SPORTS (Feb. 5, 2001, 9:09 AM), http://sports.yahoo.com/nfl/blog/shutdown_corner/post/Video-Ochocinco-grills-Goodell-during-Commissionio?urn=nfl-317260 (explaining that player anxiety is only going to grow as the deadline date for the expiration of the current Collective Bargaining Agreement gets closer)[hereinafter Farrar, *Ochocinco*].

already anxious parties by laying out a framework for how mediation should proceed.³⁶²

B. Officiating the Game: The Mediator's Role

Ultimately, Cohen cannot force the NFL's management and the NFLPA to agree on a new CBA.³⁶³ However, the role that he plays will have a profound impact on the outcome of this dispute. It will be up to Cohen to "[interpret] concerns, [relay] information between the parties, [frame] the issues, and [refocus] the problems."³⁶⁴

As previously stated, the anxiety level at any mediation session that occurs between the NFL's management and the NFLPA has to be high.³⁶⁵ With so much riding on the negotiations, the pressure is going to mount with each successive session.³⁶⁶ For this reason, Cohen must remain a composed third party that can control the negotiations when necessary.³⁶⁷ In particular, Cohen should do three things during the course of the mediation process to help ensure that mediation is as successful as possible.

First, Cohen should obtain an understanding of what each party's view of the situation is from the outset of mediation.³⁶⁸ By understanding each party's position and goals, Cohen can determine how each mediation session should proceed.³⁶⁹ To do this, it would be wise for Cohen to conduct separate meetings with both the NFL's management and the NFLPA before any joint mediation sessions begin.³⁷⁰ This would prevent the parties' hostilities from getting in the way of Cohen's comprehension of the key issues.³⁷¹

³⁶² See NOLAN-HALEY, *supra* note 353, at 82.

³⁶³ *Id.* at 70 (explaining that in mediation, the mediator cannot impose a decision on the parties).

³⁶⁴ *Id.* at 85.

³⁶⁵ See Farrar, *Ochocinco*, *supra* note 361.

³⁶⁶ *Id.*

³⁶⁷ See NOLAN-HALEY, *supra* note 353, at 82.

³⁶⁸ *Id.* at 75.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

Next, Cohen should confer with the parties at the outset of mediation to determine what the mediation schedule is going to be.³⁷² Setting out a schedule at the beginning of mediation helps the NFL's management and the NFLPA establish a concrete meeting plan and steady dialogue. This would be of particular help in the case of this dispute as the parties have been unable to maintain consistent dialogue regarding CBA negotiations since labor talks first began in June 2009. Once mediation starts, the sessions will become contentious at times.³⁷³ Either party could desire to walk away from mediation.³⁷⁴ However, having a previously agreed upon schedule is an effective prophylactic to this type of problem because it is a constant reminder from the outset that both parties are dedicated to seeing the mediation process through to the end and reaching an agreement.

Finally, Cohen will have to know when to call a "timeout." If it appears that a resolution may be difficult to achieve during a joint session, Cohen should request to meet separately with the NFL's management and the NFLPA in private caucuses.³⁷⁵ This will allow each party to confidentially share sensitive information and any concerns it has with how negotiations are proceeding. Moreover, if the NFL's management is unwilling in a joint session to produce the League financial data that the NFLPA has requested, Cohen should urge the NFL's management to produce this information during its private caucus. Cohen would then have the opportunity to review the data and interpret its meaning. After considering the financial information, Cohen could make an objective recommendation during the next joint session as to how League revenue should be divided in the new CBA. So long as the NFLPA is informed of the fact that Cohen's recommendation is based on the NFL management's full financial disclosure during the private caucus, the NFLPA would have little reason to object to Cohen's proposal and the NFL's management would not have to

³⁷² *Id.*

³⁷³ Chris Mortensen & Adam Schefter, *Sources: Sides Could Talk this Week*, ESPN.COM (Feb. 11, 2011), <http://sports.espn.go.com/nfl/news/story?id=6119630> [hereinafter Mortensen & Schefter, *Sides Could Talk*].

³⁷⁴ Chris Mortensen, *NFL-Union Talks Canceled*, ESPN (Feb. 11, 2011), <http://m.espn.go.com/nfl/story?storyId=6107737>.

³⁷⁵ See NOLAN-HALEY, *supra* note 353, at 83.

reveal the contents of its financial data to the NFLPA. This compromise, in turn, would be a monumental step toward resolving this labor dispute as it would significantly alleviate tensions over the revenue split, the primary issue separating the parties.

C. The NFL's Management and The NFLPA: What Must Happen

While Cohen can significantly influence the outcome of mediation, it will be up to the NFL's management and the NFLPA whether to agree on a new CBA.³⁷⁶ Given that the NFL's management and the NFLPA have already had negotiations regarding a new CBA, both parties have an understanding of what the other is seeking.³⁷⁷ Thus, the parties should view mediation as an opportunity to compromise on outstanding labor issues so that a new CBA is reached. However, for the mediation process to be successful, several things must happen between the parties during the course of mediation.

First, the mediation process will only work if the parties are willing to bargain in good faith.³⁷⁸ The parties have to be honest with one another and must actually desire a resolution of this dispute for mediation to be effective. With such a great deal of animosity built up between the parties, this could prove difficult.³⁷⁹ However, it will be up to the parties to put their emotions aside and realize that working together to reach an agreement is the only way to stave off disaster.

Next, assuming that the parties are willing to bargain in good faith, the NFL's management must be more forthcoming with financial information. So far, the NFL's management has refused to disclose financial statements to the NFLPA in support of their position that teams are losing money.³⁸⁰ However, production of this information is essential for a successful negotiation between the parties because it is the only way to demonstrate to the NFLPA

³⁷⁶ *Id.* at 75.

³⁷⁷ Mortensen, *NFL-Union Talks Canceled*, *supra* note 374.

³⁷⁸ See NOLAN-HALEY, *supra* note 353, at 100.

³⁷⁹ See Mortensen & Schefter, *Sides Could Talk*, *supra* note 373.

³⁸⁰ See *AFL-CIO Prez.*, *supra* note 7.

2011]

HUDDLE UP

837

that the owners' position regarding the revenue split is justified.³⁸¹ Failure to produce this information only lessens the NFL management's credibility and makes it less likely that a compromise over the distribution of league revenue will be reached. As this is the pivotal point of contention between the NFL's management and the NFLPA, resolution of this issue is essential to reaching a new CBA.³⁸²

Last, the parties need to agree to keep confidential the substance of each mediation session. To their detriment, both the NFL's management and the NFLPA have roused public concern over this labor dispute by using the media to vilify one another and gain support for their respective positions.³⁸³ As previously stated, this has only heightened tensions between the parties and made agreement more difficult.³⁸⁴

For good faith bargaining to occur and for mediation to be effective, the parties must be able to engage in the mediation process without having to worry that their words will be used against them or misconstrued.³⁸⁵ Agreeing that the content of the mediation sessions will be kept confidential virtually guarantees that this will happen and allows the parties to have open and honest negotiations.³⁸⁶ This, in turn, makes reaching a new CBA far more likely.

CONCLUSION: THE POST GAME SHOW

It is time for the NFL's management and the NFLPA to demonstrate their commitment to reaching a new CBA. Properly conducted mediation "promotes dignity and respect for [parties'] interests, addresses the root cause of conflict, and allows for resolutions that satisfy the interests of all parties. It is efficient,

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ Mortensen, *NFL-Union Talks Canceled*, *supra* note 374.

³⁸⁴ *Id.*

³⁸⁵ *See* NOLAN-HALEY, *supra* note 353, at 117.

³⁸⁶ *Id.*

838 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* [Vol. 21:789

strengthens relationships of trust and respect, . . . and controls unnecessary expenditure of resources.”³⁸⁷

In an organization where positive relationships are necessary for owners and players to achieve success, conflict can be costly.³⁸⁸ Properly conducted mediation “creates the opportunity for conflict to bring about productive outcomes,”³⁸⁹ and therefore, should play an integral part in the NFL management’s and the NFLPA’s collective bargaining process and in future labor disputes between management and players in professional sports leagues. It is time to huddle up.

³⁸⁷ Wallace, *supra* note 306, at 71.

³⁸⁸ *Id.*

³⁸⁹ *Id.*