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## Fumbling Away the Season: Will the Expiration of the NFL-NFLPA CBA Result in the Loss of the 2011 Season?

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# Fumbling Away the Season: Will the Expiration of the NFL-NFLPA CBA Result in the Loss of the 2011 Season?

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INTRODUCTION

On Tuesday, May 20, 2008, the National Football League (the “NFL” or the “League”) officially notified the National Football League Players’ Association (the “NFLPA,” the “Players’ Association” or the “Union”) that ownership (the “Owners” or “Ownership”) had elected to opt out of the parties’ current collective bargaining agreement (the “CBA” or the “Agreement”).<sup>1</sup> This decision threatens nearly two decades of uninterrupted labor peace and mutual financial gains. In 2006, Owners capitulated to Union demands, as they hastily ratified the CBA during an emergency meeting in the interest of maintaining steadily climbing League revenues.<sup>2</sup> This action by Owners was intended to avoid a work stoppage, which would have derailed the continuing economic success professional football had enjoyed. The chief concession was to allocate an additional percentage of League revenues to player salaries,<sup>3</sup> which under the 2006 CBA now

<sup>1</sup> John Clayton, *NFL Owners Vote Unanimously to Opt Out of Labor Deal*, ESPN.COM, May 20, 2008, <http://sports.espn.go.com/nfl/news/story?id=3404596>.

<sup>2</sup> Vito Stellino, *NFL Confidential: Goodell’s Hands Full with Heavy Contract Issues*, FLA. TIMES-UNION, Aug. 13, 2006, [http://jacksonville.com/tu-online/stories/081306/jag\\_4408901.shtml](http://jacksonville.com/tu-online/stories/081306/jag_4408901.shtml) (noting that “labor peace was more important than having a labor strike or Armageddon” (quoting Jacksonville Jaguars owner, Wayne Weaver)).

<sup>3</sup> *Id.*

approached 60% of League gross revenues. In signing the agreement, Ownership seemed more concerned with preserving labor peace than considering the long-term consequences of the future.

As the situation stands today, skyrocketing player salaries and a severe recession have drastically altered Ownership's opinion of the CBA. Despite league-wide revenues approaching a healthy \$9 billion,<sup>4</sup> Ownership has taken the position that the 2006 CBA allocated too high a percentage of revenues to players and now threatens the NFL's economic viability.<sup>5</sup> Said one owner, "[i]t's a bad deal. A lot of people realize that now."<sup>6</sup>

The NFLPA expected Ownership to opt out of the CBA in 2008.<sup>7</sup> Now, the Union is unifying its front after the passing of the Players' Association's longtime and seminal Executive Director, Gene Upshaw. Shortly before passing, Mr. Upshaw had commented on the League's rationale for opting out, saying "[j]ust because the owners did not make as much as they wanted, they feel they lost money. We are not going to retreat [from a higher allocation of revenues] and we are not going to take less."<sup>8</sup>

When the NFL opted out, Commissioner Roger Goodell sent Upshaw an email providing three reasons why the League had exercised its option to reopen the contract for negotiation. Goodell pointed to (1) high labor costs (an unacceptable percentage of League revenues being allocated to paying player salaries); (2) problems with NFL rookie salaries (exorbitant contracts to unproven players); and (3) the legal inability of franchises to recoup signing bonuses from players who breach contracts or refuse to perform (including issues with player discipline).<sup>9</sup> Commissioner Goodell also stated in separate comments that it is

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<sup>4</sup> Mark Maske, *Owners May Revisit NFL Labor Issues*, WASH. POST, Mar. 19, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/18/AR2008031802995.html>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Clayton, *supra* note 1.

<sup>8</sup> Gene Upshaw, Exec. Dir., Nat'l Football League Players Ass'n, Panel Address at the Sports Lawyers Conference (May 2008).

<sup>9</sup> Ron Borges, *Vrabel: There's a Place for More Pay*, BOSTON HERALD, Nov. 9, 2008, <http://www.bostonherald.com/sports/football/patriots/view.bg?articleid=1131071>.

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“very clear . . . that the [O]wnership doesn’t believe that this deal is working.”<sup>10</sup> While the NFL was not suffering undue financial hardship, Ownership recognized that player salaries needed to be curbed.<sup>11</sup> Thus, opting out of the 2006 CBA and bargaining to sign a more favorable accord became the League’s new cost containment strategy.

In response, the NFLPA sought to determine the value of NFL franchises to gauge the Owners’ profits. The NFLPA commissioned a study that found “the average value of an NFL franchise in the last [ten] years has risen from \$288 [million] to \$1.04 [billion], increasing at a compound annual rate of 13.7%.”<sup>12</sup> The League questioned the accuracy of this study, considering the only franchise data was from the Green Bay Packers, who are the League’s only publicly owned franchise.<sup>13</sup> As illustrated, both sides have a sharply contrasting picture about the financial viability of the NFL; one should expect a long, protracted and contentious labor dispute if a new CBA is not in place before the completion of the 2010 season.<sup>14</sup>

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<sup>10</sup> Mark Maske, *NFL Owners Want New Deal*, WASH. POST, May 21, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/20m08/05/20/AR2008052001693.html>.

<sup>11</sup> *See id.* In his statement to the press, Goodell chose his words carefully, as such wording is important when discussing finances and an employer’s ability to pay. *Id.*

<sup>12</sup> *NFLPA Addresses Stagnant CBA Negotiations with NFL Owners*, STREET & SMITH’S SPORTSBUSINESS DAILY, Jan. 30, 2009, <http://www.sportsbusinessdaily.com/article/127349>; *see also* KEVIN M. MURPHY & ROBERT H. TOPEL, *THE ECONOMICS OF NFL TEAM OWNERSHIP* 8–9 (2009), *available at* <http://www.rodneymart.com/PHSportsEcon/Common/LinksandFun/LinksFun04/FINAL%20-%20The%20Economics%20of%20NFL%20Team%20Ownership.pdf>.

<sup>13</sup> *Forbes* recently estimated that the Saint Louis Rams franchise was valued at \$931 million, twenty-fifth out of the thirty-one NFL teams. Michael K. Ozanian, *Rams Rushing Toward New Ownership?*, FORBES, Oct. 6, 2009, <http://blogs.forbes.com/sportsmoney/blog/2009/10/rams-rushing-toward-new-ownership/>.

<sup>14</sup> Attempts to publically address the growing labor conflict have turned contentious. Rhetoric between the parties seems to be escalating and both sides have even taken to social media to argue specifically about disclosure of financial information. *See, e.g.*, Profile of Greg Aiello, TWITTER, <http://twitter.com/gregaiello> (last visited Dec. 28, 2009) (League spokesman); Profile of George Atallah, TWITTER, <http://twitter.com/GAtallah> (last visited Dec. 28, 2009) (NFLPA spokesperson); *see also* Sean Leahy, *NFL, NFLPA Spokesmen Trade ‘Fun Facts’ About CBA on Twitter*, USA TODAY, Oct. 20, 2009, <http://content.usatoday.com/communities/thehuddle/post/2009/10/nfl-nflpa-spokesmen-trade-fun-facts-about-cba-on-twitter/1?csp=34>.

Both labor and management are making personnel-related and financial preparations for a protracted labor dispute. One move that increases the likelihood of a prolonged labor dispute is the NFL's decision to hire veteran labor attorney Bob Batterman. Batterman, as National Hockey League (the "NHL") outside counsel, was intimately involved with planning the NHL's strategy in its labor dispute with the National Hockey League Players Association (the "NHLPA").<sup>15</sup> During this work stoppage, the NHL locked players out to achieve this "cost certainty."<sup>16</sup> This directly translated into cutting player salaries and installing a "hard salary cap."<sup>17</sup> The NHL ultimately sacrificed a full season of hockey to achieve cost certainty. However, it is unclear whether this lost year was in the best interest of hockey. The NFL may be using Batterman's NHL labor strategy as a blueprint for its own approach to dealing with the Union. The question remains whether this same strategy, when employed against a more powerful union like the NFLPA, will achieve a result that is in the best interest of professional football.

With the addition of Batterman, it is unclear whether the NFL will implement a similar hard-line strategy utilized by the NHL or whether the parties will strike a more reconciliatory tone. However, considering the parties' bargaining history is important when evaluating the NFL's bargaining strategy.<sup>18</sup> This Comment examines the material issues and likely arguments regarding the

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<sup>15</sup> "'Batterman bullied [the union] into submission,' says one sports labor lawyer who requested anonymity. 'If one accepts the conspiracy theory of collective bargaining, this means the NFL must be looking for trouble,' says another." See Brian Baxter, *Proskauer's Bob Batterman Signals a Labor War in the NFL*, AMLAW DAILY (May 21, 2008), <http://amlawdaily.typepad.com/amlawdaily/2008/05/smashmouth---p.html> (alteration in original).

<sup>16</sup> See Joshua Liebman, *Tip Your "Cap" to the Players: 2007-2008 Off-Season Reveals NHL's Salary Cap Benefits on Players*, 16 SPORTS LAW. J. 81, 92 (2009) (mentioning "cost certainty" via potentially implementing a salary cap linked to league revenues); see also Roger I. Abrams, *Sports Law Issues Just over the Horizon*, 3 VA. SPORTS & ENT. L.J. 49, 61 (2003) (describing Commissioner Bettman having a steadfast adherence to the goal of "cost certainty" in discussing the NHL inevitable conflict with the NHLPA).

<sup>17</sup> A "hard salary cap" prohibits teams from having payrolls in excess of a mandated number. If a team goes over the salary cap, it is penalized.

<sup>18</sup> The parties' history is full of strikes and lockouts. See *infra* Part II.

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looming NFL-NFLPA labor stoppage in 2011. Part I recounts the origins of the NFL as well as the recent events that were material in leading to this labor dispute. Part II examines the origins of the NFLPA. As it is a labor stoppage that Mr. Batterman oversaw,<sup>19</sup> Part III recounts the NHL's 2004 lockout. Part IV summarizes and explores the major concepts of labor law, most principally the theory of good faith bargaining. Part V provides a brief statement of the case, discusses the issues germane to this labor dispute, and presents arguments for both the NFL and the Union. Part VI briefly discusses how an antitrust lawsuit recently decided by the United States Supreme Court may impact the positions of the parties. Finally, Part VII provides several predictions and a conclusion to this Comment.

This Comment recounts the origins of both the NFL and the PA, providing great detail into the bargaining process between the two entities from 1950 until 1993. This level of detail is necessary because the most effective method to determine a party's sincerity in good faith bargaining, which is a paramount concept in labor law,<sup>20</sup> is to keep in context the bargaining history of the parties. This history may influence the level of contentiousness amongst the parties and their sincerity to reach an agreement.

## I. NATIONAL FOOTBALL LEAGUE

### A. *NFL Origins*

A league with humble beginnings, the National Football League was born in an Ohio automobile showroom in 1920.<sup>21</sup> The NFL enjoyed a period of modest growth while trying to find its way onto solid financial ground after being resurrected from the

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<sup>19</sup> The NFL may also be basing its strategy in a similar vein as the NHL, who attributed the year of lost hockey to the sport's dire need to achieve "cost certainty." Thus, it may be foreseeable that the NFL, by bringing in Batterman, is seeking to use the NHL's strategy as a blueprint for management's handling of this upcoming labor stoppage.

<sup>20</sup> See *infra* text accompanying note 246.

<sup>21</sup> DAVID HARRIS, *THE LEAGUE: THE RISE AND DECLINE OF THE NFL* 12 (Bantam Books 1986).

defunct “American Professional Football Association.”<sup>22</sup> The League found its footing under Commissioner Bert Bell’s sturdy leadership.<sup>23</sup> He implemented measures such as the rookie player draft<sup>24</sup> and recognized the power of televising games.<sup>25</sup> However, professional football truly began to make strides with the rise of Commissioner Pete Rozelle. The legendary commissioner’s leadership was instrumental in convincing team executives to make decisions that promoted the best interests of the League.<sup>26</sup> This thinking led to major results such as harnessing the power of television for the benefit of the entire NFL.<sup>27</sup>

Rozelle convinced owners in large markets, such as New York Giants owner Wellington Mara, to forego lucrative local television contracts in favor of a deal that equally benefited every franchise.<sup>28</sup> Owners embraced Rozelle’s “league think” ideology<sup>29</sup> to pool individual team television broadcasting rights and leverage them into several large contracts. One deal was signed with CBS; the other with NBC. Over time, broadcasting contracts provided the financial security member franchises desperately sought.<sup>30</sup> More importantly, these contracts served as a foundation to allow the NFL to find economic and competitive parity amongst its clubs.<sup>31</sup>

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<sup>22</sup> MARK YOST, *TAILGATING, SACKS AND SALARY CAPS: HOW THE NFL BECAME THE MOST SUCCESSFUL SPORTS LEAGUE IN HISTORY* 53 (Kaplan Publishing 2006).

<sup>23</sup> See *Biography: Bert Bell*, PRO FOOTBALL HALL OF FAME, [http://www.profootballhof.com/hof/member.aspx?PLAYER\\_ID=23](http://www.profootballhof.com/hof/member.aspx?PLAYER_ID=23) (last visited Mar. 14, 2010).

<sup>24</sup> YOST, *supra* note 22, at 55.

<sup>25</sup> Although Bert Bell was the first commissioner to put NFL games on television, Alvin “Pete” Rozelle would be the first commissioner in sports to fully utilize the power of television. See *id.* at 63.

<sup>26</sup> “Rozelle surmised that the NFL’s future depended on every NFL owner—from the wealthiest and most profitable to the neediest and most owing—perceiving his or her equity stake as vitally interconnected, with one team’s economic failures threatening all others.” See Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 *YALE L.J.* 726, 731–32 (2010) (citing a *New York Times* article by David Harris detailing how “Rozelle persuaded his employers that the key to marketing the NFL’s product was maintaining a consistently high level of competition among all the clubs”).

<sup>27</sup> The first NFL television broadcast occurred in 1939.

<sup>28</sup> This occurred in 1962.

<sup>29</sup> HARRIS, *supra* note 21, at 13.

<sup>30</sup> YOST, *supra* note 22, at 63–64.

<sup>31</sup> *Id.*

The NFL faced continuous competition from rival leagues because of its financial success.<sup>32</sup> While it faced competition from multiple upstart leagues, the greatest challenge came from the American Football League (the “AFL”). The AFL was founded in 1959 after charter owner Lamar Hunt was denied an NFL franchise.<sup>33</sup> It was Hunt’s AFL that demonstrated the potential value of pooling a league’s collective broadcast rights, as he built the AFL around its national television contract with ABC.<sup>34</sup> The NFL was unsuccessful in its effort to weaken the AFL, so the NFL took a different route. After a series of secret meetings between the two rival leagues<sup>35</sup> that required receiving congressional approval for the action,<sup>36</sup> the AFL merged into the NFL. This new NFL now boasted a twenty-four-member league and would expand up to thirty member teams soon thereafter.<sup>37</sup> Thus, the NFL was poised to take on baseball for supremacy amongst the American sports consumer.

### *B. Modern NFL and Issues*

The NFL continued its success after Rozelle retired in 1989. Paul Tagliabue succeeded Rozelle as commissioner and implemented a strategy to increase League revenues through stadium construction.<sup>38</sup> During his term, Tagliabue oversaw an ambitious League initiative of stadium construction and refurbishment and also presided over almost two decades of uninterrupted labor peace between the NFL and NFLPA. While

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

<sup>33</sup> Matthew Levine, *Despite His Antics, T.O. Has a Valid Point: Why NFL Players Deserve a Bigger Piece of the Pie*, 13 VILL. SPORTS & ENT. L.J. 425, 431 (2006).

<sup>34</sup> YOST, *supra* note 22, at 73.

<sup>35</sup> See *NFL History by Decade, 1961–1970*, NFL, <http://www.nfl.com/history/chronology/1961-1970> (last visited Mar. 14, 2010) [hereinafter *NFL History by Decade*].

<sup>36</sup> HARRIS, *supra* note 21, at 17.

<sup>37</sup> *NFL History by Decade*, *supra* note 35.

<sup>38</sup> At the League’s 1994 winter meetings, Tagliabue urged owners to focus on stadiums as a high priority. YOST, *supra* note 22, at 190–91.

these two accomplishments did much to cement a positive legacy for Tagliabue, he is also increasingly being blamed by Ownership for the NFL's agreeing to the 2006 CBA.<sup>39</sup> It was Tagliabue who urged Ownership to sign a CBA that seemingly mortgaged the NFL's future in order to allow the commissioner to retire from his position without incident.<sup>40</sup> This forced Tagliabue's successor, Roger Goodell, to handle the uncertainties of the future.

### C. *Negotiating the 2006 CBA*

During the 2006 negotiations, Owners seemingly believed that preserving lasting labor peace was too immense to jeopardize with a potential labor stoppage. Not wanting his legacy tarnished by retiring just as labor unrest was developing, Tagliabue lobbied Ownership to accept the deal. The Agreement was negotiated within a matter of weeks, culminating in an eleventh-hour deliberation and decision by Ownership to accept the Union's proposal.<sup>41</sup> At the time of the agreement, Rozelle's "league think" ideology seemed to be back in place. Both labor and management seemingly acted in the best interests of the game by preserving labor peace and the massive financial revenues that are now a staple of professional football.<sup>42</sup> However, even at this time where both parties' interests seemed aligned, the CBA failed to address several areas of concern for the League: high player salaries and escalating rookie salary structures. In fact, the CBA was modified to allocate more revenue for player salaries.<sup>43</sup>

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<sup>39</sup> See Thomas George, *Owner's Meetings Could Foreshadow Labor Strife*, NFL.COM, <http://www.nfl.com/news/story?id=09000d5d80772c56&template=with-video&confirm=true> (last visited Sept. 2, 2010).

<sup>40</sup> *Id.*

<sup>41</sup> The proposal was approved by Ownership 30–2 (the Bills and Bengals dissented). Jarrett Bell, *NFL Owners Accept Player Union Proposal with 30–2 Vote*, USA TODAY, Mar. 8, 2006, [http://www.usatoday.com/sports/football/nfl/2006-03-08-labor\\_x.htm](http://www.usatoday.com/sports/football/nfl/2006-03-08-labor_x.htm).

<sup>42</sup> "This agreement is not about one side winning or losing," said Executive Director Upshaw in a statement. "Ultimately, it is about what is best for the players, the owners and the fans of the National Football League." See *NFL Owners Approve Six-Year CBA Extension*, ESPN.COM, Mar. 9, 2006, <http://sports.espn.go.com/nfl/news/story?id=2360258> [hereinafter *NFL Owners Approve*].

<sup>43</sup> See Chris Deubert & Glen M. Wong, *Understanding the Evolution of Signing Bonuses and Guaranteed Money in the National Football League: Preparing for the 2011 Collective Bargaining Negotiations*, 16 UCLA ENT. L. REV. 179, 181–82 (2009).

Some Owners were dissatisfied with the 2006 CBA even though it ensured short-term labor peace. Buffalo Bills owner Ralph Wilson questioned whether management acted too hastily without carefully deliberating its future economic consequences. Wilson felt that Ownership lacked a clear grasp on several issues covered in the proposed CBA.<sup>44</sup> It was especially unclear how the new CBA was going to solve the revenue sharing disparity amongst clubs. “I didn’t understand [the revenue sharing sections of the 2006 CBA] . . . it is a very complicated issue and I didn’t believe we should [have] rush[ed] to vote in [forty-five] minutes,”<sup>45</sup> said Wilson. League competitive balance depends on a successful revenue sharing policy.<sup>46</sup> Small market teams such as Buffalo and Indianapolis depend on shared revenue to maintain financial viability, an essential element to preserve the competitive balance of the League.<sup>47</sup>

Despite objections, both sides generally thought that the 2006 CBA adequately addressed the increasing revenue disparity between clubs due to a variety of its provisions. Under the agreement, the top fifteen revenue-producing teams pledged to contribute about \$900 million to a shared pool over the life of the CBA.<sup>48</sup> Those funds would then be equally distributed to lower revenue-generating franchises per the CBA.<sup>49</sup> The new deal also increased the revenue sharing pool from \$40 million to approximately \$100 million annually.<sup>50</sup>

One omission from the 2006 CBA was that this revenue sharing provision did not adequately address the millions of unshared dollars in revenue streams derived by savvy owners through creative use of team stadiums. When the 1993 CBA was

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<sup>44</sup> See *NFL Owners Approve*, *supra* note 42.

<sup>45</sup> *Id.*

<sup>46</sup> George, *supra* note 39.

<sup>47</sup> Deubert & Wong, *supra* note 43, at 182.

<sup>48</sup> See Don Pierson, *There’s Peace on Turf in NFL; 6-Year Accord Raises Salary Cap, Revenue Sharing*, CHI. TRIB., Mar. 9, 2006, at C1.

<sup>49</sup> Each one of the NFL’s top fifteen top revenue producing-teams was required to give even more money to less financially stable owners in addition to sharing revenue with the NFLPA. See *id.*

<sup>50</sup> See Mark Maske, *NFL Appears Headed Toward a Season Without a Cap*, WASH. POST, Dec. 30, 2009, at D3 [hereinafter Maske, *NFL Appears*].

signed, stadiums generated almost no revenues,<sup>51</sup> and thus, there was no need to include stadium revenues into the CBA as shared revenue. However, stadium revenues now account for about 20% of league-wide revenue.<sup>52</sup> Savvy NFL owners leverage the name-recognition power of their franchises by creating additional revenue streams through new or refurbished stadia. However, these new streams,<sup>53</sup> along with increasingly more creative sponsorship methods, are contra to the core NFL league think ideology.<sup>54</sup> An uneven increase in unshared team revenues threatens the competitive balance and viability of the League. Any injury to the League is also felt by its chief employees: the players.

## II. THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION

### A. *From Clean Uniforms to a Piece of the Pie*

The National Football League Players Association began in earnest in 1956.<sup>55</sup> Members of the Green Bay Packers and Cleveland Browns were in search of a few simple guarantees from management, such as clean uniforms and payment of salaries to injured players.<sup>56</sup> Players eventually enlisted the assistance of attorney Creighton Miller, a former NFL player and team general manager.<sup>57</sup> Players throughout the NFL signed authorization cards

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<sup>51</sup> In the early 1990s, an average NFL team's stadium revenues were roughly 10% of its total revenue. YOST, *supra* note 22, at 6.

<sup>52</sup> *Id.*

<sup>53</sup> Revenue streams may include premium club seating, luxury suites, stadium clubs, and personal seat licenses. Personal seat licenses, or PSLs, are a one-time fee that fans pay in exchange for the privilege to buy a season ticket. *Id.* at 6.

<sup>54</sup> As one NFL owner contended, unshared revenues generated by new or refurbished stadia provide teams with "an extra pool of cash that could be used to compensate players above, beyond, and 'around' the salary cap limitations." *Id.* at 10–11 (presenting the small market prospective in the unshared revenue debate).

<sup>55</sup> *History, The Beginning—1956*, NFL PLAYERS ASS'N, <http://www.nflplayers.com/About-us/History> (last visited Mar. 10, 2010).

<sup>56</sup> *History of the NFLPA*, NFL PLAYERS ASS'N, <http://www.nflplayers.com/About-us/History> (last visited Mar. 10, 2010) [hereinafter *NFLPA History*]. Additionally, players demanded a minimum salary and that management pay for players' equipment. *Id.*

<sup>57</sup> *Id.*

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and, by November 1956, Miller became their leader.<sup>58</sup> This effort led to the creation of the NFLPA, which represented National Football League players in their collective bargaining efforts.<sup>59</sup>

Ownership initially balked at the Players' Association's attempts at collective bargaining. Players, fearful of owner reprisal due to frowned-upon union involvement, held secret meetings to plan a strike.<sup>60</sup> Fear of owner reprisal was justified; one owner stated to his team members that if they struck, he would simply play the game without them.<sup>61</sup> The players quickly capitulated, realizing that negotiating leverage was squarely with management.<sup>62</sup>

Player mobility was a cardinal issue long before any football union was formed. Since no leverage existed to bargain, players opted to litigate the issue. The first notable player lawsuit was Bill Radovich's 1957 challenge under the Sherman Antitrust Act. The Detroit Lions nose guard claimed that the NFL's refusal to allow his request to move from Detroit to California to be near an ill family member was a restraint of trade.<sup>63</sup> The NFL argued that the League was immune from an antitrust challenge, citing the Supreme Court's exemption of Major League Baseball from the Sherman Act.<sup>64</sup> The Supreme Court instead sided with Radovich, holding that football did not have the same antitrust exemption that Major League Baseball enjoyed.<sup>65</sup> This favorable ruling gave the Players' Association an important victory that the Union could use as leverage in negotiations with Ownership. Although *Radovich* was a significant victory, the Players' Association failed to take advantage by challenging other fundamental NFL concepts.<sup>66</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> ROBERT C. BERRY ET AL., *LABOR RELATIONS IN PROFESSIONAL SPORTS* 124 (Auburn House Publishing Co. 1986).

<sup>61</sup> *Id.* The individual threatening reprisal was Washington Redskins' owner, George Preston Marshall. *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Radovich v. Nat'l Football League*, 352 U.S. 445, 447-48 (1957).

<sup>64</sup> *Id.* at 449-50.

<sup>65</sup> *See id.* at 451-54; *see also* *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1197 (6th Cir. 1979) (finding that the NHL's reserve system was subject to antitrust scrutiny).

<sup>66</sup> MICHAEL ORIARD, *BRAND NFL: MAKING AND SELLING AMERICA'S FAVORITE SPORTS* 57 (Univ. of N.C. Press 2007).

The next decade brought a new challenge to League owners as they were forced to deal with the upstart American Football League. After these leagues merged in 1966, player solidarity became a significant issue of concern for the Union.<sup>67</sup> NFL player representatives faced the task of representing all members that had merged into the League. The Players' Association only represented sixteen of the twenty-six team rosters in the League at this point.<sup>68</sup> The players sought guidance from the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO") to assist in forming a labor union of professional athletes.<sup>69</sup> The AFL-CIO was not interested, and neither was Creighton Miller.<sup>70</sup> As a result, the players voted to remain an association instead of a union. The NFL responded by refusing to negotiate with the players.<sup>71</sup> Knowing the Players' Association was weak, in 1968, Ownership locked out the players.<sup>72</sup> The weeklong labor stoppage resulted in the first-ever NFL-NFLPA CBA.<sup>73</sup> But the lack of player solidarity contributed to less-than-hoped-for results.<sup>74</sup>

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<sup>67</sup> *Id.* at 58.

<sup>68</sup> *The 1960's—AFL/NFL Competition*, NFL PLAYERS ASS'N, <http://www.nflplayers.com/About-us/History> (last visited Dec. 29, 2009) [hereinafter *NFLPA in the 1960s*].

<sup>69</sup> *NFLPA History*, *supra* note 56.

<sup>70</sup> *Id.* The players also rejected overtures from the International Brotherhood of Teamsters to organize. ORIARD, *supra* note 66, at 58.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> The CBA embodied less than the teams had hoped for, as player-representatives accepted Ownership's terms without first consulting the Association. *NFLPA in the 1960s*, *supra* note 68.

The agreement called for far less than the NFLPA had hoped to achieve. Included in the demands were minimum salaries of \$15,000 for rookies and \$20,000 for veterans, exhibition game pay of \$500 per game, lowering retirement age to 45, and impartial grievance arbitration. But, under the contract eventually agreed to, minimum salary remained at \$9,000 for rookies and \$10,000 for veterans, exhibition game pay stayed at \$50 per game, the commissioner remained as the arbitrator, and retirement age stayed at 65.

*Id.*

*B. A Cat and Mouse Game—Negotiations Between the NFL and NFLPA*

Players took a significant step toward achieving cohesiveness by consolidating the NFL and AFL Players Associations into one Players' Association in 1970.<sup>75</sup> While both NFL and AFL loyalists pushed for their respective union leaders to be the Union's first-ever president, Baltimore Colts tight end John Mackey was eventually selected.<sup>76</sup> With its new leader, the Players' Association was ready to engage Ownership in a new round of negotiations.

Ownership seemed receptive to recognize and meet with the Players' Association. However, recognition was based on several conditions including a promise to eliminate lawyers from being present during meetings and that there would be no attempts by the Players' Association to negotiate increases in pre-season pay.<sup>77</sup> A meeting was arranged in which two representatives from each side would be present. But when the two reps for the Players' Association arrived, they were greeted by an Ownership delegation comprised of nine individuals.<sup>78</sup> Before the meeting started, Mackey was advised by his counsel to sign a contract that Ownership had provided.<sup>79</sup> This document included a provision that would have bound the players to Ownership's only offer "in perpetuity."<sup>80</sup> Instead of signing the document, Mackey fired his attorney and hired the law firm of Lindquist & Vennum.<sup>81</sup> A young attorney by the name of Ed Garvey was assigned as counsel; shortly thereafter he left the firm and became the Players' Association's first-ever Executive Director.<sup>82</sup>

Garvey was charged with an arduous job as the first ever NFL-CBA expired in January 1970. Negotiations led to a three-day

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<sup>75</sup> *The 1970's—AFL and NFL Players Association Merge*, NFL PLAYERS ASS'N, <http://www.nflplayers.com/About-us/History> (last visited Dec. 29, 2009) [hereinafter *NFLPA in the 1970s*].

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

players' strike, and Ownership retaliated with a seventeen-day lockout.<sup>83</sup> Eventually, Garvey secured \$19.1 million in concessions by Ownership, which mostly came in the form of player pension contributions.<sup>84</sup> Under Garvey's direction, the NFLPA started bargaining for concessions that it arguably already should have based on the *Radovich* decision in 1957. These bargaining issues included (1) the elimination of the amateur draft, (2) the elimination of the options clause, (3) the Rozelle Rule, (4) impartial arbitration of all disputes, (5) individual contracts to protect players, and (6) elimination of the waiver system.<sup>85</sup> Under the Rozelle Rule, a player could change teams at the conclusion of his contract provided the new team compensated the old club for the loss of that player's services.<sup>86</sup> Compensation was provided to teams in the form of players, money, or draft picks.<sup>87</sup> If teams failed to reach an agreement, Commissioner Rozelle was able to determine and award compensation.<sup>88</sup> While players could negotiate with any team after their contract expired, the rule still significantly restrained player movement.

In 1974, the Players' Association levied sixty-three "freedom issues" upon the Owners, including a demand for the elimination of the Rozelle Rule.<sup>89</sup> Owners feared that such a free agency system would ruin the League's competitive balance, thereby destroying the very foundation that the League's success was based upon.<sup>90</sup> Thus, each side had drawn their lines of contention. Ownership attempted to send a message to the Union by only inviting rookies and free agents to NFL training camps.<sup>91</sup> The NFLPA tried to hold its line with pickets, but solidarity was still

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<sup>83</sup> BERRY ET AL., *supra* note 60, at 125.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> 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).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> ORIARD, *supra* note 66, at 61. The mantra amongst the rank-and-file players became "no freedom, no football." *NFLPA in the 1970s*, *supra* note 75.

<sup>90</sup> According to Rozelle, if players were "given total freedom to negotiate their services, the [L]eague would be dominated by a few rich teams and would eventually lose both fan interest and revenue." Goplerud, *supra* note 86, at 16.

<sup>91</sup> BERRY ET AL., *supra* note 60, at 126.

weak.<sup>92</sup> After one month, more than one-quarter of all players had crossed lines. The strike ended after forty-four days,<sup>93</sup> leaving the Union “badly split and seriously underfunded.”<sup>94</sup> Ownership punished players who were significantly involved with the strike, illustrating that there would be consequences for individuals who involved themselves with the Players’ Association.<sup>95</sup>

The NFLPA responded by filing unfair labor practice charges with the National Labor Relations Board (the “NLRB” or the “Board”).<sup>96</sup> The NLRB Administrative Law Judge (the “ALJ”) ordered reinstatement of the players.<sup>97</sup> After another failed strike attempt in 1975, it became apparent that Garvey’s Union was still weak. Many players lacked the willingness to unite as a viable union. Instead of negotiating, the Union again found redress through the court.<sup>98</sup> Mackey and thirty-five other players filed suit against the League in Minnesota Federal District Court, claiming that the Rozelle Rule violated antitrust laws as a restraint on trade.<sup>99</sup> The district court ruled in the Union’s favor, finding that the Rozelle Rule was a *per se* violation of the Sherman Act in the form of a group boycott.<sup>100</sup> Upon appeal, the League asserted that the nonstatutory labor exemption<sup>101</sup> precluded players from

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Goplerud, *supra* note 86, at 16.

<sup>95</sup> Three Union leaders, Bill Curry, Kermit Alexander, and Tom Keating, were either cut or traded by their respective NFL clubs during the 1974 strike as a consequence of their Players’ Association activities. BERRY ET AL., *supra* note 60, at 126.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* Sports law commentators viewed ALJ involvement as a symptom of the Union’s poor negotiating leverage with the NFL. *Id.*

<sup>98</sup> See Goplerud, *supra* note 86, at 17 (stating that using antitrust law was “necessary because of the failure of the bargaining process and the strike to effectively represent the players’ interests, thus leaving antitrust laws as the only vehicle for challenging the owners’ actions”).

<sup>99</sup> Mackey v. Nat’l Football League, 407 F. Supp. 1000, 1002 (D. Minn. 1975), *rev’d on other grounds*, 543 F.2d 606, 623 (8th Cir. 1976).

<sup>100</sup> *Id.* at 1007.

<sup>101</sup> The nonstatutory labor exemption is a mechanism preventing antitrust scrutiny that survives the “expiration of a collective bargaining agreement until the parties reach an impasse *as to that issue*; thereafter, the term or condition is no longer immune from scrutiny under the antitrust laws, and the employer runs the risk that continued imposition of the condition will subject the employer to liability.” Powell v. Nat’l Football League, 678 F. Supp. 777, 788 (D. Minn. 1988) [hereinafter *Powell I*], *rev’d*, 930 F.2d 1293 (8th

challenging this rule because players had collectively bargained to two previous CBAs that contained the Rozelle Rule.<sup>102</sup>

The Eighth Circuit rejected the NFL's argument and sided with the district court.<sup>103</sup> However, the Eighth Circuit declined to follow the lower court's ruling. Instead, the court suggested that the parties collectively bargain in good faith to create a player movement and inter-team compensation system.<sup>104</sup> The court required the parties to resolve this dispute through continued negotiations because the parties were better suited to determine their own mutual interests than the courts.<sup>105</sup>

Despite this significant victory for free agency, support for the Players' Association waned.<sup>106</sup> In March 1977, the successor CBA scaled back some of the victories the Union achieved in *Mackey*, such as free agency.<sup>107</sup> Among the additions to the 1977 CBA was a modified format for player movement and compensation. Under this new system, players who played out their contracts could pursue free agency.<sup>108</sup> However, teams had the option of matching a competing team's offer or they were compensated if the player

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Cir. 1989) [hereinafter *Powell III*]. The Supreme Court has stated that limited nonstatutory exemptions are proper compromises, and "that in order to properly accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining under the National Labor Relations Act . . . certain union-employer agreements must be accorded a limited nonstatutory exemption from antitrust sanctions." *Id.* at 782 (citing *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975); *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965)).

<sup>102</sup> *Mackey v. Nat'l Football League*, 543 F.2d 606, 623 (8th Cir. 1976).

<sup>103</sup> The court of appeals stated that the Rozelle Rule was "significantly more restrictive than necessary to serve any legitimate purpose[]" and "as implemented, contravene[d] the Rule of Reason." *Mackey*, 543 F.2d at 622-23.

<sup>104</sup> *Id.* at 623.

<sup>105</sup> *Id.*

<sup>106</sup> *NFLPA in the 1970s*, *supra* note 75.

<sup>107</sup> The 1977 CBA included impartial arbitration of non-injury grievances and, instead of outright free agency, a modified free agency scheme that included a team's right of first refusal and compensation in the event a player was lost. BERRY ET AL., *supra* note 60, at 127; *see also NFLPA in the 1970s*, *supra* note 75.

<sup>108</sup> BERRY ET AL., *supra* note 60, at 127.

was lost. This proved to be an unworkable system as few players changed teams.<sup>109</sup>

Following the 1981–82 season, the NFLPA held its annual membership meeting in Albuquerque, New Mexico.<sup>110</sup> Players increasingly showed signs of unity as approximately one-third of the Union’s membership (at least 537 players) attended the event.<sup>111</sup> During the meetings, the players adopted a proposal that their compensation come from a pool of 55% of League revenues.<sup>112</sup> This scheme of player compensation was based on years of service, playing time, and individual and team performance.<sup>113</sup>

NFL management estimated that players were already receiving 48% of League revenue and preferred a performance-based salary system without seniority considerations.<sup>114</sup> Ownership worried that if salaries were based mostly on seniority, the newly formed United States Football League would then raid NFL talent.<sup>115</sup> The League’s financial ability became a central topic of debate amongst the parties. Jack Donlan, Executive Director of the NFL Management Council,<sup>116</sup> granted the Players’ Association’s request to inspect the League’s finances in a January 1982 letter.<sup>117</sup> Ownership then reneged on this agreement and

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<sup>109</sup> *Powell I*, 678 F. Supp. 777, 780 (D. Minn. 1988) (“[D]uring the 5-year period covered by the 1977 Collective Bargaining Agreement, fewer than 50 out of 600 players received offers from other NFL clubs after becoming free agents.”), *rev’d*, 930 F.2d 1293 (8th Cir. 1989). The NFLPA website described the resulting trend in practice:

Although the new free agent system made sense in theory, since it geared draft choice compensation to new salary offers made to the free agent player, it did not anticipate the huge increases in club revenues—and therefore salaries for players—which began occurring one year after the 1977 CBA was signed. As a result, most players were “worth” more than a first-round choice when they became free agents.

*NFLPA in the 1970s*, *supra* note 75.

<sup>110</sup> *NFLPA History*, *supra* note 56.

<sup>111</sup> BERRY ET AL., *supra* note 60, at 130.

<sup>112</sup> *NFLPA History*, *supra* note 56.

<sup>113</sup> *Id.*

<sup>114</sup> BERRY ET AL., *supra* note 60, at 131, 134.

<sup>115</sup> *Id.*

<sup>116</sup> The NFL Management Council is the NFL’s labor relations unit.

<sup>117</sup> BERRY ET AL., *supra* note 60, at 131.

instead proposed an anonymous audit for an average team.<sup>118</sup> The Union challenged Ownership's refusal to provide financial information through the NLRB.<sup>119</sup> The Board upheld the League's position because the Union had no definitive basis from which to demand 55% of the League's gross revenues.<sup>120</sup> This setback meant the Union would have to take other action.

The Union continued with its plans to strike as the 1982 season inched closer. Players joined hands prior to the start of each preseason contest as a showing of solidarity, an action that drew the ire of team owners.<sup>121</sup> Four days prior to the regular season, Ownership tendered a counter-offer to the Union that included what was labeled as "\$600 million in new money."<sup>122</sup> This proposal broke down as \$40 million in player benefits, \$126 million in career adjustment bonuses for veterans, and \$475 million for player salaries with the goal of increasing pay by 15% per year during the agreement.<sup>123</sup> Players would receive retroactive annual increases of \$10,000 for each season of player participation between 1977 and 1982, and an additional \$10,000 per each year played between 1983 and 1986.<sup>124</sup> The NFLPA rejected the revenue sharing agreement but kept the proposal's benefits and wage adjustments, proposing that \$1.06 billion come from 50% of the League's television deal money.<sup>125</sup> Ownership rebuffed this proposal.

In response, the Union voted to strike after week two.<sup>126</sup> The League, in response, shut down team operations and barred players

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<sup>118</sup> *See id.*

<sup>119</sup> *Id.*

<sup>120</sup> The Union's challenge was not a complete loss, however, as the NLRB's General Counsel ordered the League to provide the Union with some of the information it requested. This sought-after information included broadcast contracts, players' salaries, and workers compensation insofar as knowing whether team doctors had financial interests in the NFL clubs. While the Players' Association did in fact receive some of the requested data, it fell short of full financial disclosure. *Id.*

<sup>121</sup> The Owners considered fining the players. *Id.* at 136.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 136–37.

<sup>125</sup> *Id.* at 137.

<sup>126</sup> *Id.*; see also *The 1980's—Era of Change*, NFL PLAYERS ASS'N, <http://www.nflplayers.com/about-us/History> (last visited Mar. 22, 2010) [hereinafter

from entering team facilities for any reason.<sup>127</sup> Ownership also said that players would not be paid for any additional games on the schedule and would no longer receive medical treatment at team facilities.<sup>128</sup> Thus, both the Union and the League utilized their available weapons, the strike and the lockout, during the bargaining process.

A contentious relationship between lead negotiators further complicated the bargaining process. The relationship between Garvey and Donlan was so volatile that there was widespread distrust among the parties, clouding whether a compromise could be reached.<sup>129</sup> Ownership only modified its stance twice: one week into and then again forty days into the strike.<sup>130</sup> The Players' Association rejected both proposals.<sup>131</sup> On the forty-fifth day of the strike,<sup>132</sup> Ownership offered what was labeled "money now" bonuses<sup>133</sup> to all players who had played at least three games into their fourth season. The bonuses were to be payable at the time a new CBA was signed.<sup>134</sup> Ownership made a calculated move by guaranteeing money to veteran players, a significant part of the bargaining unit.<sup>135</sup>

The parties tentatively reached an agreement on November 16, 1982 and signed the new CBA on December 5, 1982 after another three weeks of negotiations.<sup>136</sup> In the new agreement, players received their "money now" bonuses in the form of \$60 million from Ownership at the time the agreement was signed.<sup>137</sup> Players gained increases in minimum salary, pension pay, and pre-season

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*NFLPA in the 1980s*]. Garvey classified the players' strike as an unfair practice strike as opposed to an economic strike, meaning that the NFL was violating the Players' rights, which gave rise to their right to strike without punishment. BERRY ET AL., *supra* note 60, at 137.

<sup>127</sup> BERRY ET AL., *supra* note 60, at 137.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 138.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> This date was more than seven weeks into the sixteen-game regular season.

<sup>133</sup> The bonus offered to players in this instance was \$60,000.00.

<sup>134</sup> BERRY ET AL., *supra* note 60, at 138.

<sup>135</sup> *See id.*

<sup>136</sup> *NFLPA in the 1980s*, *supra* note 126.

<sup>137</sup> *Id.*

pay, and also the right to a second medical opinion, the right to select a surgeon for injury-related operations, and the right to inspect their club medical records.<sup>138</sup> Yet still missing from the new CBA was the true free agency scheme that much of the NFLPA coveted.<sup>139</sup>

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

During the life of the 1982 CBA negotiations, Ed Garvey left his post as Executive Director and the Union elected former all-pro guard Gene Upshaw in June 1983.<sup>140</sup> When Union membership was polled for key issues heading into negotiations for the 1987 CBA, the results clearly indicated that free agency was the “highest priority.”<sup>141</sup> The player mobility provisions of the prior accord had been woefully ineffective, as “during the five year period covered by the 1982 CBA, not a single veteran player moved from one NFL club to another under the Right of First Refusal/Compensation system.”<sup>142</sup> While Upshaw was making his rounds with the players and gathering important information for the upcoming negotiations, Ownership was readying for another labor stoppage. The League made arrangements to secure a \$150 million line of credit for just such an event.<sup>143</sup> This time, Ownership appeared to possess even greater negotiating leverage.<sup>144</sup>

The parties returned to the bargaining table to negotiate a successor agreement to the 1982 CBA and made little progress. Ownership quickly rejected the Union’s proposal for free agency and although they still hoped for a compromise, players voted to

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<sup>138</sup> *Id.*

<sup>139</sup> Goplerud, *supra* note 86, at 25.

<sup>140</sup> *NFLPA in the 1980s*, *supra* note 126.

<sup>141</sup> *Id.*

<sup>142</sup> *Powell I*, 678 F. Supp. 777, 781 n.6 (D. Minn. 1988) (stating that “[o]f the 1,415 players who became veteran free agents during the term of the 1982 Agreement . . . , apparently only one player even received an offer from another club”), *rev’d*, 930 F.2d 1293 (8th Cir. 1989).

<sup>143</sup> PAUL D. STAUDOHR, *COLLECTIVE BARGAINING IN THE PRIVATE SECTOR* 248 (Paul F. Clark, John T. Delaney & Ann C. Frost eds., Indus. Relations Research Ass’n 2002).

<sup>144</sup> *Id.*

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strike.<sup>145</sup> The League did not capitulate to Union demands and instead hired replacement players.<sup>146</sup> Games were played with replacement players and television ratings suffered due to inferior play, but they continued to be televised in order for the networks to fulfill their contractual obligations. The Players' Association knew that a strike would not work if the Owners were willing to replace the on-the-field product with "inferior talent."<sup>147</sup> Accordingly, after just a few weeks, the Union voted to end its strike on October 15, 1987.<sup>148</sup>

Ownership's leverage negated the Players' Association's ability to wage an effective campaign through a strike. The Union instead opted for litigation. On October 15, 1987, the last day of its strike, the Players' Association filed an antitrust lawsuit against the League in United States Federal Court challenging, among other practices, the League's commissioner-determined right of first refusal compensation system.<sup>149</sup> The Union argued that the NFL's method of free agency violated section 1 of the Sherman Antitrust Act because it was an unreasonable restraint on trade.<sup>150</sup> The League filed its own motion, asking the court to declare that resolving the free agency issue can only occur "within the context of the national labor laws, and that the nonstatutory 'labor exemption' insulates the challenged restraints from antitrust scrutiny."<sup>151</sup>

The district court ruled that the nonstatutory labor exemption did in fact insulate the League's right of first refusal/compensation

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<sup>145</sup> Goplerud, *supra* note 86, at 26–27; *see also NFLPA in the 1980s, supra* note 126.

<sup>146</sup> According to the Union, "[t]he NFL Management Council Executive Committee ('CEC') . . . believed that the [L]eague had been too soft on players in 1982 . . . . [The CEC] also knew free agency would push veteran salaries up and force clubs to be more competitive. That, of course, would mean less profit for . . . owners." *NFLPA in the 1980s, supra* note 126.

<sup>147</sup> *Id.*

<sup>148</sup> Still working without a contract, the Union elected to file suit with the NLRB. *Id.*

<sup>149</sup> *NFLPA in the 1980s, supra* note 126.

<sup>150</sup> 15 U.S.C. § 1 (2006). The NFLPA also sued pursuant to sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. *See generally Powell I*, 678 F. Supp. 777 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989).

<sup>151</sup> *Powell I*, 678 F. Supp. at 781.

system.<sup>152</sup> Because this issue was a mandatory subject of bargaining, the nonstatutory labor exemption continued to protect Ownership's activities until the parties reached a bargaining impasse.<sup>153</sup> Thus, in order to protect the status quo and foster a "stable environment in which to negotiate a new collective bargaining agreement,"<sup>154</sup> the nonstatutory labor exemption also survived the expiration of the CBA until an impasse.<sup>155</sup> The district court stopped short of stating whether the parties had reached an impasse, as the NFL had filed a charge with the NLRB alleging that the Union had not bargained in good faith.<sup>156</sup> The court pointed out, "[b]ecause a finding of good faith must be made as a precondition to determining impasse, the Court must await the NLRB's 'good faith' determination."<sup>157</sup> The NLRB eventually issued a ruling that allowed the Players' Association's lawsuit to continue.<sup>158</sup>

On appeal, the district court found that the nonstatutory labor exemption did apply because the parties had negotiated to an impasse.<sup>159</sup> However, the district court refused to issue an injunction, opining that "a preliminary injunction to secure unrestricted free agency would wholly subvert the collective bargaining process<sup>160</sup> and thereby offend a central purpose of the

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<sup>152</sup> *Id.* The court opined that the free agency system provision of the 1982 CBA met the three necessary elements under the *Mackey* Test. *Id.* at 783–84.

<sup>153</sup> *Id.* at 785.

<sup>154</sup> *Id.*

<sup>155</sup> This occurs following intense, good faith negotiations, where the parties have exhausted the prospects of concluding an agreement, despite their best efforts. *Id.* at 788 (citing the standard as provided in *Taft Broadcasting Co.*, 163 N.L.R.B. 475, 478 (1967), which states that an impasse exists after "good-faith negotiations have exhausted the prospects of concluding and agreement").

<sup>156</sup> *Id.* at 789.

<sup>157</sup> *Id.*

<sup>158</sup> On April 28, 1988, the NLRB rendered its ruling, dismissing the League's charge of bad faith bargaining. *Powell v. Nat'l Football League*, 690 F. Supp. 812, 814 (D. Minn. 1988) [hereinafter *Powell II*]; see also *Goplerud*, *supra* note 86, at 27.

<sup>159</sup> See *Powell II*, 690 F. Supp. at 814.

<sup>160</sup> The court went further into its rationale by saying:

[i]t would be highly destructive to collective bargaining if major issues could be removed from the bargaining table and preliminarily resolved in isolation in antitrust litigation. If one of the parties to the bargaining relationship were able to secure the substance of its bargaining objectives by obtaining a preliminary injunction, there

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Norris-LaGuardia Act.”<sup>161</sup> Ultimately, the U.S. Court of Appeals for the Eighth Circuit held that the nonstatutory labor exemption protected the Owners beyond impasse, and that as a result, the Union could not bring an antitrust suit to enforce what should be enforced through good faith bargaining.<sup>162</sup> In other words, the courts defer to federal labor law if the issue could be resolved through the bargaining process or be heard before the NLRB. As the Union was forced back to the bargaining table, it took note of Justice Gerald Heaney’s dissent that subtly suggested a bold move: disband the union so the nonstatutory labor exemption no longer applies.<sup>163</sup>

#### *D. Decertification and Challenging “Plan B” Free Agency*

The Union took Justice Heaney’s counsel literally. On November 3, 1989, two days after the *Powell III* decision, the Union formally disclaimed any interest in representing NFL players in collective bargaining.<sup>164</sup> Player representatives convened in Dallas on December 5, 1989 and finalized this dramatic decision by ending the NFLPA’s official status as a union.<sup>165</sup> Instead, the NFLPA now exists more as a trade association, lacking any authority to bargain on behalf of players.<sup>166</sup>

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would be very little motivation for that party to bargain in good faith toward reaching an agreement. Judicial intervention at this stage of the bargaining process would give one side a preliminary victory while effectively disabling the other.

*Powell II*, 690 F. Supp. at 817.

<sup>161</sup> *Id.*

<sup>162</sup> *Powell III*, 930 F.2d 1293, 1304 (8th Cir. 1989).

<sup>163</sup> Justice Heaney wrote:

[t]he majority purports to reject the owners’ argument that the labor exemption in this case continues indefinitely. The practical effect of the majority’s opinion, however, is just that—because the labor exemption will continue until the bargaining relationship is terminated either by a NLRB decertification proceeding or by abandonment of bargaining rights by the union.

*Id.* at 1305 (Heaney, J., dissenting).

<sup>164</sup> *NFLPA in the 1980s*, *supra* note 126.

<sup>165</sup> *Id.*

<sup>166</sup> Goplerud, *supra* note 86, at 29.

Between *Powell I* and *Powell II*, the League somewhat modified its free agency system and established a process called “Plan B Free Agency.”<sup>167</sup> Under Plan B Free Agency, all NFL teams preserved limited rights over no more than thirty-seven players out of a forty-five man roster season.<sup>168</sup> If a player was a protected free agent, the team signing that player was obligated to provide the previous club an opportunity to match the tendering-team’s offer, or a right of first refusal.<sup>169</sup> If the player’s former organization chose not to match the offer, the signing club had to provide compensation in the form of draft choices.<sup>170</sup> Unprotected players could negotiate contracts with a team of their choosing. Plan B Free Agency allowed generally less talented players to, in many instances, secure larger contracts than more highly skilled players simply because protected players were precluded from negotiating with other teams without compensating their original club.<sup>171</sup>

Plan B Free Agency all but halted the mobility of marquee players. Union leaders filed a class action lawsuit against the League in response to this Rozelle Rule-like scheme.<sup>172</sup> Because the Union had disbanded, labor law no longer governed the parties’ relationship. The lawsuit challenged the League’s free agency rules as an unlawful restraint of trade in court without contravening labor law.<sup>173</sup> The Players ultimately prevailed as a jury found in their favor.<sup>174</sup> The jury found that Plan B Free Agency deprived players of the opportunity to freely offer their services as professional football players to other teams, causing them to

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<sup>167</sup> 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).

<sup>168</sup> *Id.*

<sup>169</sup> See Reynolds v. Nat’l Football League, 584 F.2d 280, 287 (8th Cir. 1978).

<sup>170</sup> Thomas George, *N.F.L.’s Free-Agency System Is Found Unfair by U.S. Jury*, N.Y. TIMES, Sept. 11, 1992, at A1.

<sup>171</sup> Nissim, *supra* note 167, at 260.

<sup>172</sup> New York Jets running back Freeman McNeil was chosen as the lead plaintiff for free agency because of his first name, Freeman (the symbolic nature of the name, as “Free Man”). See generally McNeil v. Nat’l Football League, 790 F. Supp. 871 (D. Minn. 1992).

<sup>173</sup> See McNeil v. Nat’l Football League, No. 4-90-476, 1992 WL 315292, at \*1 (D. Minn. Sept. 10, 1992).

<sup>174</sup> See generally *id.*

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receive less compensation.<sup>175</sup> The jury felt that these rules were more restrictive than reasonably necessary to achieve the objective of establishing or maintaining competitive balance within the NFL.<sup>176</sup> Through the *McNeil* decision and additional ensuing litigation, the Union ended Plan B Free Agency<sup>177</sup> and continued to apply pressure on the Owners.

*E. The Modern Era—a Time of Mutual Economic Gain and Benefit*

With the League now susceptible to attack through antitrust law, Ownership began settlement talks with the Players' Association in November 1992.<sup>178</sup> During that time, Union leaders had filed another lawsuit, *White v. National Football League*, which sought true free agency and compensation relief through the legal system.<sup>179</sup> Ownership desired enactment of a mechanism to curb unbridled free agency and protect smaller-market teams in the form of a salary cap.<sup>180</sup> Players sought true free agency. The parties finally reached an agreement outside of court in January 1993, and submitted it to Judge David S. Doty of the U.S. District Court for the District of Minnesota for a consent decree. The settlement agreement submitted to Judge Doty contained a provision that Judge Doty's court would retain jurisdiction over the enforcement and review of the agreement as well as all other matters stemming from the eventual CBA.<sup>181</sup> The stipulated

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See generally *Jackson v. Nat'l Football League*, 802 F. Supp. 226 (D. Minn. 1992); see also *White v. Nat'l Football League*, 822 F. Supp. 1389 (D. Minn. 1993) (class action by Eagles defensive end Reggie White on behalf of all players).

<sup>178</sup> Although it became increasingly evident that collective bargaining was going to settle this dispute, Ownership still attempted to break Union solidarity. For instance, Owners tried to steal players from the Union's licensing arm over to the NFL's licensing arm by giving certain players more money. *NFLPA in the 1980s*, *supra* note 126 (noting that Jim Kelly, Dan Marino, Bobby Brister, Warren Moon, Phil Simms, John Elway, Boomer Esiason, Troy Aikman, Jim Everett, and Randall Cunningham all defected to NFL Properties).

<sup>179</sup> See generally *White*, 822 F. Supp. at 1389.

<sup>180</sup> *The 1990's—Growth of the Union*, NFL PLAYERS ASS'N, <http://www.nfl.com/about-us/History> (last visited Dec. 30, 2009) [hereinafter *NFLPA in the 1990s*].

<sup>181</sup> See *White v. Nat'l Football League*, 585 F.3d 1129, 1134 (8th Cir. 2009).

settlement agreement was signed on April 30, 1993 and contained all of the major provisions sought by both sides. Settlement finally came through compromise. Once the CBA was approved and the consent decree was in place to settle the *White* antitrust lawsuit, the NFL voluntarily recognized the NFLPA as the Players' Association's bargaining representative.<sup>182</sup> Finally there was labor peace between the NFL and the NFLPA.

Over the years, the NFLPA and the League extended their 1993 agreement five times. The most recent extension took place in March 2006 when both sides voted to extend the CBA through the 2011 season. Ownership voted thirty-to-two to accept the NFLPA's final proposal. Each vote to extend the collective bargaining agreement was also a vote against uncertainty and to maintain the status quo. However, on May 20, 2008, in the midst of the worst recession in decades, League owners unanimously voted to opt out of the agreement.<sup>183</sup>

Under the CBA, the 2010 season operates as the agreement's final year if one of the parties opts out.<sup>184</sup> Further, the 2010 season will operate without a salary cap.<sup>185</sup> While this may be perceived as being beneficial to NFL players, there are drawbacks. For instance, there is no salary floor, meaning that Ownership can spend as little as it desires on player salaries.<sup>186</sup> Other negatives include the extension of free agency eligibility from four years to six years of service, franchises' ability to use an additional franchise tag, and restrictions on a playoff team's ability to sign free agents.<sup>187</sup> Thus the players will also be penalized in the uncapped year.

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<sup>182</sup> This occurred after a majority of players signed authorization cards and the American Arbitration Association acknowledged the NFLPA. *See White*, 822 F. Supp. at 1435. The NFLPA membership vote to ratify the new CBA was 952 for, and 34 against. *NFLPA in the 1990s*, *supra* note 180.

<sup>183</sup> *NFL Owners Opt Out of CBA*, NFL, <http://www.nfl.com/news/story?id=09000d5d80868b78&template=without-video&confirm=true> (last visited Dec. 30, 2009).

<sup>184</sup> *NFL-CBA Related Questions and Answers*, SI.COM, <http://sportsillustrated.cnn.com/2010/football/nfl/01/20/cba.qa/index.html> (last visited Apr. 12, 2010).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Tom Curran, *Goodell on Work Stoppage*, NBCSPORTS.COM, Mar. 23, 2009, <http://blogs.nbcsports.com/home/archives/2009/03/goodell-on-work-stoppage.html>; *see also Maske*, *NFL Appears*, *supra* note 50.

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In its view, Ownership opted out early because it was an unreasonable fiscal obligation to spend more than half of NFL combined revenue on player expenses without getting some concession or cooperation from the Union in return. In particular, the League was referring to costs associated with the massive stadium initiative undertaken in the late 1990s under Commissioner Tagliabue's leadership. The League released a statement addressing its reasons for opting out, attributing its decision to the high cost of player salaries and having to spend significant money on stadium construction, operations, and improvements.<sup>188</sup> According to the NFL's statement, these facts along with the recession prevent Owners from wanting to invest in the game under the current CBA.<sup>189</sup>

Ownership has taken issue with other material elements of the current deal. For example, the CBA effectively prohibits clubs from recouping bonuses paid to players who, after signing, breach their player contracts or refuse to perform.<sup>190</sup> This issue was exemplified by the events surrounding the incarceration of former Atlanta Falcons' quarterback and convicted dog fighting ring financier Michael Vick. Vick was able to keep most of his twenty million dollar signing bonus even though he was in prison and unable to play.<sup>191</sup> The League now seeks to bargain over the handling of this type of issue.

Owners are also dissatisfied with the rising salaries of rookie players. Some first year players make more money than veterans who have already proven their worth. In 2006, Ownership failed to allocate ample time to examine how to curb rookie salaries during those negotiations. Now the NFL wishes to negotiate better

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<sup>188</sup> Jason Cole, *Owners Opt Out*, YAHOO SPORTS (May 20, 2008), <http://sports.yahoo.com/nfl/news?slug=jc-optout052008&prov=yhoo&type=lgn>.

<sup>189</sup> *Id.*

<sup>190</sup> See NFL COLLECTIVE BARGAINING AGREEMENT 2006–2012, art. XIV, § 9 (2006).

<sup>191</sup> See *White v. Nat'l Football League*, No. 4-92-906(DSD), 2008 WL 1827423, at \*1 (D. Minn. Apr. 22, 2008); see also *Judge: Vick Can Keep \$20M Signing Bonus*, CBS.COM, Feb. 4, 2008, [http://www.cbsnews.com/stories/2008/02/04/sports/main3785994.shtml?source=RSSattr=U.S.\\_3785994](http://www.cbsnews.com/stories/2008/02/04/sports/main3785994.shtml?source=RSSattr=U.S._3785994).

terms for its member clubs and allocate more resources for players who prove themselves.<sup>192</sup>

Although Mr. Upshaw strongly opposed a rookie salary scale,<sup>193</sup> many members of his constituency were in favor of a rookie pay scale.<sup>194</sup> It was in the best interests of many players to have CBA mechanisms that curtail large rookie bonuses and other forms of guaranteed compensation in order to free up salary cap space for veteran contracts.<sup>195</sup> Sadly, the NFLPA's hard-line stance against a rookie salary scale changed, as Mr. Upshaw passed away on August 21, 2008<sup>196</sup> after losing a short bout with pancreatic cancer.<sup>197</sup> The successor to the iconic former all-pro and union leader would take a different viewpoint on many NFL-Union issues, including rookie wage scales.

After a lengthy, and at times controversial,<sup>198</sup> search for a new executive director, the Union settled on pro football outsider DeMaurice Smith. Each of the Union's thirty-two player representatives voted in favor of Smith, a lawyer with no professional football ties and no labor law experience.<sup>199</sup> Smith is

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<sup>192</sup> See Dan Wetzel, *Rookie Salaries Out of This League*, YAHOO SPORTS (Apr. 25, 2008), <http://sports.yahoo.com/nfl/news?slug=dw-draftsalaries042408>.

<sup>193</sup> See Gene Upshaw, *100 Words from Gene Upshaw for April 28*, NFLPA.COM (Apr. 28, 2008), <http://www.nflplayers.com/Articles/NFLPAs-Weekly-Message/100-Words-From-Gene-Upshaw-for-April-28>.

<sup>194</sup> See Michael David Smith, *Tomlinson Favors Rookie Cap*, PRO FOOTBALL TALK (June 20, 2008), <http://www.profootballtalk.com/2008/06/20/tomlinson-favors-rookie-cap>; see also Mike Florio, *Mawae Doesn't Like Rookie Windfalls*, PRO FOOTBALL TALK (May 21, 2008), <http://www.profootballtalk.com/2008/05/21/mawae-doesnt-like-rookie-windfalls>.

<sup>195</sup> Deubert & Wong, *supra* note 43, at 228.

<sup>196</sup> A potential byproduct of Upshaw's tragic death may be the erosion of any rapport the Union may have possessed with Goodell and other members of the Management Council.

<sup>197</sup> *Hall of Famer Upshaw Loses Battle with Pancreatic Cancer*, ESPN.COM, Aug. 21, 2008, <http://sports.espn.go.com/nfl/news/story?id=3545830>.

<sup>198</sup> See Mike Florio, *Lawsuit Claims that Troy Vincent Was Undermining Upshaw*, PRO FOOTBALL TALK (Sept. 1, 2009), <http://profootballtalk.nbcsports.com/2009/09/01/lawsuit-claims-that-troy-vincent-was-undermining-gene-upshaw>; see also NFLPA: *Feds Investigating Alleged Collusion Between Goodell, Vincent*, USA TODAY, Sept. 2, 2009, [http://www.usatoday.com/sports/football/nfl/2009-09-01-nflpa-investigation\\_N.htm](http://www.usatoday.com/sports/football/nfl/2009-09-01-nflpa-investigation_N.htm).

<sup>199</sup> Mark Maske, *DeMaurice Smith Elected New Union Leader*, WASH. POST, Mar. 15, 2009, <http://views.washingtonpost.com/theleague/nflnewsfeed/2009/03/demaurice-smith-elected-new-union-leader.html>; see also *Attorney Smith Elected to Succeed Upshaw as*

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a former partner at the Washington, D.C.-based firm of Patton Boggs and is a former United States attorney with connections to many key government figures, including current Attorney General Eric Holder and President Obama.<sup>200</sup> Smith pledged that he would use his substantial political connections to assist the players during negotiations.<sup>201</sup> While Smith's rhetoric initially took a conciliatory tone when referring to the lockout with the NFL, his language is now escalating and becoming pessimistic.<sup>202</sup>

Formal negotiations between the parties began in summer 2009 but the verbal jousting began long before these discussions. While each side publicly approached these talks with the expectation that they would be productive, the opposite seems to be occurring. Smith notified his constituency that the NFL intends to lock out the players in 2011 and, although both sides continue to negotiate, players should begin to save at least one-fourth of their earnings during the next two years.<sup>203</sup> The Union is further preparing for a labor stoppage by creating a strike/lockout fund.<sup>204</sup> This fund will be established through a 50% increase in union dues for the 2009 and 2010 seasons.<sup>205</sup> Another trend beginning to emerge in the

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*NFLPA Executive Director*, ASSOCIATED PRESS, Mar. 27, 2009, available at <http://www.nfl.com/news/story?id=09000d5d80f469df&template=withoutvideo&confirm=true> [hereinafter *Attorney Smith Elected*].

<sup>200</sup> Jeff Levine, *After Bargaining Session, NFL Players Association Takes Message to Washington*, BIZ OF FOOTBALL (July 21, 2009), [http://www.bizoffootball.com/index.php?option=com\\_content&view=article&id=469:after-bargaining-session-nfl-players-association-takes-message-to-washington&catid=44:articles-and-opinion&Itemid=61](http://www.bizoffootball.com/index.php?option=com_content&view=article&id=469:after-bargaining-session-nfl-players-association-takes-message-to-washington&catid=44:articles-and-opinion&Itemid=61).

<sup>201</sup> See Michael David Smith, *DeMaurice Smith: 'If It's Going to Be a Fight, Lets Get It Going.'* NFL FANHOUSE (May 16, 2009), <http://nfl.fanhouse.com/2009/05/16/demaurice-smith-if-its-going-to-be-a-fight-lets-get-it-goin>.

<sup>202</sup> See Jim Corbett, *Smith: NFLPA Hopes for 'Peace,' Prepares for 'War' with Owners*, USA TODAY, Mar. 18, 2009, [http://www.usatoday.com/sports/football/nfl/2009-03-16-nflpa-update\\_N.htm](http://www.usatoday.com/sports/football/nfl/2009-03-16-nflpa-update_N.htm).

<sup>203</sup> Scott Brown & Carl Prine, *Union Chief: NFL Headed for Lockout*, PITTSBURGH TRIB.-REV., Aug. 19, 2009, [http://www.pittsburghlive.com:8000/x/pittsburghtrib/sports/s\\_638933.html](http://www.pittsburghlive.com:8000/x/pittsburghtrib/sports/s_638933.html).

<sup>204</sup> *NFLPA Votes to Start Fund for '11 in Case of Lockout or Strike*, STREET & SMITH'S SPORTSBUSINESS DAILY, Sept. 14, 2009, <http://www.sportsbusinessdaily.com/article/133277>.

<sup>205</sup> Liz Mullen of the *SportsBusiness Journal* reported that the NFLPA, on September 21, 2009,

sent out a notice to agents that active NFL player dues for the '09 and '10 seasons are being increased from \$10,000 to \$15,000 per player

early stage of bargaining is the League's summary rejection of any and all NFLPA proposals,<sup>206</sup> a tactic that is eerily familiar to the beginning stages of the NHL lockout.<sup>207</sup> The Union believes that this familiar tactic is the work of League outside counsel Bob Batterman and, like the NHL labor stoppage, Owners will wait to engage in substantive negotiations until the current CBA has expired.<sup>208</sup>

The NHL and NFL conflicts also share a common element in that the NFL and NHL labor stoppages involve attempts by both labor and management to gain leverage through use of the media. Although each denies their interest in utilizing the media to communicate their respective message, both Goodell and Smith are using such methods to transmit increasingly contentious messages<sup>209</sup> to each other and the public. Both sides understand the importance of controlling and manipulating the media, as public support hinges on the information disseminated through various media outlets. As detailed in Part III, the most recent

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in order to create a "dues lockout fund." NFL player agents' annual membership fees have not been affected, sources said. For players, in addition to the flat annual \$15,000 dues, those who are eligible to receive the equal share licensing royalty payments due them by NFL Players, Inc will have their dues increased by that amount as well for '09 and '10. In past years that payment equaled approximately \$10,000 per player—which means dues for those players will equal about \$25,000.

*NFLPA Increasing Yearly Players Dues to Establish Lockout Fund*, STREET & SMITH'S SPORTSBUSINESS DAILY, Sept. 22, 2009, <http://www.sportsbusinessdaily.com/article/133481>.

<sup>206</sup> See, e.g., Judy Battista, *Players' Bid to Keep Salary Cap Is Rejected*, N.Y. TIMES, Mar. 2, 2010, at B16; *NFLPA Says Proposed One-Year Extension of CBA Rejected by League*, STREET & SMITH'S SPORTSBUSINESS DAILY, Mar. 3, 2010, <http://www.sportsbusinessdaily.com/article/137461>.

<sup>207</sup> See Jeff Levine, *Labor Web Site for NFL Mirrors NHL's Past Effort*, BIZ OF FOOTBALL (Feb. 13, 2010), [http://www.bizoffootball.com/index.php?option=com\\_content&view=article&id=631:labor-web-site-for-nfl-mirrors-nhls-past-effort&catid=34:nfl-news&Itemid=53](http://www.bizoffootball.com/index.php?option=com_content&view=article&id=631:labor-web-site-for-nfl-mirrors-nhls-past-effort&catid=34:nfl-news&Itemid=53).

<sup>208</sup> See Liz Mullen, *NFL Rejects Players' 'Lock-in' Idea for Future Labor Talks*, SPORTING NEWS TODAY, Nov. 3, 2009, at 21 [hereinafter Mullen, *NFL Rejects Players'*], available at <http://today.sportingnews.com/sportingnewstoday/20091103/?pg=21&pm=1&u1=friend#pg21>.

<sup>209</sup> *Smith Waiting for Formal CBA Proposal*, ESPN.COM, Sept. 9, 2009, <http://sports.espn.go.com/nfl/news/story?id=4457637>.

lockout in professional sports illustrates that either side can win a labor stoppage by influencing the public's view on the matter. Understanding this concept may provide some clues as to how both the NFL and the Union will proceed if there indeed is a lockout in 2011.

### III. RECOUNTING THE NHL LOCKOUT

#### A. *From Enjoying Unrivaled Success to Facing-Off Against Dire Financial Straits*

The NHL faced a financial crisis earlier this decade that is similar to the dilemma confronting the NFL. Professional hockey enjoyed a period of tremendous growth in the late 1990s, both economically and in fan viewership. However, the NHL seemed to be in dire straits in the early portion of the new millennium. The majority of NHL franchises claimed an operating loss.<sup>210</sup> Several franchises reported losses of at least \$30 million and four teams had recently filed for bankruptcy protection.<sup>211</sup> NHL Commissioner Gary Bettman asserted that player salaries were the chief reason for each team's financial losses and that a salary cap was the only solution.<sup>212</sup> The NHL lobbied NHLPA Executive Director Bob Goodenow<sup>213</sup> to consider a salary cap for the good of

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<sup>210</sup> Nineteen out of the NHL's thirty teams claimed an operating loss. See Stephen M. Yoost, *The National Hockey League and Salary Arbitration: Time for a Line Change*, 21 OHIO ST. J. ON DISP. RESOL. 485, 491–92 (2006).

<sup>211</sup> *Id.*

<sup>212</sup> See Alan Adams, *NHL and Union Reject New Proposals*, USA TODAY, Dec. 14, 2004, [http://www.usatoday.com/sports/hockey/nhl/2004-12-14-labor-talks\\_x.htm](http://www.usatoday.com/sports/hockey/nhl/2004-12-14-labor-talks_x.htm) (“We only know of really one approach to meaningfully address and fix our problems. And that means we need to forge an economic partnership [implement a salary cap] . . . . We need to be together—teams and players, league and union—working together to grow this game and I don't think there's any substitute for that.” (quoting Bettman) (internal quotation marks omitted)).

<sup>213</sup> Mr. Goodenow played college hockey at Harvard and after completing his brief NHL playing career, received his J.D. from the University of Detroit Law School. Mr. Goodenow assumed leadership of the NHLPA in 1992.

the game; however, it also started accumulating a war chest in case of a work stoppage.<sup>214</sup>

After the 2002–03 NHL season, the NHL began using the media to publicly justify locking out players. Commissioner Bettman asserted that NHL player salaries were disproportionately larger when compared to other major sports.<sup>215</sup> He illustrated this point by saying that the NHL would “lose less money by not playing” hockey next season.<sup>216</sup> To validate Bettman’s assertion, the League retained former SEC Chairperson Arthur Levitt to prepare a finances audit of NHL revenues and losses.<sup>217</sup> The audit showed that NHL teams collectively lost \$273 million during the 2002–03 season;<sup>218</sup> it further unveiled that “an astounding 73% of NHL revenue was paid to players in the 2002–2003 season, significantly [more]” when compared with the other major sports in America.<sup>219</sup> The NHLPA attacked the accuracy of the report, calling it “flawed”<sup>220</sup> and asserting that the report was “‘simply another league public relations initiative [to blame the players for hockey’s financial situation].’”<sup>221</sup> This report and the resulting exchange between the two sides helped sow seeds of distrust that eventually led to the longest labor dispute in professional sports.

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<sup>214</sup> The NHL mandated that each club contribute \$10 million into a “rainy day” fund, which would most likely be used to cover financial losses as a result of the looming labor stoppage. Abrams, *supra* note 16, at 61–62.

<sup>215</sup> Bettman, prior to the lockout, continuously cited the report stating “players get 76 percent of all league revenues—far more than the percentage for the other major team sports.” Associated Press, ‘We Can’t Live Any Longer’ Under This CBA, ESPN.COM, May 26, 2004, <http://sports.espn.go.com/nhl/news/story?id=1809397>.

<sup>216</sup> *Commish Claims Locked-Out Union in Denial*, ESPN.COM, Nov. 2, 2004, <http://sports.espn.go.com/nhl/news/story?id=1914328>.

<sup>217</sup> Liebman, *supra* note 16, at 91–92.

<sup>218</sup> Yoost, *supra* note 210, at 491.

<sup>219</sup> Jonathan Kotler, *Parallel Unionism in Professional Hockey: Redefining the Nonstatutory Labor Exemption to the Antitrust Laws*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 843, 847 (2007).

<sup>220</sup> Associated Press, *NHL Lockout Chronology*, ESPN.COM, Feb. 16, 2005, <http://sports.espn.go.com/espn/print?id=1993004&type=story>; *see also* Liebman, *supra* note 16, at 92 (“Forbes Magazine conducted a study of league revenues and expenditures during the 2002–2003 season. Forbes reported that teams lost \$123 million and that the league spent only 66% of its revenues on player salaries.”).

<sup>221</sup> *See NHLPA’s Goodenow Issues Response*, TSN.COM, Feb. 12, 2004, <http://www.tsn.ca/nhl/story/?id=71954>.

### B. 2004 Lockout

The NHL remained resolute in its necessity of achieving cost certainty. “We can’t live any longer under [this] CBA,” Commissioner Bettman maintained.<sup>222</sup> Both sides knew the danger a labor stoppage posed; a prior lockout in 1994 had reversed years of fan development in North America. Television ratings had suffered as a result of the lost games.<sup>223</sup> Despite the substantial risks associated with any labor stoppage, Bettman realized that curtailing player costs was paramount to the League’s financial viability. This meant securing a salary cap regardless of the consequences.<sup>224</sup>

Bettman was determined to learn from the mistakes the league had made during prior labor stoppages.<sup>225</sup> Ownership would stay disciplined and not make any concessions until players accepted a salary cap. The NHL’s strategy seemed to include a component of using the press to convince the public that a salary cap was necessary to save the game. This message put the NHLPA in a difficult public relations position, as it had already backed itself into a corner by refusing to accept any proposal with a salary cap. Goodenow’s steadfast refusal to even consider this cost control provision allowed the media to cast blame on the players for not making financial concessions necessary to save the game.

Sensing that the upcoming labor conflict would be long in duration, Goodenow attempted to prepare his side for a prolonged lockout. However, he was unsure whether players were willing to sacrifice one or two seasons of guaranteed salary in order to avoid a cap.<sup>226</sup> NHL owners considered using replacement players as the lockout began in earnest. In response, Goodenow reportedly mandated that any player who chose to cross party lines would be

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<sup>222</sup> *Attorney Smith Elected*, *supra* note 199.

<sup>223</sup> See Jake Fisher, *Television and the Potential NFL Lockout*, HARV. SPORTS ANALYSIS COLLECTIVE, Nov. 18, 2009, <http://harvardsportsanalysis.wordpress.com/2009/11/18/television-and-the-potential-nfl-lockout>.

<sup>224</sup> *Id.*

<sup>225</sup> In prior labor conflicts, NHL owners had lacked cohesion and conceded to player demands. For example, NHL owners locked players out in 1995 in order to secure a salary cap. However, owners were unable to maintain a united front and ended up signing a new CBA that lacked a salary cap.

<sup>226</sup> Avoiding a cap would benefit future NHL players.

obligated to pay back to the NHLPA all player benefits received during the work stoppage.<sup>227</sup> This amount totaled between \$5,000 and \$10,000 per each month of the labor stoppage.<sup>228</sup> The NHL responded to this edict by filing an unfair labor practice (“ULP”) against the Players Association,<sup>229</sup> calling such a practice “coercive.”<sup>230</sup> This ULP filing quashed any hope that both sides would quickly find common ground and work to save the season.

On February 16, 2005, the NHL canceled the season. As the lockout trudged on, players were the first side to exhibit signs of breaking solidarity.<sup>231</sup> Players were not willing to sacrifice a significant portion of their career to fight a cap through a prolonged labor dispute.<sup>232</sup> Some players were reportedly communicating with general managers, owners, and the media.<sup>233</sup> This activity undermined Goodenow’s position. The owners, in contrast and unlike during prior labor stoppages, did not break rank<sup>234</sup> and presented a united front. It soon became evident to Goodenow that his union was neither united nor willing to sacrifice several seasons in order to avoid a salary cap.<sup>235</sup> Bettman’s new NHL would involve a salary cap. Some leaders within the NHLPA

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<sup>227</sup> *League Dislikes NHLPA’s Replacement Player Stance*, ESPN.COM, Mar. 27, 2005, <http://sports.espn.go.com/nhl/news/story?id=2022161>.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* Any player who crossed the picket line was at risk of violating § 8(b)(1) of the NLRB. See generally *Overview of the National Labor Relations Act*, NLRB, [http://www.nlr.gov/about\\_us/overview/national\\_labor\\_relations\\_act.aspx](http://www.nlr.gov/about_us/overview/national_labor_relations_act.aspx) (last visited Jan. 3, 2010).

<sup>230</sup> Associated Press, *NHL Files an Unfair Labor Practice Charge with NLRB*, WASH. POST, at D03. “The practice of conditioning the receipt of work stoppage benefits on a player’s agreement not to return to the NHL without a new CBA was coercive, and in violation of the player’s rights under the labor laws,” NHL Chief Legal Officer Bill Daly said. *Id.*

<sup>231</sup> Because players were beginning to crack just months into the lockout, it seemed unreasonable to believe that they would last through 2006. Sheila Bloch & Lee Clark, Report to the NHLPA Executive Board and Members 40 (2007) (unpublished manuscript) (on file with authors).

<sup>232</sup> Players were not prepared for a prolonged strike or to sacrifice the only asset they had: their career. *Id.*

<sup>233</sup> *Id.* at 39.

<sup>234</sup> *Id.* at 41 (discussing how the critical part of the lockout was won by ownership due to Bettman policing management and maintaining a united front against the players).

<sup>235</sup> *Id.* at 46 (discussing the players’ trepidation concerning a prolonged work stoppage in hockey).

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realized the union needed to change its strategy since its membership was capitulating to a salary cap.<sup>236</sup> Disagreement over the appropriate new strategy created a rift among the union's leadership.

As more serious negotiations began, the NHLPA split into several factions: those who supported a salary cap (this strategy was led by Goodenow's number two and NHLPA general counsel, Ted Saskin) and those still loyal to Goodenow, who would not vote for a cap.<sup>237</sup> Whether it was a purposeful strategy by the NHL or just a fortunate occurrence, a wedge began to form between Goodenow and other senior union members.<sup>238</sup> Goodenow's control on the CBA negotiation process began to weaken.<sup>239</sup> Saskin started to emerge as the more effective NHLPA negotiator. The NHL attempted to eliminate Goodenow from the negotiation process entirely by suggesting to Saskin that he "keep the lines of communication open" with Bettman's number two, Bill Daly.<sup>240</sup> Increasingly, both Saskin and Daly assumed the roles as negotiators of the new CBA. This isolation of Goodenow, in effect, allowed Saskin to legitimize himself as the de facto union leader.<sup>241</sup>

Negotiations began progressing more smoothly once Goodenow became less of a factor. Saskin agreed to a salary cap and tension in the bargaining process began to ease. Eventually, the sides agreed to a new CBA in principle.<sup>242</sup> One byproduct of the cap-inclusive CBA was the resignation of Goodenow. The aftermath of the lockout left the NHLPA in an extremely weakened state. Since the conclusion of the lockout, the union has gone through at least two different executive directors<sup>243</sup> and is currently

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<sup>236</sup> *Id.* (stating that the Union's mantra of "no cap" was no longer an option).

<sup>237</sup> *Id.* at 49.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Key Terms of NHL Agreement*, ESPN.COM, July 13, 2005, <http://sports.espn.go.com/nhl/columns/story?id=2107128>.

<sup>242</sup> *Sides Will Have to Ratify New CBA*, ESPN.COM, July 13, 2005, <http://sports.espn.go.com/nhl/news/story?id=2106776>.

<sup>243</sup> See Maury Brown, *Ian Penny Steps Down as Interim Exec. Director of NHLPA*, BIZ OF HOCKEY (Oct. 31, 2009), <http://www.bizofhockey.com> (search "Ian Penny Steps

without an executive director, general counsel, or outside legal counsel. Now, the National Football League has Bob Batterman serving as outside counsel. Mr. Batterman may provide the NFL a blueprint similar to the one utilized by the NHL during its recent lockout.

#### IV. THE PERTINENT LAWS, POSITIONS, AND POSSIBILITIES OF THE PARTIES

##### A. *Statement of the Case*

NFL ownership gravitated toward labor uncertainty in 2008 when it elected to opt out of the CBA extension signed only two years prior. The single biggest issue in need of renegotiation is the League's rising labor costs. Initially, the Union's leadership responded to this event by quipping that Ownership "just [doesn't] like what [it] agreed to in March of 2006" and that if Ownership locked out the players, the Union would decertify, thereby disabling labor law and enabling the Union to sue the NFL under antitrust law.<sup>244</sup> However, as time has passed and leadership has changed within the Players' Association, a quick defusing of this potential lockout seems like wishful thinking. Both sides have done little bargaining and have instead opted to pad their respective war chests and prepare for a protracted, and potentially contentious, negotiation process.

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Down," result will be fourth from top); *see also* Liz Mullen, *Paul Kelly Fired as Executive Director of NHLPA*, SPORTING NEWS TODAY, Aug. 31, 2009, <http://www.sportingnews.com/nhl/article/2009-08-31/report-paul-kelly-fired-executive-director-nhlpa>; *NHLPA Fires Executive Director Ted Saskin*, CBC.COM, May 10, 2007, <http://www.cbc.ca/sports/hockey/story/2007/05/10/nhlpa-saskin-fired.html>.

<sup>244</sup> Lester Munson, *Storm Clouds Gather and Lockout Looms Large in NFL Labor Strife*, ESPN.COM, Mar. 12, 2008, <http://sports.espn.go.com/nfl/columns/story?id=3288568>.

## *B. Applicable Law*

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

The National Labor Relations Act<sup>245</sup> (the “NLRA” or the “Act”) is the guidepost by which all collective bargaining exists. Central to the Act is the duty to bargain collectively in good faith, as this process is intended to be a tool to foster industrial peace:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .<sup>246</sup>

Section 158(a)(5) of the Act states that an employer’s refusal to bargain collectively with its employee representatives is grounds for an unfair labor practice<sup>247</sup> and that a labor organization or its agent’s refusal to bargain collectively with the employer is also grounds for a ULP.<sup>248</sup> The statutory language only states that there is a duty to bargain in good faith; the NLRB and the federal courts have rendered opinions establishing what is and what is not bargaining in good faith. Section 8(5) of The Wagner Act of 1935<sup>249</sup> established an employer’s “refus[al] to bargain collectively with the representatives of his employees” as an unfair labor

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<sup>245</sup> 29 U.S.C. §§ 151–69 (2006).

<sup>246</sup> *Id.* § 158(d).

<sup>247</sup> This is subject to § 159(a), which involves the construction industry and is outside the scope of this Comment.

<sup>248</sup> *Id.* § 158(b)(3).

<sup>249</sup> This is the original version of the National Labor Relations Act. National Labor Relations (Wagner) Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–69).

practice.<sup>250</sup> In 1947, the Taft-Hartley Amendments added the requirement that unions must collectively bargain.<sup>251</sup> As defined by the Supreme Court, the purpose of the Act is to provide a vehicle for the “free opportunity for negotiation with accredited representatives of employees . . . [and] to promote industrial peace.”<sup>252</sup>

## 2. The Bargaining Obligation

Primarily, the Act calls on the parties “to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”<sup>253</sup> There is no mandate that the parties reach an actual agreement; however, there is a requirement that both sides attempt to find an amicable resolution.<sup>254</sup> The requirements of the parties can be broken down as follows: the duty to meet, confer, and negotiate, and the obligation to deal in good faith.

### a) The Duty to Meet, Confer, and Negotiate

Nowhere in the Act does it state how many times or how often the parties must meet in order to satisfy its good faith duty.<sup>255</sup> The requirement to meet at reasonable times was discussed in *NLRB v. Highland Park Manufacturing Co.*,<sup>256</sup> where the union was negotiating a draft proposal of an agreement with management.<sup>257</sup> After the second negotiating session was cut short due to the company president’s illness, the vice president took over. He met with the union twice more and then stopped negotiating.<sup>258</sup> The Fourth Circuit agreed with the Board that the company’s response to the union when taken collectively amounted to a refusal to

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<sup>250</sup> 29 U.S.C. § 158(a)(5).

<sup>251</sup> Labor Management Relations (Taft-Hartley) Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–44); *see also* JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 824* (BNA Books 2006) (1970).

<sup>252</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45–47 (1937).

<sup>253</sup> 29 U.S.C. § 158(d).

<sup>254</sup> *See generally* HIGGINS, *supra* note 251, at 825.

<sup>255</sup> *Id.*

<sup>256</sup> 110 F.2d 632 (4th Cir. 1940).

<sup>257</sup> *Id.* at 634.

<sup>258</sup> *Id.*

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bargain because the employer had no intent of reaching an agreement with the union.<sup>259</sup> The court elaborated that the endgame in collective bargaining is not necessarily an agreement, but the desire to forge an accord.

The court opined the mere act of meeting with no intention of ever agreeing to an accord is evidence of a lack of good faith.<sup>260</sup> “If some valid reason had been advanced for unwillingness to reduce agreements to writing, this conclusion would not necessarily follow; but in the absence of explanation, it clearly indicates respondent’s hostility to the whole process of collective bargaining.”<sup>261</sup> The court likened the coming to terms of an agreement to “an industrial constitution of the enterprise;” if a party is not interested in coming to an agreement, then there is no interest in industrial harmony.<sup>262</sup>

#### b) The Obligation to Deal in Good Faith

Like the duty to confer, meet, and negotiate, the obligation to deal in good faith is not precisely defined. The United States Supreme Court adopted this concept in 1940 when it decided *National Licorice Co. v. NLRB*,<sup>263</sup> a case where the employer refused to acknowledge the union as the designated bargaining representative.<sup>264</sup> The employer’s president “declined to recognize the [u]nion as the bargaining representative of all the employees, and declared that he would negotiate with it only as the bargaining representative of the Union members, refusing to bargain with it as the representative of all the employees, a plain violation of the Act.”<sup>265</sup> The company president then refused to negotiate with the union altogether.<sup>266</sup> The Court concluded that the negotiations the employer entered into “were not entered into by the [employer] in

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<sup>259</sup> *Id.* at 637.

<sup>260</sup> *Id.* at 637–38.

<sup>261</sup> *Id.* at 638.

<sup>262</sup> *Id.*

<sup>263</sup> 309 U.S. 350 (1940).

<sup>264</sup> The employer also attempted to circulate a petition amongst the employees to have an employer-dominated committee negotiate the CBA. Some employees signed and then subsequently cancelled their signatures. *See id.* at 358.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

good faith, and were but thinly disguised refusals to treat with the Union representatives.”<sup>267</sup>

The determinative issue was whether the employer had actually intended to negotiate with the union. More recent examples of an employer’s refusal to bargain in good faith are abundant.<sup>268</sup> The decisions all demonstrate the Act’s desire to have the parties negotiate with the vision of reaching an agreement. An employer’s conduct is generally evaluated under the totality of the particular circumstances.<sup>269</sup> Any alleged bad faith conduct in question may take place at or away from the bargaining table.<sup>270</sup>

### 3. Subjects of Bargaining

The Act classifies the failure of the parties to meet at reasonable times and confer in good faith as to “wages, hours, and other terms and conditions of employment” as an unfair labor practice.<sup>271</sup> These three areas are considered “mandatory subjects of bargaining,” and are subjects that the parties must negotiate in good faith in an attempt to reach an agreement.<sup>272</sup> While the Act only classifies three items as mandatory subjects, the list of actual negotiation terms is much more expansive.

In *NLRB v. Wooster Division of Borg-Warner Corp.*,<sup>273</sup> an employer insisted on a “ballot clause,” which called for a secret ballot election for employees as to the employer’s last pre-strike offer, and a “recognition clause” excluding the international union as the official bargaining representative of the union.<sup>274</sup> At issue was whether this conduct amounted to a refusal to bargain over non-mandatory terms.<sup>275</sup> The employer felt it had complied with its duties insofar as coming to terms on the three mandatory subjects, but its insistence on non-mandatory terms in the

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<sup>267</sup> *Id.*

<sup>268</sup> *See, e.g.,* *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1378–79 (8th Cir. 1993); *Excel Fire Prot. Co.*, 308 N.L.R.B. 241 (1992).

<sup>269</sup> *See Radisson Plaza*, 987 F.2d at 1381.

<sup>270</sup> *Id.*

<sup>271</sup> 29 U.S.C. § 158(d) (2006).

<sup>272</sup> *Id.*

<sup>273</sup> 356 U.S. 342 (1958).

<sup>274</sup> *Id.* at 343.

<sup>275</sup> *Id.* at 344.

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agreement was the basis of the alleged unfair labor practice.<sup>276</sup> The Court's analysis of the Act as well as the employer's conduct supported the Board's sustained ULP charge.<sup>277</sup> The *Borg-Warner* decision thus created the distinction between mandatory and permissive subjects of bargaining.

Mandatory subjects of bargaining directly impact wages, hours, and other terms and conditions of employment.<sup>278</sup> These topics must be bargained for by the parties.<sup>279</sup> Permissive bargaining subjects may be negotiated but such agreements are not mandatory.<sup>280</sup> These subjects may include retiree benefits, internal union matters (such as how union representatives are elected, the amount of union dues, union officer structure, etc.), supervisors' conditions of employment, interest arbitration, legal liability clauses, and the make-up of the employer's board of trustees or directors.<sup>281</sup> A unilateral change of a mandatory subject of bargaining falls into a certain category of violations. By virtue of this conduct, this type of action is considered a per se violation of the Act.<sup>282</sup>

#### 4. Per Se Violations

In *NLRB v. Katz*,<sup>283</sup> the Court held that an employer's unilateral change in granting merit increases, sick leave policy, and wage increases during its contract negotiations with the union (and prior to reaching an impasse) evidenced a per se violation of its

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<sup>276</sup> *Id.* at 348–49.

<sup>277</sup> *Id.* at 349–50.

<sup>278</sup> 29 U.S.C. § 158(d) (2006).

<sup>279</sup> Some examples of mandatory subjects in the NFL-NFLPA bargaining context include salary, holiday pay, bonus pay, step pay (including pay for rookies), vacations, discipline, union dues check off, grievance procedures (injury and non-injury), uniforms, and drug testing.

<sup>280</sup> HIGGINS, *supra* note 251, at 831.

<sup>281</sup> There are also “illegal subjects of bargaining,” which include discrimination against certain groups of people, hot cargo clauses (allowing workers to refuse to handle materials/goods from a struck facility or on an “unfair” list), and closed shop clauses (a provision that all employees are union members before being hired).

<sup>282</sup> *See, e.g.,* Litton Fin. Printing Div. v. NLRB, 501 U.S. 190 (1991) (reaffirming *NLRB v. Katz*, 369 U.S. 736 (1962), and holding that it is an unfair labor practice to unilaterally implement a change to a mandatory subject of bargaining after contract termination without first bargaining to impasse).

<sup>283</sup> 369 U.S. 736 (1962).

requirement to bargain in good faith.<sup>284</sup> Even if the employer exhibited “subjective good faith” in reaching an agreement, a unilateral change is nonetheless evidence of a violation because it circumvents the duty to negotiate.<sup>285</sup> This circumvention frustrates the objectives of § 8(a)(5) and is tantamount to a flat refusal to bargain.<sup>286</sup>

### 5. Good Faith

In 1947, the “good faith” requirement was incorporated into section 8(d) of the NLRA.<sup>287</sup> This good faith requirement means employers and employee organizations must meet and confer with an open mind and with the intent of reaching an agreement.<sup>288</sup> While there is no single definition of good faith in the context of labor relations, ascertaining whether an individual bargained in good faith centrally involves evaluating a party’s subjective state of mind and asking whether there exists an inclination to engage in sincere negotiations with an intent to settle differences and arrive at an agreement.<sup>289</sup>

The NLRB and courts examine the facts of each case when dealing with a ULP charge. In *NLRB v. General Electric Co.*,<sup>290</sup> the court upheld the Board’s decision that General Electric’s “take it or leave it” attitude during negotiations, its dealings with individual locals instead of the international union, as well as a media blitz against the union, constituted an unfair labor practice, despite the fact that the union signed a contract.<sup>291</sup> In addition, General Electric only furnished part of the information requested after the end of the strike.<sup>292</sup> General Electric also switched its position several times as to union offers, which stifled the pace of

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<sup>284</sup> *Id.* at 741–42.

<sup>285</sup> *Id.* at 743.

<sup>286</sup> *See id.*

<sup>287</sup> 29 U.S.C. § 158(d) (2006).

<sup>288</sup> *See HIGGINS, supra* note 251, at 856.

<sup>289</sup> *See NLRB v. Biles-Coleman Lumber Co.*, 98 F.2d 18, 22 (9th Cir. 1938).

<sup>290</sup> 418 F.2d 736 (2nd Cir. 1969).

<sup>291</sup> *See id.* at 746–56. This tactic is also known as “Boulwareism.” *See* Marc Mandelman & Kevin Manara, *Staying Above the Surface—Surface Bargaining Claims Under The National Labor Relations Act*, 24 HOFSTRA LAB. & EMP. L.J. 261, 270 (2007).

<sup>292</sup> *Gen. Elec.*, 418 F.2d at 753.

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negotiations.<sup>293</sup> The court reasoned that the employer's refusal to provide information within a timely manner forced the union into a position where it was "unable to bargain intelligently."<sup>294</sup> As to the charge that the employer failed to bargain in good faith, the court compared it to "a mosaic of many pieces, but depending not on any one alone."<sup>295</sup> However, a specific violation alone could also be evidence of a failure to bargain in good faith as well.<sup>296</sup>

#### 6. Examples of Good and Bad Faith

A failure to bargain in good faith (which illustrates bad faith) is typically inferred from a party's conduct at or away from the bargaining table because a participant's intent to frustrate an agreement is rarely articulated.<sup>297</sup> As such, a party's conduct under the circumstances is highly probative. One example of a failure to bargain in good faith is surface bargaining. The term "surface bargaining" connotes "going through the motions" of negotiating as opposed to demonstrating a genuine desire to reach an agreement.<sup>298</sup> Thus, the requirement of conferring in good faith is more comprehensive than just meeting, or engaging in repetitive discussion of formalities that lack any meaning, thereby leading one party to declare an impasse or engage in some other anti-bargaining action.<sup>299</sup>

An illustration of these principles in practice is *Unbelievable, Inc. v. NLRB*.<sup>300</sup> In *Unbelievable, Inc.*, the employer engaged in a series of acts from pre-negotiation through the eventual strike that evidenced a desire to continuously goad the union into striking.<sup>301</sup> There never was any desire to actually negotiate with the union.<sup>302</sup> The employer's attorney scolded union representatives after the

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<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 756.

<sup>296</sup> *Id.*

<sup>297</sup> HIGGINS, *supra* note 251, at 827.

<sup>298</sup> *Id.* at 864.

<sup>299</sup> *See, e.g.,* Wheatland Elec. Coop. Inc. v. NLRB, 208 F.2d 878 (10th Cir. 1953).

<sup>300</sup> 118 F.3d 795 (D.C. Cir. 1997).

<sup>301</sup> *See id.* at 796-99.

<sup>302</sup> *Id.* at 797.

first bargaining session. Three sessions followed in five months.<sup>303</sup> The employer never considered the union's counter-proposal, and after the second meeting, the employer's attorney declared impasse.<sup>304</sup>

In another demonstrative case, *Atlanta Hilton & Tower v. International Brotherhood of Firemen and Oilers, AFL-CIO*,<sup>305</sup> the Board set forth seven factors that signal a party's refusal to bargain in good faith.<sup>306</sup> In this case, the Board ruled that the employer did not negotiate in bad faith, despite failing to honor the union's request for certain financial information, because it was merely holding firm on its offer for a one year contract.<sup>307</sup> The parties met thirteen times, and the overall conduct of the employer was justified as "hard bargaining, rather than surface bargaining."<sup>308</sup> Therefore, whether a party is engaging in hard bargaining instead of surface bargaining depends on the facts present in each case.<sup>309</sup>

The Board and courts evaluate additional indicia of good faith when determining whether the sides have engaged in good faith bargaining or surface bargaining. The proposals and demands advanced by each side may be a factor.<sup>310</sup> A proposal that one side might consider totally unacceptable is not definitive indicia of the other party's absence of good faith. However, a proposal that is clearly meant to frustrate the negotiation process or is plainly unreasonable is evidence of bad faith.<sup>311</sup> An employer's withdrawal of its sole proposal that includes existing conditions, withdrawal of previously agreed-upon proposals, or substitution of

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<sup>303</sup> The employer's initial proposal to one union was a nearly 50% wage reduction, to which the union responded by saying it was "outlandish" and "that no union would agree to [such demands]." *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> 271 N.L.R.B. 1600 (1984).

<sup>306</sup> These factors include: (1) delaying tactics; (2) unreasonable bargaining demands; (3) unilateral changes in mandatory subjects of bargaining; (4) efforts to bypass the union; (5) failure to designate an agent with sufficient bargaining authority; (6) withdrawal of already agreed-upon provisions; and (7) arbitrary scheduling of meetings. *Id.* at 1603.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> HIGGINS, *supra* note 251, at 828; *see also* NLRB v. Fitzgerald Mills Corp., 313 F.2d 260, 264 (2d Cir. 1963).

<sup>310</sup> HIGGINS, *supra* note 251, at 879.

<sup>311</sup> *See* Unbelievable, Inc. v. NLRB, 118 F.3d 795, 798 (D.C. Cir. 1997).

new issues after the parties have reached an agreement is generally considered evidence of a lack of good faith.<sup>312</sup> An employer also violates § 8(a)(5) if it unilaterally modifies mandatory subjects of bargaining (wages, hours, working conditions).<sup>313</sup>

### 7. The Duty to Furnish Information

During negotiations, parties are required to furnish the other side with additional information so as to understand each other's position. The Board has continually found that, in order to make informed decisions and engage in effective bargaining, there exists a duty to provide information.<sup>314</sup> A refusal to furnish information can severely impede the bargaining process. A refusal may also change the characteristic of a strike from an economic strike to an unfair labor practice strike.<sup>315</sup> Because this is such an important concept of labor law, one must understand when the duty to provide information arises and what type of information must be provided in those situations.

In *NLRB v. Truitt Manufacturing Co.*,<sup>316</sup> the employer committed a ULP when it refused to supply the union with information necessary to support its claim of not being able to afford a wage increase.<sup>317</sup> The union asked the employer to provide evidence of its claim by allowing a certified public accountant to examine the company's books and financial data.<sup>318</sup> The request was denied.<sup>319</sup> In response to this refusal, the union requested the company submit "full and complete information with respect to its financial standing and profits" to verify its inability to pay for a wage increase.<sup>320</sup> Again the company refused.<sup>321</sup> The

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<sup>312</sup> See generally HIGGINS, *supra* note 251, at 779–85.

<sup>313</sup> *Id.* at 903.

<sup>314</sup> See *id.* at 958–59.

<sup>315</sup> *Id.* at 920.

<sup>316</sup> 351 U.S. 149 (1956).

<sup>317</sup> See *id.* at 150 (stating that the employer claimed "it was undercapitalized, had never paid dividends, and that an increase of more than two and one-half cents per hour would put it out of business").

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 150–51 (stating that the employer argued the information was not pertinent to the negotiations and that the union had no legal right to the documents either).

Board agreed with the union and ordered the company to provide the union with information to “substantiate the Respondent’s position.”<sup>322</sup> After the court of appeals refused to enforce the Board’s order, the union appealed to the United States Supreme Court and eventually prevailed.

First, the Court set aside any question as to whether the request to furnish information itself was overly burdensome on the company because it never raised this point on appeal.<sup>323</sup> The Court concluded that both parties considered the ability to pay as “highly relevant.”<sup>324</sup> It also opined that claims made by either negotiating party must be honest claims.<sup>325</sup> Further,

If such an argument [made by a party] is important enough to be present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without the slightest effort to substantiate the claim.<sup>326</sup>

The Court then limited its holding:

We do not hold, however, that in every case [in] which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. The inquiry must be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.<sup>327</sup>

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<sup>322</sup> *Id.* at 151.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 152.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* at 152–53.

<sup>327</sup> *Id.* at 153–54 (footnote omitted).

This duty to furnish information extends during the life of the contract and not just to negotiations between the parties.<sup>328</sup> It also extends to the union; such a request must be made in good faith.<sup>329</sup> A good faith request means that the information must at least be necessary and relevant to the relationship between the employer and the union in its capacity as employee representative.<sup>330</sup> If the union request is considered too broad, the employer may request a reasonable clarification from the union to demonstrate the relevancy of the request, or the employer may comply with the request to the extent it believes it must under the law.<sup>331</sup> A pertinent example of this concept is illustrated in *Unbelievable, Inc.*, where the court found that the request for information was directly related to the question of substantial wage cuts.<sup>332</sup> This issue was essential to the union's representation of its members.<sup>333</sup>

Future events may render a request for information moot.<sup>334</sup> One such instance is where the employer no longer possesses the duty to furnish information. However, if the information in question could have aided the union in making a bargaining decision, the duty to furnish is not rendered moot. An employer may avoid the duty to disclose financial information by making it unmistakably apparent to the union that the employer has abandoned its position of financial instability.<sup>335</sup> In determining the validity of that defense, a court will examine the substance of the employer's bargaining position rather than the formal statements it has made.<sup>336</sup>

Even if an employer presents partial information to the union after initially denying such a request, an unfair labor practice may still exist. In *Curtiss-Wright Corp. v. NLRB*,<sup>337</sup> such events took

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<sup>328</sup> HIGGINS, *supra* note 251, at 921.

<sup>329</sup> *See id.* at 924–25 (citing *Oakland Press Co.*, 233 N.L.R.B. 994 (1977), *aff'd*, 598 F.2d 267 (D.C. Cir. 1979)).

<sup>330</sup> HIGGINS, *supra* note 251, at 958.

<sup>331</sup> *Id.* at 927.

<sup>332</sup> *See Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 797 (D.C. Cir. 1997).

<sup>333</sup> *See generally id.*

<sup>334</sup> HIGGINS, *supra* note 251, at 931.

<sup>335</sup> *Int'l Chem. Workers Union Council v. NLRB*, 467 F.3d 742, 752 (9th Cir. 2006).

<sup>336</sup> *Id.* at 749.

<sup>337</sup> 347 F.2d 61 (3d Cir. 1965).

place.<sup>338</sup> The union asked for certain lists of employees because of concerns that the bargaining unit was slowly being outnumbered.<sup>339</sup> The employer first denied such requests, but after the matter went to the Board, it provided some requested information.<sup>340</sup> The employer maintained that it had not committed an unfair labor practice because it complied with the request to furnish information.<sup>341</sup> The Board and the U.S. Court of Appeals for the Third Circuit disagreed. The court held that the Board's analysis in the matter was no different than the Supreme Court's analysis in *Truitt*.<sup>342</sup> The union had "successfully demonstrated the relevance of the data it requested," according to the court.<sup>343</sup> The requested information illustrated that the change made in the composition of the out-of-bargaining-unit employees was relevant as to the administration and policing of current agreements as well as to the negotiation of future agreements.<sup>344</sup> Although the parties eventually agreed to a contract, the information would have been necessary and relevant to the union.<sup>345</sup>

Furnishing information is paramount to the bargaining process. The duty to provide information, when established to be relevant, must be provided in a reasonable manner when this information is available, and in such a way that does not impede the bargaining process of the parties.<sup>346</sup> The employer should avoid furnishing information that contains deliberate inaccuracies or is incomplete, but the information can be provided in a way no more extensive than normal business practice dictates.<sup>347</sup> Although an employer may defend against this duty by alleging that compliance would be too burdensome or expensive, this argument has been met with

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<sup>338</sup> See *id.* at 64–67.

<sup>339</sup> *Id.* at 65.

<sup>340</sup> *Id.* at 66.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 69. See generally *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 151 (1956).

<sup>343</sup> *Curtiss-Wright Corp.*, 347 F.2d at 69.

<sup>344</sup> *Id.* at 70.

<sup>345</sup> The information would have been useful in determining whether the union should have utilized another means in changing the composition of the ratio between bargaining and non-bargaining unit members. *Id.*

<sup>346</sup> See *Cincinnati Steel Casting Co. v. NLRB*, 86 N.L.R.B. 592, 593 (1949).

<sup>347</sup> See HIGGINS, *supra* note 251, at 940–41.

little success.<sup>348</sup> However, the employer does have other defenses against such requests.

#### 8. Employer Defenses

The duty to furnish information does not foreclose an employer from alleging defenses. An employer may refuse to furnish certain information under particular circumstances.<sup>349</sup> In *Detroit Edison Co. v. NLRB*,<sup>350</sup> the Court was faced with the novel question of whether an employer's duty to provide relevant information included the disclosure of tests and test scores achieved by named employees in an employer administrated psychological aptitude testing program.<sup>351</sup> The union was processing a grievance to arbitration and requested the company provide the psychological aptitude testing program information.<sup>352</sup> The employer replied that it could release all but three items to the union: (1) the actual test questions, (2) the actual employee answer sheets, and (3) the scores linked with the names of the employees who received the information.<sup>353</sup> An arbitrator refused to grant the union's demand for the three items due to an outstanding unfair labor practice charge against the employer.<sup>354</sup>

Eventually the employer provided the requested information. The raw scores of those who had taken the test were disclosed with the examinees' names deleted. The company supplied the union with sample test questions and with detailed information regarding its scoring procedures.<sup>355</sup> Finally, the company also offered to turn over the scores of any employee who would sign a waiver releasing the company psychologist from his confidentiality pledge.<sup>356</sup> The union declined to seek such releases.<sup>357</sup>

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<sup>348</sup> *Id.* at 941.

<sup>349</sup> *Id.* at 943.

<sup>350</sup> 440 U.S. 301 (1979).

<sup>351</sup> *Id.* at 304.

<sup>352</sup> *See id.* at 307–08.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.* at 308.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

While the employer won the grievance, the Board sided with the union because the requested information was relevant and necessary to its policing of the parties' agreement.<sup>358</sup> The ALJ agreed with the company's recommendation that a qualified neutral psychologist be allowed to examine the information. However, the Board and the U.S. Court of Appeals for the Sixth Circuit ordered all the information delivered to the union because the union should be able to determine for itself if a psychologist needed to review the test results.<sup>359</sup>

On appeal, the Supreme Court first addressed the Board's remedial action against the company, holding that this decision to order all information to the union was incorrect.<sup>360</sup> In light of the company's expense to prepare the questions, there were serious concerns that such information, if handed over to the union, could easily be disseminated to the membership. This would compromise the exam and could harm test takers whose scores were lower than others.<sup>361</sup> Specifically, the Court stated that no particular policy supported the union's position.<sup>362</sup> Thus, it held that the Board abused its discretion. The Court opined:

[a] union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested. The duty to supply information under § 8 (a)(5) turns upon "the circumstances of the particular case," . . . and much the same may be said for the type of disclosure that will satisfy that duty.<sup>363</sup>

The Court also sided with the company on the ULP charges.<sup>364</sup> First, it stated that there is not an absolute right to any relevant information in light of the concerns for the confidentiality of the

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<sup>358</sup> *Id.* at 309.

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at 314–15.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* at 315 (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956)).

<sup>364</sup> *Id.* at 317–20.

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psychologist and the individuals' scores.<sup>365</sup> No evidence existed that the scores were protected to frustrate the union or serve some other devious position.<sup>366</sup> The Court then turned to the company's evidence that the prior release of scores had resulted in the harassment of lower-scoring employees and illustrated that the union's demands paled in comparison with the company's concerns.<sup>367</sup> The employer prevailed by providing more than just a generalized contention that the requested information was confidential, thereby meeting its burden of proof.

Combining *Truitt* and *Detroit Edison*, the duty to provide information begins with the signing of the collective bargaining agreement and continues for the life of the agreement to allow the parties the ability to properly police their agreement.<sup>368</sup> An employer risks violating § 8(a)(5) by refusing to provide requested information to a union if that information is necessary for the union to properly discharge its duties as the bargaining representative.<sup>369</sup> An employer must furnish information if the employer asserts a financial inability to grant the union's demands.

#### 9. Financial Information

There is a distinction between an inability to pay and a competitive disadvantage, both of which are cited as concerns with respect to requests for financial information. Financial information is relevant and necessary in the context of an employer's statement that it cannot financially support the union's demands for wages or benefits.<sup>370</sup> This proposition is illustrated in *Truitt*, as the Court declared that good faith bargaining "requires that claims made by either bargainer . . . be honest claims," and this applies to claims related to an asserted inability to pay an increase in wages.<sup>371</sup>

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<sup>365</sup> *Id.* at 317–18.

<sup>366</sup> *Id.* at 318–19.

<sup>367</sup> *Id.* at 319–20.

<sup>368</sup> HIGGINS, *supra* note 251, at 958–59; *see also* *Detroit Edison*, 440 U.S. at 303; *Truitt*, 351 U.S. at 152–53.

<sup>369</sup> NLRB v. *Whitin Mach. Works*, 217 F.2d 593, 594 (4th Cir. 1954).

<sup>370</sup> HIGGINS, *supra* note 251, at 963.

<sup>371</sup> *Truitt*, 351 U.S. at 152.

Arguments of this nature must be supported through proof of its accuracy.<sup>372</sup>

If a party is claiming an inability to pay, it must be willing to support its contention with more than mere words.<sup>373</sup> In the 2004 decision of *AMF Trucking & Warehousing, Inc.*,<sup>374</sup> the Supreme Court was forced to examine a company's assertions made during negotiations to determine whether it had effectively stated that the employer could not pay for increases to the health insurance and pension fund. The Board discussed the company's response to these requests in some detail:

The Respondent stated that the [u]nion was asking for "pie in the sky," that the Respondent had purchased the Company "in distress a year and a half earlier, and that the company was still in distress." The Respondent also said that it was "fighting to [stay] alive," and was "weaker this year" than it had been in previous years.<sup>375</sup>

The Board concluded that the employer's statements did not meet the threshold test because the statements neither explicitly stated that insufficient assets existed nor that such conditions would cause the employer to go out of business by agreeing to the union's demands.<sup>376</sup> The Board determined that the standard for "inability to pay" denotes "that the company presently has insufficient assets to pay or that it would have insufficient assets to pay during the life of the contract that is being negotiated. Thus, inability to pay is inextricably linked to nonsurvival in business."<sup>377</sup>

Furthermore, supplying financial information without allowing the union an opportunity to directly examine company records might be insufficient disclosure.<sup>378</sup> However, an employer may set

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<sup>372</sup> See *id.* at 152–53.

<sup>373</sup> In football parlance, that might be akin to "walking the walk and talking the talk."

<sup>374</sup> 342 N.L.R.B. 1125 (2004).

<sup>375</sup> *Id.* at 1125.

<sup>376</sup> See *id.* at 1126–27.

<sup>377</sup> *Id.* at 1125.

<sup>378</sup> HIGGINS, *supra* note 251, at 965.

parameters for the union to review and verify an employer's inability to pay.<sup>379</sup>

### *C. General Considerations*

The collective bargaining process is based on several concepts, most principally being the cooperative negotiation process. This is founded upon the notions of mutual understanding and teamwork between the bargaining parties. However, while both sides endeavor to bargain in good faith in hopes of reaching a mutually amicable settlement, each party may exert economic pressure upon the other bargaining participant. These tools of economic pressure include the lockout,<sup>380</sup> the unfair practice strike,<sup>381</sup> and the economic strike.<sup>382</sup> The use of each of these activities may influence a bargaining party's negotiation strategy and the disclosure of information between the parties. These tools assist the parties to bargain in good faith, which is the overall objective of labor law.

While the duty to bargain does not require each side to engage in marathon discussions, the parties must fully negotiate in good faith. However, even if the parties bargain in good faith, an impasse still may occur. This occurs when both sides are engaging each other with a sincere intent to reach an agreement but cannot find that necessary common ground to make such an accord. An impasse is defined as the point in time during negotiations when the parties are warranted in assuming that further bargaining would

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<sup>379</sup> *NLRB v. St. Joseph's Hosp.*, 755 F.2d 260, 261 (2d Cir. 1985) (stating that the employer's request was reasonably related to the audit, the qualifications were appropriate, and the employer expressed willingness to discuss the qualifications, to which the union was opposed).

<sup>380</sup> *See Am. Ship Bldg. v. NLRB*, 380 U.S. 300, 310 (stating "there is nothing in the statute which would imply that the right to strike 'carries with it' the right exclusively to determine the timing and duration of all work stoppages").

<sup>381</sup> In an unfair labor practice strike, strikers are to be reinstated to their former positions upon the conclusion of the ULP strike. The employer must reinstate the employee even if the organization had hired other workers during the strike. *See NLRB v. Int'l Van Lines*, 409 U.S. 48, 50-51 (1972).

<sup>382</sup> In an economic strike, an employer is able to freely fire and hire employees or replacements and may, without fear of legal recourse, refuse requests for reinstatement from a striker who was replaced during a strike. *See NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 342-43 (1938).

be futile.<sup>383</sup> To determine whether an impasse exists, one must examine the totality of the circumstances<sup>384</sup> and unique factors surrounding the parties' bargaining relationship.<sup>385</sup> Upon reaching this point, an employer may make unilateral changes in working conditions so long as the changes had been offered to the union during negotiations.<sup>386</sup> In addition to the employer being able to implement his last offer, the participants may also look to other tools within labor law to assist in applying pressure to bring a mutually agreeable resolution.<sup>387</sup> Upon reaching an impasse, the duty to bargain is not terminated. Instead, it is suspended and may be reinstated upon the happening of a condition or circumstance that renews the possibility of fruitful discussion amongst the parties.<sup>388</sup>

#### V. POSITIONS OF THE PARTIES

The bargaining between the NFL and NFLPA is increasingly turning contentious. While some issues may raise less controversy than others, it appears that both sides are having problems finding common ground even on the less controversial non-economic issues. For the purposes of the upcoming collective bargaining process, and as articulated by Commissioner Goodell in his letter to Mr. Upshaw, major issues include (1) addressing those financial

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<sup>383</sup> HIGGINS, *supra* note 251, at 989.

<sup>384</sup> *See id.* at 989–95.

<sup>385</sup> Unique factors include the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. Additional factors may include whether there has been a strike or the union has consulted the employees regarding this possibility, fluidity of the parties' positions, continuation of bargaining, statements or understandings of the parties concerning impasse, union animus as evidenced by previous events, the bargaining history of the parties, the importance of the issues and the extent of the difference or opposition amongst the parties, the parties bargaining history, any willingness by the parties to further consider the issue, time between bargaining sessions, and the number of bargaining sessions amongst the parties. *See id.* at 990–95.

<sup>386</sup> *See generally* NLRB v. Katz, 369 U.S. 736 (1962) (enumerating certain circumstances that might justify unilateral employer action).

<sup>387</sup> As mentioned above, these tools include the economic strike, ULP strike, and lockout. *See supra* notes 380–82 and accompanying text.

<sup>388</sup> *See* Gulf States Mfg. v. NLRB, 704 F.2d 1390, 1399 (5th Cir. 1983).

issues that the League perceives as being obsolete in the current NFL (the recalculation of League revenue as it applies to the salary cap and team allocation of player salaries) and the considerations as to whether the NFL has a duty to disclose its financial information to the Union, (2) curbing rookie salaries through a rookie wage scale and, to a certain extent, (3) addressing player discipline issues. Taking the above-mentioned topics together, and when considering the entire bargaining relationship between the parties thus far, it is unclear whether the NFL is bargaining in good faith.

A. *The National Football League: The League Is Not Disclosing Financial Information Because It Is Not Alleging an Inability to Pay and Thus Is Bargaining in Good Faith*<sup>389</sup>

The NFL is not going to provide any financial information to the Union because it is not claiming an inability to pay.<sup>390</sup> As such, there is no duty to open League financial information for review.<sup>391</sup> Under the present CBA, Owners assume all of the risks and the players reap the vast majority of the financial revenues.<sup>392</sup>

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<sup>389</sup> This viewpoint is portrayed by Jeffrey F. Levine.

<sup>390</sup> Dennis Curran, Senior Vice President and Gen. Counsel, Nat'l Football League, Panel Address at the Sports Lawyers Conference (May 16, 2009); *see also Smith Addresses Industry Lawyers, NFL Executives, in Chicago*, NFLPA.COM (May 19, 2009), <http://www.nflplayers.com/Articles/Public-News/Smith-Addresses-Industry-Lawyers-NFL-Executives-in-Chicago> ("We are not claiming an inability to pay. We're not going to open our books. We don't have to open our books." (quoting Mr. Curren) (internal quotation marks omitted)).

<sup>391</sup> *See Smith Addresses Industry Lawyers, supra* note 390.

<sup>392</sup> Jim Corbett, *NFL Owners Setting Priorities for CBA Negotiations*, USA TODAY, Mar. 24, 2009, [http://www.usatoday.com/sports/football/nfl/2009-03-23-owners-priorities\\_N.htm](http://www.usatoday.com/sports/football/nfl/2009-03-23-owners-priorities_N.htm) [hereinafter Corbett, *NFL Owners Setting Priorities*]. Owners opted out in May 2008 because the deal paid players nearly 60% of revenues. This large percentage, coupled with rising operating costs, mounting stadium debt, and a tough economy, caused NFL ownership to become more risk adverse. Thus, the NFL wants players to assume more of their risk in regard to rising player costs. Commissioner Goodell asserted that player costs increased by \$500 million over 2008 and 2009, and that "[t]he risk falls entirely on the clubs here. We have to make sure we address that issue in a responsible fashion, including our partners." The NFLPA responded by saying that players take plenty of risk already, by playing in each game each week. *Interview with DeMaurice Smith, National Football League Players' Association Executive Director*, SPORTING NEWS TODAY, Oct. 7, 2009, at 20, available at <http://today.sportingnews.com/sportingnewstoday/20091007/?pg=20&pm=1&u1=friend#pg20>.

The NFL is the only sports league in which every team has a player payroll in excess of \$100 million; the average player salary this year is \$2 million plus an additional \$300,000 per player in benefits.<sup>393</sup> This is all occurring in the greatest economic downturn since the Great Depression. While the League can still exist under these conditions, it is time to balance its financial risk by working with the Union to create a new CBA that is foundationally sound.

Ownership may have opted out of the 2006 CBA because this accord altered how the NFL and its players divided League revenues.<sup>394</sup> After the 2006 CBA's ratification, players received a larger share of revenues. These revenues now include all stadium revenues related to football.<sup>395</sup> Under the current Agreement, stadium revenues include concessions, parking, local advertising and promotion, signage, magazine advertising, local sponsorship agreements, stadium clubs, and luxury box income. All of these revenue sources were excluded in prior CBAs.<sup>396</sup> Thus, the current CBA casts significant financial risk on Ownership by substantially raising the likelihood of lucrative player salaries and also artificially inflates the salary cap.

As a result of this increase in revenue being directed to player salaries, the salary caps for each successive year are spiraling out of control. Small market teams cannot keep up with the burdensome costs forced upon them because of their comparatively small consumer base.<sup>397</sup> Small market teams are not as financially well suited as large market teams to shoulder this financial burden.<sup>398</sup> Consequently, the relative inequities between the NFL's small market and large market teams exacerbate this player salary issue.<sup>399</sup> Although the League agreed to the current CBA

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<sup>393</sup> Leahy, *supra* note 14 (citing post from National Football League spokesman Greg Aiello).

<sup>394</sup> Deubert & Wong, *supra* note 43, at 181.

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* (citing the NFL-CBA).

<sup>397</sup> See Mark Curnutte, *Financial Gap Widening Between NFL's Haves and Have-Nots*, USA TODAY, Jan. 25, 2007, [http://www.usatoday.com/sports/football/nfl/2007-02-25-financial-gap\\_x.htm](http://www.usatoday.com/sports/football/nfl/2007-02-25-financial-gap_x.htm).

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

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through good faith bargaining, allocating nearly 60% of League revenues to player salaries and benefits through a mechanism that was invented in 1993 is untenable. It is an obsolete manner of operating the NFL. This obsolete system gives Ownership no incentive to invest in the game.

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

1. The Disclosure of Financial Statements Is Not Necessary to Understand the League's Bargaining Position That the Current CBA Is Obsolete

In regard to financial issues, the NFL did not opt out of the 2006 CBA because it was unable to pay the players. Instead, the League opted out because this method of salary compensation is obsolete.<sup>400</sup> The current CBA's salary calculation and distribution is derived from a method that was created in 1993. Since then, League revenues have gone up extensively due to monies derived through the NFL's stadium construction initiative and other initiatives.<sup>401</sup> Now, team salary commitments are unreasonably inflated and are pushing player compensation into an unhealthy realm. It is time to renegotiate the formula for salary cap calculation.

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<sup>400</sup> See generally *NFL Owners Opt Out of CBA*, *supra* note 183.

<sup>401</sup> Judy Battista, *In N.F.L.'s Labor Talks, the Rumbblings of War*, N.Y. TIMES, Aug. 22, 2009, at SP7, available at <http://www.nytimes.com/2009/08/23/sports/football/23labor.html>.

The NFL is bargaining in the best faith possible under the circumstances. Ownership seeks to engage in sincere negotiations with the Union to establish a system that fits the modern NFL revenue generation model. The League will not release any financial information because the Players' Association knows the figures;<sup>402</sup> the Union also is keenly aware that the NFL's largest costs are player salaries, which were in excess of \$4.5 billion for the 2009 season.<sup>403</sup> Further, Ownership is not under any obligation to furnish information because the League has not stated that it is unable to abide by the financial terms of the CBA. Despite this fact, the Union continues to argue that the Owners do possess some duty to disclose financial information to the NFLPA. However, the duty to provide information under § 8(a)(5) does not turn on the bare assertions of the Players' Association.<sup>404</sup> Instead, one must examine the specific circumstances of this case.<sup>405</sup> In other words, the information must be necessary and relevant to the bargaining relationship between the parties.<sup>406</sup> Here, in addition to the League not pleading an inability to pay, the Union already knows this financial information. Thus, there is no duty to furnish information.

One way in which the NFLPA could get a snapshot of League financials would be to audit the corporate filings of the Green Bay Packers. The Packers are a publicly owned entity and thus the financial information is available. According to its financial statements, the Packers earned \$20.1 million in operating profits during the 2008 season.<sup>407</sup> This healthy profit substantiates the League's argument that it did not opt out of the CBA because of financial inability. Since the profits of the Packers act as a bellwether reading into the financial health of the NFL as a whole,

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<sup>402</sup> Tom Curran, *Goodell on Work Stoppage*, NFL INSIDER REP. (Mar. 23, 2009), <http://blogs.nbcsports.com/home/archives/2009/03/goodell-on-work-stoppage.html> (quoting Commissioner Goodell).

<sup>403</sup> *Id.*

<sup>404</sup> See *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956)).

<sup>405</sup> See *id.* at 314 (citing *Truitt*, 351 U.S. at 153).

<sup>406</sup> See *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 436 (1966).

<sup>407</sup> *Brown & Prine*, *supra* note 203.

the League has no obligation to furnish financial information to the Union.<sup>408</sup>

The NFL seeks to bargain with the NFLPA and come to an agreement ensuring that there will not be a work stoppage. The League is focusing on its priorities in the collective bargaining process, achieving cost certainty, and working with the Union to reach an agreement.<sup>409</sup> There is no need to engage in a “lock-in”<sup>410</sup> or create artificial deadlines, as these will obstruct the natural development of negotiations between the parties. At this point, the League has instructed franchises to take preparatory measures for a possible work stoppage because this is prudent. One needs revenue in order to run a league; this is why signing deals such as the one with DirecTV<sup>411</sup> was paramount regardless of whether or not there is a labor stoppage. While the parties are seeking to come to an accord, one must also prepare to face the potential scenario where football will not be played. Thus, cost containment is an important element to the NFL’s success.

## 2. Cost Containment Includes a True Rookie Wage Scale and Modifying Player Discipline Mechanisms

One element of cost containment paramount to establishing a solid financial foundation is the curbing of excess and unnecessary costs. The most effective method to effectuate this change is through regulating rookie compensation.<sup>412</sup> Both management and the Union must work together to curb rising salaries for those players that were selected in the early portion of the NFL Draft. The simple and most obvious way to rein in over-inflated rookie salaries is through the implementation of a rookie salary cap.

The League is proposing that a rookie wage scale and a mechanism that credits against NFL club owners’ expenses be

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<sup>408</sup> See *Truitt*, 351 U.S. at 152.

<sup>409</sup> Corbett, *NFL Owners Setting Priorities*, *supra* note 392.

<sup>410</sup> Mullen, *NFL Rejects Players’*, *supra* note 208.

<sup>411</sup> See Matthew Futterman, *NFL, DirecTV Extend Pact in \$4 Billion Deal*, WALL ST. J., Mar. 24, 2009, at B5, available at <http://online.wsj.com/article/SB123786503490122053.html>.

<sup>412</sup> Goodell: *Rookie Pay Scale ‘Ridiculous,’* ASSOCIATED PRESS, Aug. 3, 2008, available at <http://www.nfl.com/news/story?id=09000d5d80909cc9&template=with-video&confirm=true>.

implemented into the new CBA.<sup>413</sup> Under this proposal, these expenses will be deducted from revenues that determine the NFL salary cap, thereby providing a cost savings.<sup>414</sup> It is in the best interests of the game and all of those involved to insert into the CBA cost containment mechanisms. One only needs to look at such mechanisms and how they helped restore the vitality of professional hockey after the NHL lockout.<sup>415</sup> Therefore, it is paramount to include the proper mechanisms in the new CBA to stop the absurd escalation of salaries for unproven rookie players.<sup>416</sup>

In addition, League franchises must possess the ability to recover the significant money that each organization invests in players as signing bonuses if that individual breaches his contract or refuses to perform. This issue is complicated by the fact that grievances such as these are overseen by a judge who is overtly biased toward the Union.<sup>417</sup> Pursuant to the 1993 consent decree, all labor-related issues between the parties fall under the supervision of the U.S. District Court for the District of Minnesota.<sup>418</sup> While Judge Doty's court has resolved disputes over the terms of the Stipulation and Settlement Agreement and the parallel CBA over the last sixteen years, he is no longer impartial.<sup>419</sup> A prime example illustrating both the League's inability to recover signing bonuses from players who breach and Judge Doty's bias is the events surrounding the incarceration of Michael Vick.

After signing a contract that made him the highest paid player in the NFL, which included a \$20 million signing bonus, Vick was indicted on charges stemming from his financing of a dog-fighting

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<sup>413</sup> *NFL Presents Economic Proposal for New CBA to NFLPA*, STREET & SMITH'S SPORTSBUSINESS DAILY, Nov. 9, 2009, <http://www.sportsbusinessdaily.com/index.cfm?fuseaction=sbd.main&ArticleID=134723>.

<sup>414</sup> *Id.*

<sup>415</sup> Michael K. Ozanian & Kurt Badenhausen, *NFL on the Rebound*, FORBES.COM, Nov. 9, 2006, [http://www.forbes.com/2006/11/09/nhl-teams-owners-biz\\_06nhl\\_cz\\_mo\\_kb\\_1109nhlintro.html](http://www.forbes.com/2006/11/09/nhl-teams-owners-biz_06nhl_cz_mo_kb_1109nhlintro.html).

<sup>416</sup> *Goodell: Rookie Pay Scale 'Ridiculous,' supra* note 412.

<sup>417</sup> *See generally* White v. Nat'l Football League, 585 F.3d 1129 (8th Cir. 2009).

<sup>418</sup> *Id.* at 1133.

<sup>419</sup> *Id.*

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ring.<sup>420</sup> On August 27, 2007, Vick pled guilty to the charges and was sentenced to nearly two years in federal prison.<sup>421</sup> Commissioner Goodell suspended Vick indefinitely without pay shortly thereafter.<sup>422</sup> The NFL also initiated a non-injury grievance procedure on behalf of the Atlanta Falcons, Vick's former team, in order to recuperate part of the \$19.97 million in roster and signing bonuses the franchise had paid Vick, as he was still under contract with the team until 2014.<sup>423</sup> Pursuant to the Consent Agreement and CBA, a Special Master presided over a hearing to determine whether Vick had to give the money back. Special Master Burbank ruled in favor of the Falcons, determining that Vick needed to repay the bonus money.<sup>424</sup> Vick appealed to the U.S. District Court for the District of Minnesota, where Judge Doty reversed the Special Master's ruling. The court ruled that Vick had already earned his bonus prior to his indefinite suspension.<sup>425</sup> The League appealed, but the district court's decision was upheld. The Eighth Circuit Court of Appeals found that based on the language used in the CBA, Vick's bonus was fully earned prior to his legal problems.<sup>426</sup>

Although Vick seemingly violated the terms of his contract, he was still able to keep the vast majority of his signing bonus. The League and the Union must remedy the anti-forfeiture provision in the CBA that the arbiters relied upon. Changing this term will allow franchises to recover funds from a player who breaches his contract or engages in conduct that is contrary to the best interests of football.<sup>427</sup> This would free up money to compensate players who actually perform pursuant to or outperform their contracts. Both the district court and the appellate court misinterpreted the

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<sup>420</sup> Michael S. Schmidt, *Vick Pleads Guilty in Dog-Fighting Case*, N.Y. TIMES, Aug. 27, 2007, <http://www.nytimes.com/2007/08/27/sports/football/27cnd-vick.html>.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> Deubert & Wong, *supra* note 43, at 220–21.

<sup>424</sup> “The Special Master is an arbitrator that has exclusive jurisdiction over disputes arising out of a wide range of articles in the CBA. . . . As of 2009, the current Special Master is University of Pennsylvania Law School professor Richard Burbank.” *Id.* at 203.

<sup>425</sup> *White v. Nat'l Football League*, 533 F. Supp. 2d 929, 935 (D. Minn. 2008), *aff'd*, 585 F.3d 1129 (8th Cir. 2009).

<sup>426</sup> *White v. Nat'l Football League*, 585 F.3d 1129, 1143 (8th Cir. 2009).

<sup>427</sup> *White*, 533 F. Supp. 2d at 931.

relevant provisions within the CBA; thus, the parties must change this provision so that it unequivocally protects franchises that are injured by non-performing or breaching players and enables other players to receive that money being forfeited.

The parties must also agree to extricate themselves from the supervision of Judge Doty. Throughout the latter portions of this CBA's life, Judge Doty has demonstrated overt bias toward the Union through his comments about the bargaining process between the parties during the last twenty years.<sup>428</sup> It is time to end the unnecessary dependence on the U.S. District Court for the District of Minnesota and instead work with all necessary stakeholders to establish a new foundation that will mutually benefit all parties involved. The League is confident that the NFL and the Union can continue to bargain in good faith without the unduly burdensome oversight of any court.

### 3. The System Needs to Change

It is clear that major provisions of this Agreement are obsolete. The NFL needs to work with all stakeholders to chart a new strategy so that the next century of professional football is as successful as the last decade. However, a new strategy must be negotiated that equally distributes risk amongst the parties and bargaining must occur free from the supervision of a biased referee. Although the NFLPA alleges that the current system is mutually beneficial, this statement is erroneous and disingenuous. In fact, the system is broken.

With each passing year, the disparity between large market and small market clubs continues to widen.<sup>429</sup> The chief constraint on

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<sup>428</sup> Judge Doty stated that the

[NFL Owners] pretend they're getting beaten around. Well, they did, initially, but they had a position that was not legally sound. . . . I think if you ask Tagliabue, he would say, "The whole thing has come out our way." Because, even though they complain about it . . . all they've done is make tons of money.

*White*, 585 F.3d at 1139 (quoting Jay Weiner, *NFL's Toughest Official Wields a Gavel, Not a Whistle*, STREET & SMITH'S SPORTSBUSINESS J., Jan. 28, 2008, at 8, available at <http://www.sportsbusinessjournal.com/article/57905> (internal quotation marks omitted)).

<sup>429</sup> Brian Karpuk, *Will There Be an NFL Lockout in 2011?*, NEWSBURGLAR (June 3, 2009), <http://newsburglar.com/2009/06/03/will-there-be-an-nfl-lockout-in-2011>.

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each club's finances is the enormous cost that player salaries embody.<sup>430</sup> To this end, major stakeholders must work together to implement a system that curbs the NFL's largest costs: player salaries.<sup>431</sup> Thus, a rookie salary cap will do much to ease the trend of skyrocketing rookie salaries, especially those taken in the early portions of the first round. In the meantime, the NFL must continue to find new ways to offset its substantial costs. While the NFL has negotiated deals that guarantee that revenues will be received in the event of a labor stoppage, any sort of disruption of games is contrary to the best interests of the game. The League has presented substantial reasons for its position to the Union and is negotiating in good faith. Thus, the NFL is and has been bargaining in the best faith possible under the circumstances and therefore did not engage in any unfair labor practices.

*B. The National Football League Players Association: The National Football League Is Not Bargaining in Good Faith*<sup>432</sup>

Ever since the Owners unanimously voted on May 20, 2008 to opt out of the current CBA, the Union has repeatedly asked for the rationale of this decision.<sup>433</sup> The League's continued response is that this deal is not affording all clubs a chance to be competitive. As professional football is a multi-billion dollar enterprise, it is difficult without viewing the NFL's financial information to understand exactly how this current Agreement fails to foster competitiveness amongst the thirty-two franchises. Since the 2006 season, the most recent year the CBA was extended, eight different teams have appeared in the Super Bowl.<sup>434</sup> The financial state of the League has never been healthier. There is no reason to change any element of the current financial structure without tangible

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<sup>430</sup> Larry Weisman, *NFL Salaries '08: Big Ben Smiling as Highest-Paid Player*, USA TODAY, Nov. 14, 2008, [http://www.usatoday.com/sports/football/nfl/2008-11-05-salaries\\_N.htm](http://www.usatoday.com/sports/football/nfl/2008-11-05-salaries_N.htm); see also *NFL Owners Opt Out of CBA*, *supra* note 183.

<sup>431</sup> *NFL Owners Meetings: Work Stoppage Unlikely After CBA Opt-Out*, STREET & SMITH'S SPORTSBUSINESS DAILY, May 21, 2008, <http://www.sportsbusinessdaily.com/article/121029>.

<sup>432</sup> This viewpoint is portrayed by Bram Maravent.

<sup>433</sup> *NFL Owners Opt Out of CBA*, *supra* note 183.

<sup>434</sup> *Superbowl History*, NFL, <http://www.nfl.com/superbowl/history> (last visited Feb. 25, 2010).

evidence; mere words do not suffice. The Union has presented its impression of the League's financial health in economic reports that were quickly rebuffed by management. The only justification the Union keeps hearing from Ownership is that the current deal is not financially workable. Facts prove otherwise: teams are shelling out big money on player contracts and, from an overall perspective, multiple television deals are already signed, sealed, and delivered to the League's coffers that guarantee payment even in the event of a strike or lockout. If this is the case, then the natural train of thought is to have Ownership demonstrate why this current CBA is not financially viable. As Ownership is unwilling to provide any financial information despite the Union's repeated attempts to request and obtain these figures, the League is not bargaining in good faith.

1. The Disclosure of Financial Statements Is Vital to Understanding the League's Bargaining Position

Ownership unanimously opted out of the 2006–12 CBA in May 2008. In doing so, the League released, in part, this statement:

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

The NFL earns very substantial revenues. But the clubs are obligated by the CBA to spend substantially more than half their revenues—almost \$4.5 billion this year alone—on player costs. In addition, as we have explained to the [U]nion, the clubs must spend significant and growing amounts on stadium construction, operations and improvements to respond to the interests and demands of our fans. The current labor agreement does not adequately recognize the costs of generating the revenues of which the players

receive the largest share; nor does the [A]greement recognize that those costs have increased substantially—and at an ever increasing rate—in recent years during a difficult economic climate in our country. As a result, under the terms of the current agreement, the clubs’ incentive to invest in the game is threatened.<sup>435</sup>

A CBA has to work for both sides. The NFLPA is not disagreeing with this statement, but disagrees with Ownership’s declaration that costs are too high.<sup>436</sup> This assertion must be supported by some kind of proof. The League insists that the Union has this information; some have stated off the record that these documents are protected by a strict confidentiality agreement, and as such are not available to the public. The League’s thirty-two teams have refused to provide financial data to support their collective cry that they are not earning enough to afford their labor costs.<sup>437</sup>

The NFLPA possesses some financial information as each year’s salary cap is based on the League’s yearly total revenue. The NFLPA also has access to the Green Bay Packers’ financial data.<sup>438</sup> Because the Packers are publicly owned, this information was publicly available and used by economists Kevin M. Murphy and Robert H. Topel, who issued *The Economics of NFL Team Ownership*, which was distributed by the NFLPA to the Owners prior to the January 2009 Super Bowl.<sup>439</sup> The study also compiled the League’s financial information, as it was provided to the authors by the NFLPA.<sup>440</sup>

The results were astounding. The Packers’ revenue, when compared against the estimates of *Forbes* magazine (just under

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<sup>435</sup> *NFL Owners Opt Out of CBA*, *supra* note 183.

<sup>436</sup> *NFL Leader Says Lockout Almost Certain*, NBCSPORTS.COM, Feb. 4, 2010, <http://nbcsports.msnbc.com/id/35247167/ns/sports-nfl/>.

<sup>437</sup> MURPHY & TOPEL, *supra* note 12, at 1.

<sup>438</sup> *Id.*

<sup>439</sup> *See, e.g.*, Rick Maese, *This One Could Get Ugly*, BALTIMORE SUN, Jan. 31, 2009, [http://articles.baltimoresun.com/2009-01-31/sports/0901300188\\_1\\_nfl-commissioner-roger-goodell-ravens-owner-steve-bisciotti-raymond-james-stadium](http://articles.baltimoresun.com/2009-01-31/sports/0901300188_1_nfl-commissioner-roger-goodell-ravens-owner-steve-bisciotti-raymond-james-stadium) (noting that the Union “paraded around” this report).

<sup>440</sup> MURPHY & TOPEL, *supra* note 12, at 3.

\$250 million), was slightly higher.<sup>441</sup> The report noted that “the Green Bay Packers have been approximately in the middle of all NFL teams in financial performance as reported by *Forbes* indicating that the team is not an outlier.”<sup>442</sup> Player costs and operating income were also similar.<sup>443</sup>

The NFL’s revenue, when the economists considered the Union’s data against the data of *Forbes*, was also higher.<sup>444</sup> Player costs were the same (\$4 billion).<sup>445</sup> According to the study, estimated team values have risen from \$288.1 million to \$1.04 billion since the 1998 CBA extension; these figures were supported by data from the sales of seven NFL franchises since 1998.<sup>446</sup> Most recently, the economists used the December 2008 sale of the Miami Dolphins to New York real estate billionaire Stephen Ross as proof that the current economic problems that many businesses encounter are not affecting the value of NFL franchises.<sup>447</sup>

The study also discussed one of the League’s reasons for renegotiating the current CBA—that the teams are carrying too much debt. To examine this statement, the economists utilized the average ratio of total debt to team equity value and the ratio of average total debt to average team equity value.<sup>448</sup> Total debt has actually decreased since the 1998 CBA extension, and total debt has increased slower than team value.<sup>449</sup> Thus, as the economists expressed, “debt is less of an issue for NFL teams now than it has been in the past.”<sup>450</sup> When taking into account both team value and operating income, the study states that between 2000 and 2008, the average return for an NFL owner is between “\$49 million and \$131 million per year depending on the year, with

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<sup>441</sup> *Id.* at 4.

<sup>442</sup> *Id.* at 4 n.3.

<sup>443</sup> *Id.* at 5–6.

<sup>444</sup> *Id.* at 6 (noting that the Union reported the NFL’s revenue as over \$7 billion compared to \$6.5 billion as estimated by *Forbes*).

<sup>445</sup> *Id.*

<sup>446</sup> *Id.* at 8–9.

<sup>447</sup> *Id.* at 10.

<sup>448</sup> *Id.* at 12.

<sup>449</sup> *Id.*

<sup>450</sup> *Id.*

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average financial returns in recent years that have typically exceeded \$100 million per year,” proving that NFL team ownership is not a losing proposition.<sup>451</sup>

Only one team, according to the report (citing *Forbes*), had an operating loss over the last five years.<sup>452</sup> The Detroit Lions had a net operating loss of \$3.1 million in 2008, according to *Forbes*.<sup>453</sup> Because of this information, Professor Murphy and Professor Topel concluded “it is difficult to make a case that the owners are not earning enough to pay the players what they are due to make under the current CBA.”<sup>454</sup> Regarding player salaries, the study found that the current salary cap and free agency system in place has only brought the players’ percentage of salaries to a level near the overall average since 1994, and that reducing salaries, as has been suggested by Ownership, would reduce players’ salaries to a level below the historical average since the 1994 CBA.<sup>455</sup> The Agreement has a ceiling, and therefore, the salary cap and player benefits cannot be more than 61.68% of projected revenues in any year; this provides “a substantial cushion” for Ownership.<sup>456</sup> In sum, team values have quadrupled over the last decade and franchises made on average \$25 million last year; these figures are a far cry from a system in need of significant change.<sup>457</sup>

In response to this report, NFL Commissioner Goodell stated,

There’s a lot of fiction in that report. . . . The [U]nion has very in-depth knowledge of our economics and they also know our largest cost is player costs. What’s happened is the system has changed and the environment has changed. . . . The

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<sup>451</sup> *Id.* at 13.

<sup>452</sup> *Id.*

<sup>453</sup> *Id.*

<sup>454</sup> *Id.* at 14.

<sup>455</sup> *Id.* at 14–15.

<sup>456</sup> *Id.* at 15.

<sup>457</sup> Aaron Kuriloff, *NFL Lockout Would Cost Owners \$15.5 Billion, Union Lawyer Says*, BLOOMBERG, Jan. 29, 2009, <http://www.bloomberg.com/apps/news?pid=20601079&sid=asJ1X9A8a.LI&refer=home>.

model has shifted over the years and we will address that in negotiations.<sup>458</sup>

NFLPA Executive Director Smith has sent a letter to Commissioner Goodell asking for a more detailed explanation of the Owners' decision to opt out of the Agreement and has made repeated requests for financial information.<sup>459</sup> Smith also demanded that the NFL "turn over all audited financial statements [and] profit-loss information" to the Union.<sup>460</sup> Despite these good-faith demands, Goodell refuses to release this financial information, alleging that the Union "knows our revenue down to almost a penny" because of revenue figures used to compute the [L]eague's salary cap."<sup>461</sup> Goodell's statements are fraught with the idea that the current economics of the deal are not working. However, the NFL will not provide financial statements to support its contention because the Union knows only one figure: that nearly 60% of League revenues must be spent on player salaries and benefits.<sup>462</sup>

The League has postured in many ways that might indicate poor financial health, such as staff layoffs and allowing teams to opt out of the League-run pension, retirement, and 401(k) plans for club employees.<sup>463</sup> However, after repeated requests, no tangible

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<sup>458</sup> Associated Press, *Goodell: Union Report Inaccurate*, ESPN.COM, Jan. 30, 2009, <http://sports.espn.go.com/espn/print?id=3872330&type=story>.

<sup>459</sup> Liz Mullen, *NFLPA's Smith Sends Letter to Goodell Asking About CBA Opt Out*, STREET & SMITH'S SPORTSBUSINESS DAILY, May 19, 2009, <http://www.sportsbusinessdaily.com/article/130321> [hereinafter Mullen, *NFLPA's Smith Sends Letter*]; see also Mike Florio, *Union Poses 10 Questions to NFL*, NBC SPORTS, Mar. 25, 2010, <http://profootballtalk.nbcsports.com/2010/03/25/union-poses-10-questions-to-nfl> [hereinafter Florio, *Union Poses*].

<sup>460</sup> Alex Marvez, *'New Players' Union Head Begins Posturing*, FOX SPORTS, May 18, 2009, <http://msn.foxsports.com/nfl/story/9586506/New-players'-union-head-begins-posturing>.

<sup>461</sup> *Id.*

<sup>462</sup> See Sportsdoc, *The Plight of Former National Football League Players Heads Back to the Senate*, SPORTS BUS. NEWS (Sept. 19, 2007, 12:10 AM), <http://sportsbiznews.blogspot.com/2007/09/plight-of-former-national-football.html>. See generally Liz Mullen, *Union Economist: NFL Numbers Don't Add Up*, STREET & SMITH'S SPORTSBUSINESS J., Jan. 11, 2010, <http://www.sportsbusinessjournal.com/article/64542>.

<sup>463</sup> Daniel Kaplan & Liz Mullen, *NFL Owners OK Opt-Out of Pension Plans*, STREET & SMITH'S SPORTSBUSINESS J., Apr. 13, 2009, <http://www.sportsbusinessjournal.com/>

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information has been delivered to the Union to support Ownership's contention that the current economic structure is not working.<sup>464</sup> Under the precedent of *Truitt*, a request for information must be made in good faith; thus, it must at least be a request for necessary and relevant information crucial to the relationship between the employer and the union in its capacity as employee representative.<sup>465</sup> Surely financial information is both necessary and relevant insofar as determining how the current economic structure is or is not working. This is not a situation like *Detroit Edison* where the information would be considered a trade secret or harmful to the employees.<sup>466</sup> In *AMF Trucking*, the Board stated that an inability to pay means that an employer does not have the money to pay now or for the life of the contract the current wage and benefit terms in place.<sup>467</sup> The League insists that all of its clubs will not continue to remain competitive if the current economic structure exists and that the clubs' incentive to invest in the game is threatened. The League must provide financial information to the extent it can support these statements. As the League has not provided this information, and because it is the party that opted out of the Agreement, the League is not bargaining in good faith.

## 2. A Rookie Wage Scale Already Exists

Another reason Ownership opted out of the current CBA is that it feels that the current salaries for rookies are too high and is thus seeking a rookie salary cap. However, a rookie wage scale already exists in the form of a rookie wage pool,<sup>468</sup> and it is up to the teams to spend their money properly. Second, the share of rookie salaries is wrongly considered by the League from a cumulative

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article/62186; *NFL Chief Takes Pay Cut After Layoffs*, CNNMONEY.COM, Feb. 25, 2009, [http://money.cnn.com/2009/02/25/news/newsmakers/nfl\\_commissioner/index.htm](http://money.cnn.com/2009/02/25/news/newsmakers/nfl_commissioner/index.htm).

<sup>464</sup> See Mullen, *NFLPA's Smith Sends Letter*, *supra* note 459.

<sup>465</sup> See generally *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); see also HIGGINS, *supra* note 251, at 958.

<sup>466</sup> See generally *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

<sup>467</sup> See *AMF Trucking & Warehousing, Inc.*, 342 N.L.R.B. 1125, 1126 (2004).

<sup>468</sup> Mike Florio, *2009 Rookie Pool Numbers Are Released*, PRO FOOTBALL TALK (Apr. 28, 2009), <http://www.profootballtalk.com/2009/04/28/2009-rookie-pool-numbers-are-released> [hereinafter Florio, *2009 Rookie Pool Numbers*].

perspective. Third, rookies do not take money away from veteran players. Thus, because there are already mechanisms in place to address the situation, there is no need to bargain over the issue.

The NFL allocates a maximum cap value to each of its thirty-two teams that may be devoted to all of a team's draft picks. This amount is based upon the number of draft picks, the round the player is selected, and the overall spot within the round in which the picks are made.<sup>469</sup> This wage pool provides teams with a limit on the amount of money in base salaries they can allocate toward rookie salaries each year. A rookie wage scale would establish rigid and restrictive guidelines for rookie salaries based on where players are drafted. A number would essentially be earmarked for players depending upon where they were drafted without exception. The current system, however, is based on the teams' salary cap figure, and rookie salaries amount to around 4% of all franchise salaries.<sup>470</sup> The only difference between the current system and a wage scale is the assigning of a particular number to the slot to which each player is drafted.

One reason the League is pushing the notion that a rookie wage scale is necessary is that such a system would shift the blame from the team to the player. Under a wage scale, the player cannot be upset with a set salary, only with the team that drafted him or the spot where he was drafted.<sup>471</sup> A slotting system, such as the one within the National Basketball Association, would take any negotiating leverage away from the player and his team.<sup>472</sup> Additionally, the League is trying to drive a wedge between rookies and veterans.<sup>473</sup> The veterans, however, should be more upset with Owners who continue to perpetrate this massive financial feeding frenzy that has become the top half of the first

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<sup>469</sup> *Id.*

<sup>470</sup> Dan Graziano, *Crabtree Aside, NFL Doesn't Need a Rookie Wage Scale*, NFL FANHOUSE (Aug. 17, 2009), <http://nfl.fanhouse.com/2009/08/17/crabtree-aside-nfl-doesnt-need-a-rookie-wage-scale> [hereinafter Graziano, *Crabtree Aside*].

<sup>471</sup> *Id.*

<sup>472</sup> *Id.*

<sup>473</sup> *Id.*

round of the NFL Draft. The Union has no control over the money teams choose to spend on bonuses to rookies.<sup>474</sup>

The argument that veteran players are harmed by the current system is also misguided. After the wage pool money is allotted, which amounts to 4% of the total salary cap, there is 96% of the salary cap pie available to veteran players.<sup>475</sup> The economists commissioned by the NFLPA to study NFL financials stated that Ownership's argument that teams are paying more for rookies than for veterans is "without merit."<sup>476</sup> Furthermore, "the average rookie pool has declined relative to the per team salary cap from approximately seven percent in 1994 to just under four percent in 2008."<sup>477</sup>

Ownership argues that wages at the top of the draft (i.e., players chosen in the top half of the first round) are growing at an increasingly disproportionate rate.<sup>478</sup> Additionally, others argue that those teams in need of the most help are actually penalized by the draft, as those teams must surrender large amounts of money to unproven players.<sup>479</sup> Critics of these large contracts argue that perhaps the immediate riches these agreements afford create troublesome and disruptive players.<sup>480</sup> Some veteran players have even spoken out against the current system.<sup>481</sup> However, none of these critics have pointed to any information more tangible than the data provided by the economists commissioned by the Union. The truth of the matter is negotiating salaries is part of the business of football. It is also true that the average career of an NFL player might be less than a few seasons.<sup>482</sup> Ownership and the Union

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<sup>474</sup> *See id.*

<sup>475</sup> MURPHY & TOPEL, *supra* note 12, at 16.

<sup>476</sup> *Id.*

<sup>477</sup> *Id.*; see also Mike Florio, *2009 Rookie Pool Numbers*, *supra* note 468.

<sup>478</sup> Mike Florio, *The Case for a True Rookie Wage Scale*, PRO FOOTBALL TALK (May 19, 2009), <http://profootballtalk.nbcsports.com/2009/05/19/the-case-for-a-true-rookie-wage-scale>.

<sup>479</sup> *Id.*

<sup>480</sup> *Id.*

<sup>481</sup> Mike Florio, *Lorenzo Neal Doesn't Like the Current Rookie Pay System*, PRO FOOTBALL TALK (May 11, 2009), <http://profootballtalk.nbcsports.com/2009/05/11/lorenzo-neal-doesnt-like-the-current-rookie-pay-system>.

<sup>482</sup> *NFL Hopeful FAQs*, NFL PLAYERS ASS'N, <http://www.nflplayers.com/about-us/FAQs/NFL-Hopeful-FAQs> (last visited Jan. 3, 2010).

have already negotiated a rookie salary cap.<sup>483</sup> A rookie does not possess much bargaining power because one way or another, the team can only pay its rookies what it is allotted by the League.<sup>484</sup> After the small percentage from the rookie wage pool is paid, a large amount of money is available under the cap to sign veteran players.<sup>485</sup> Any complaints veteran players may have should be taken to their respective teams for not doling out the remainder of the allotted salary cap money to players.<sup>486</sup> Veterans might not want to do that though, as a rookie salary may also inflate the market for veterans.<sup>487</sup>

It is widely acknowledged that the League will implement a rookie wage scale as a means to divide rookies and veterans.<sup>488</sup> However, if the above-commissioned NFLPA report is taken under proper consideration,<sup>489</sup> there is no reason for an intra-union dispute. The real issue is whether the League can police Owners and front office personnel into drafting better, selecting smarter, and paying veteran players the entire remainder of the available space allotted to them under the salary cap.

### 3. The League's Pockets Keep Getting Deeper

As discussed thus far, player salaries and benefits consist of roughly 60% of total League revenue.<sup>490</sup> The CBA used to only include "Defined Gross Revenues," which included a limited group of sources, but did include national television contracts, ticket sales, and NFL merchandise sales. Ownership's argument that it does not have a system that can financially work for players and Owners does not hold water when considering all of the revenue generated by advertising sales (which the players help generate as the end product of the game of football) and television

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<sup>483</sup> See Graziano, *Crabtree Aside*, *supra* note 470.

<sup>484</sup> *Id.*

<sup>485</sup> Mike Florio, *The Case Against a True Wage Scale*, PRO FOOTBALL TALK (May 26, 2009), <http://profootballtalk.nbcsports.com/2009/05/26/the-case-against-a-true-rookie-wage-scale> [hereinafter Florio, *The Case Against*].

<sup>486</sup> *Id.*

<sup>487</sup> *Id.*

<sup>488</sup> Graziano, *Crabtree Aside*, *supra* note 470.

<sup>489</sup> Notably, the NFL has not provided data against this report.

<sup>490</sup> MURPHY & TOPEL, *supra* note 12, at 12.

money, which is not contingent on a strike-free year or a lockout.<sup>491</sup>

Companies spent a total of \$2.616 billion on television advertising during the 2008 NFL season, which includes the regular season, playoffs, and Super Bowl.<sup>492</sup> The NFL average ticket price has risen in the last year, up 4% to \$75, despite the efforts of twenty-one of the League's thirty-two teams to cut or sustain ticket prices this season.<sup>493</sup> Only three of the NFL's thirty-two teams did not attempt a new advertising push or cut ticket prices this season.<sup>494</sup> While teams are facing economic problems at the gate,<sup>495</sup> these issues do not exist with the League's television contracts.<sup>496</sup>

The NFL and DirecTV signed a deal that sends \$1 billion to the League every year, whether or not a game is played in 2011, the year when a strike or lockout might take place.<sup>497</sup> Some have called this provision "lockout insurance."<sup>498</sup> In other words, the League has a strike fund in place, and a much bigger one than the Union has tried to accumulate. The League also has enough money to wait for the deal it wants, instead of being under

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<sup>491</sup> See generally *id.*

<sup>492</sup> *NFL TV Advertisers Spent \$2.6B Last Season, Led by A-B, U.S. Gov't*, STREET & SMITH'S SPORTSBUSINESS DAILY, Sept. 17, 2009, <http://www.sportsbusinessdaily.com/article/133374>.

<sup>493</sup> Larry Weisman, *NFL Blitz: Ticket Prices and the Fan Cost Index*, REDSKINS.COM (Sept. 18, 2009), [http://www.redskins.com/gen/articles/NFL\\_Blitz\\_\\_Holding\\_the\\_Line\\_On\\_Ticket\\_Prices\\_51755.jsp](http://www.redskins.com/gen/articles/NFL_Blitz__Holding_the_Line_On_Ticket_Prices_51755.jsp).

<sup>494</sup> Daniel Kaplan, *Tough Ticket Market Forces NFL Teams to Be Creative*, SPORTING NEWS TODAY, Sept. 10, 2009, at 11, available at [http://today.sportingnews.com/sportingnewstoday/20090910/?pg=11&pm=1&u1=friend&sub\\_id=WKoPOPTTLtA#pg11](http://today.sportingnews.com/sportingnewstoday/20090910/?pg=11&pm=1&u1=friend&sub_id=WKoPOPTTLtA#pg11).

<sup>495</sup> Daniel Kaplan, *Up to 12 NFL Teams May Face Blackouts*, STREET & SMITH'S SPORTSBUSINESS J., Aug. 31, 2009, <http://www.sportsbusinessjournal.com/article/63444>.

<sup>496</sup> Maury Brown, *At Midseason, NFL TV Ratings Exceptionally Strong*, BIZ OF FOOTBALL (Nov. 11, 2009), [http://www.bizoffootball.com/index.php?option=com\\_content&view=article&id=575:at-midseason-nfl-tv-ratings-exceptionally-strong&catid=40:television&Itemid=57](http://www.bizoffootball.com/index.php?option=com_content&view=article&id=575:at-midseason-nfl-tv-ratings-exceptionally-strong&catid=40:television&Itemid=57).

<sup>497</sup> Peter King, *DirecTV Deal Is Lockout Insurance*, SI.COM, Mar. 24, 2009, [http://sportsillustrated.cnn.com/2009/writers/peter\\_king/03/24/meetings/index.html](http://sportsillustrated.cnn.com/2009/writers/peter_king/03/24/meetings/index.html).

<sup>498</sup> See *id.* But see Mike Florio, *DirecTV "Guarantee" Would Likely Reduce Future Payments*, PRO FOOTBALL TALK (Mar. 24, 2009), <http://profootballtalk.nbcsports.com/2009/03/directv-guarantee-would-likely-reduce-future-payments.php>.

financial pressure to take any deal offered by the Union.<sup>499</sup> During the last NFL strike, which occurred in 1987, the television networks dealt with replacement player games and scheduled alternative programming to fill the void.<sup>500</sup> A strike in 2011 could exhibit similar problems. The NFL has already signed deals extending its current television partnerships with FOX and CBS.<sup>501</sup> But for Ownership, it can just sit back and continue to count the money rolling in, even if ticket revenue might be down.

Additionally, the League is engaging in behavior that it shied away from in previous years, such as advertising on player practice jerseys and signing deals with lotteries.<sup>502</sup> Owners now also schedule events at their venues, from concerts to college football games, for additional revenue.<sup>503</sup> The League also has the NFL Network and the Red Zone Channel, which provide additional cable revenue and advertising dollars.<sup>504</sup> The NFL Network even broadcasts some NFL regular season games. This is on top of the already-existing television relationships the League has with NBC, CBS, FOX, and ESPN, which paid each team close to \$94 million last year alone.<sup>505</sup> If all other shared national revenue is included in this figure, which includes road-game receipts and other league-wide source revenues, each NFL team made about \$147 million in

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<sup>499</sup> See *NFL Team Valuations*, FORBES.COM, Sept. 2, 2009, [http://www.forbes.com/lists/2009/30/football-values-09\\_NFL-Team-Valuations\\_Value.html](http://www.forbes.com/lists/2009/30/football-values-09_NFL-Team-Valuations_Value.html).

<sup>500</sup> Clare Farnsworth, *NFL Crossed the Line on Replacement Sunday*, SEATTLE POST-INTELLIGENCER, Oct. 4, 2002, [http://www.seattlepi.com/football/89817\\_replace04.shtml](http://www.seattlepi.com/football/89817_replace04.shtml).

<sup>501</sup> Associated Press, *NFL Inks Broadcast Deals with CBS, FOX*, CRAIN'S N.Y. BUSINESS.COM, May 19, 2009, <http://www.crainsnewyork.com/article/20090519/FREE/905199972>.

<sup>502</sup> See *Packers Possibly Looking to Sell Ad Space on Practice Jerseys*, STREET & SMITH'S SPORTSBUSINESS DAILY, June 4, 2009, <http://www.sportsbusinessdaily.com/article/130699>; see also Chad Millman, *The NFL Isn't a Hypocritical League on Gambling, It Just Lacks Serious Vision*, ESPN.COM, May 28, 2009, <http://sports.espn.go.com/espnmag/story?id=4211465>.

<sup>503</sup> See, e.g., *Events Scheduled for Cowboy Stadium in Arlington*, DALLAS MORNING NEWS, May 18, 2009, <http://www.dallasnews.com/sharedcontent/dws/news/localnews/cowboysstadium/stories/000000dnspocowboysstadiumevents.1d084b10.html>.

<sup>504</sup> See Press Release, DirecTV, NFL and DirecTV Extend NFL Sunday Ticket Agreement Through 2014 Season (Mar. 23, 2009), available at <http://www.directv.com/DTVAPP/global/article.jsp?assetId=P5590122>.

<sup>505</sup> Kurt Badenhausen, Michael K. Ozanian & Christina Settimi, *Recession Tackles NFL Team Values*, FORBES.COM, Sept. 2, 2009, <http://www.forbes.com/2009/09/02/nfl-pro-football-business-sportsmoney-football-values-09-values.html>.

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2008.<sup>506</sup> With so much money in its collective hands, Ownership has neither any worries of economic failure nor of the effect of a work stoppage.

The NFL is immensely popular and profitable for all sides involved. “According to the Nielsen ratings, in 2008, five of the top 10 single-event television broadcasts were NFL-related. Because of this, television networks pay a premium for NFL content.”<sup>507</sup> However, one must remember that players have to be playing in these contests in order for virtually all involved to enjoy those immense benefits. Ownership, on the other hand, is the only outlier. Under the above-mentioned contracts, the NFL is guaranteed some return even in the event of a strike or lockout because of these television contracts and other business ventures.<sup>508</sup> These lucrative contracts give the League another reason to drag along negotiations as long as possible. The longer negotiations take, the more pressure is on the Union to agree to a deal or face the prospect of losing part of a revenue sharing arrangement. Since a deal was not reached between the NFL and the Union before March of 2010, the players will only enjoy whatever percentage of the salary “pie” they can get, as there will be no salary cap for the 2010 season. The NFLPA will likely look to legal action to see that this “lockout insurance” is used for the common good of both sides.<sup>509</sup> This may reduce the likelihood of a labor stoppage.<sup>510</sup>

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<sup>506</sup> Don Walker, *Packers’ Net Profit: \$5.2 Million*, J. SENTINEL (Milwaukee, Wis.), July 14, 2010, <http://www.jsonline.com/blogs/sports/98421189.html>.

<sup>507</sup> Fisher, *supra* note 223.

<sup>508</sup> King, *supra* note 497.

<sup>509</sup> Sean Leahy, *NFLPA Asks Arbitrator to Put NFL’s TV Money in Escrow in Event of 2011 Lockout*, USA TODAY, June 9, 2010, <http://content.usatoday.com/communities/thehuddle/post/2010/06/nflpa-asks-arbitrator-to-put-nfls-tv-money-in-escrow-in-event-of-2011-lockout/1>; David Elfin, *NFLPA Files Complaint over League’s Guaranteed TV Deals*, NFLPLAYERS.COM (June 9, 2009), <http://www.nflplayers.com/articles/cba-news/nflpa-files-complaint-over-leagues-guaranteed-tv-deals>.

<sup>510</sup> Sean Leahy, *Analyst: NFLPA’s TV Complaint ‘Probably Reduces the Probability of a Lockout,’* USA TODAY, June 10, 2010, <http://content.usatoday.com/communities/thehuddle/post/2010/06/analyst-nflpas-tv-complaint-probably-reduces-the-probability-of-a-lockout/1>.

Ownership has taken the position that the current financial structure does not work.<sup>511</sup> However, when presented with the very same information that the League says the Union has as part of its commissioned economic report, it called it “fiction.”<sup>512</sup> The Union has in turn asked for audited financial statements of the NFL’s thirty-two teams to determine what, if any, part of the current financial structure is not working.<sup>513</sup> The League has refused any such request.<sup>514</sup> The NFL’s position regarding a rookie wage scale is purely based on an interest to remove any bargaining power from the top-tier rookies and to displace the solidarity of the Union.<sup>515</sup> A pool of money is already set aside for rookies and has no effect on veteran salaries.<sup>516</sup> The only agents affecting veteran salaries are the NFL teams themselves, as many teams are withholding some of the 96% of the pie left for veterans after rookies claim a miniscule 4% of the total cap space.<sup>517</sup>

#### 4. The League Was Dragging Out Negotiations to Free Itself from Antitrust Law

The League may have been dragging out negotiations in the hope that it would receive a favorable decision in the *American Needle v. National Football League*<sup>518</sup> case, which could have eliminated one of the Union’s negotiating tactics. Ownership had an incentive to drag out negotiations in order to both pad its lockout fund and potentially gain a tactical advantage in negotiations. The League is already generating a steady stream of revenues, with more already in place in the event of a strike or lockout.<sup>519</sup> Due to its growing pockets, the NFL can drag

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<sup>511</sup> Jeff Levine, *All Signs Point to NFL Work Stoppage in 2011*, BIZ OF FOOTBALL (Jan. 8, 2010), [http://www.bizoffootball.com/index.php?option=com\\_content&view=article&id=595:all-signs-point-to-nfl-work-stoppage-in-2011&catid=44:articles-and-opinion&Itemid=61](http://www.bizoffootball.com/index.php?option=com_content&view=article&id=595:all-signs-point-to-nfl-work-stoppage-in-2011&catid=44:articles-and-opinion&Itemid=61).

<sup>512</sup> *Goodell: Union Report Inaccurate*, *supra* note 458.

<sup>513</sup> Florio, *Union Poses*, *supra* note 459.

<sup>514</sup> *Id.*

<sup>515</sup> *See* Graziano, *Crabtree Aside*, *supra* note 470.

<sup>516</sup> Florio, *The Case Against*, *supra* note 485.

<sup>517</sup> *Id.*

<sup>518</sup> 130 S. Ct. 2201 (2010).

<sup>519</sup> *See, e.g.*, King, *supra* note 497.

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negotiations out for a significant period of time and never produce the information the Union has requested.

If the NFL had successfully persuaded the Supreme Court that it functioned as a single entity, the League would have become exempt from antitrust scrutiny, thereby making antitrust law inapplicable. If this occurred, the NFLPA would have been foreclosed from decertifying and filing an antitrust lawsuit like it did in 1993.<sup>520</sup> This occurrence would have then only left the Union with the option of using labor law to come to an agreement. Luckily, the NFL was unable to convince the Supreme Court that its teams operated as a single entity, in “complete unity of interest”<sup>521</sup> with objectives that are in common.<sup>522</sup> Instead the Court definitely ruled against providing the NFL any type of labor exemption.<sup>523</sup>

If the NFL was dragging its feet in negotiations in order to see if *American Needle* would provide it with an improved bargaining position, the League’s conduct amounts to merely going through the motions of bargaining with no intent to come to an agreement. Thus, in this situation, the NFLPA may contend that the NFL and its thirty-two teams are not bargaining in good faith.<sup>524</sup>

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<sup>520</sup> Jeff Levine, *High Court to Hear NFL Antitrust Case, Could Lead to Huge Victory for League*, BIZ OF FOOTBALL (Aug. 10, 2009), [http://www.bizoffootball.com/index.php?option=com\\_content&view=article&id=461:high-court-to-hear-nfl-antitrust-case-could-lead-to-huge-victory-for-league&catid=34:nfl-news&Itemid=53](http://www.bizoffootball.com/index.php?option=com_content&view=article&id=461:high-court-to-hear-nfl-antitrust-case-could-lead-to-huge-victory-for-league&catid=34:nfl-news&Itemid=53).

<sup>521</sup> *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n (Bulls II)*, 95 F.3d 593 (7th Cir. 1996).

<sup>522</sup> *Am. Needle*, 130 S. Ct. at 2212.

<sup>523</sup> The Court opined that the League’s teams “compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel” and specific to the *American Needle* case, “the teams compete in the market for intellectual property.” *See id.* at 2212–13.

<sup>524</sup> For the NFL, waiting to meaningfully negotiate with the Union until *American Needle* was decided was worth risking a possible ULP filing because of the relatively short career span of the average NFL player. *See* Dan Raley, *New NFL Goal: A Longer Life*, SEATTLE POST-INTELLIGENCER, May 9, 2008, [http://www.seattlepi.com/football/362412\\_nflhealth09.html](http://www.seattlepi.com/football/362412_nflhealth09.html) (noting that the average career for an NFL player is three and a half seasons). If the League was granted an antitrust exemption, it could have drastically dragged out negotiations for years and decimated the PA’s membership. Similar to the rationale of the NHL players who would not present a united front in exchange for potentially sacrificing multiple seasons of hockey, if the average life of an NFL player is around three and a half years, that player does not have the luxury of waiting out a

## VI. PREDICTIONS—LOCKOUT SEEMS IMMINENT

The rhetoric of both the NFL and NFLPA is intensifying. Judging from the behavior of the parties, it appears that both sides have no problem dealing with an uncapped 2010 season in preparation of a prolonged labor stoppage.<sup>525</sup> The pace of negotiations has slowed.<sup>526</sup> The NFL was content to take a wait-and-see approach with *American Needle* and engage in real negotiations only after the Supreme Court rendered its decision. Even though the League did not receive a favorable ruling, the NFLPA is convinced that Ownership will lock the players out.<sup>527</sup> “Our players know the [L]eague has hired the guy [attorney Bob Batterman] that engineered the NHL lockout,” Smith said. “They look at these new TV contracts that guarantee payment even in the event of a lockout.”<sup>528</sup> Thus, Smith surmises, the NFL hopes to implement a strategy similar to that engineered by Batterman during the NHL lockout and wait for the NFLPA to break solidarity all while relying on its guaranteed contracts from sponsors such as DirecTV.<sup>529</sup> The only difference with this labor stoppage is that this time, the NFL hoped to avoid the possibility of Union decertification and antitrust scrutiny through a favorable

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lockout that could last multiple years in duration. NFL players are more likely to acquiesce to Ownership’s demands in a long labor dispute because of their relatively short playing career. This short playing career would make it difficult for the Union to present a united front to the League, thereby giving the NFL the upper hand in negotiating a management-friendly CBA.

<sup>525</sup> See *supra* note 14 and accompanying text.

<sup>526</sup> Peter King recently wrote, “I hear progress is virtually nil and the players are pessimistic that a new deal will get done in time for them to play the 2011 season.” *Cowboys Owner Jerry Jones Discusses NFL Economics on “FNIA,”* STREET & SMITH’S SPORTSBUSINESS DAILY, Dec. 28, 2009, <http://www.sportsbusinessdaily.com/article/135834>.

<sup>527</sup> *NFLPA Director Smith Convinced Players Will Be Locked Out in 2011*, ASSOCIATED PRESS, Aug. 17, 2009, available at <http://www.nfl.com/news/story?id=09000d5d811f51d2&template=without-video-with-comments&confirm=true>.

<sup>528</sup> Dan Graziano, *DeMaurice Smith: NFL Intent on Locking Out Players*, NFL FANHOUSE (June 15, 2009), <http://nfl.fanhouse.com/2009/06/15/demaurice-smith-nfl-intent-on-locking-out-players>.

<sup>529</sup> See Futterman, *supra* note 411.

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*American Needle* decision.<sup>530</sup> However, the NFL was unable to convince the Supreme Court to grant such a tactical advantage.

Since the League cannot stand behind *American Needle* in order to elude an antitrust challenge, the PA has begun to seek authorization from the membership to decertify as a union if necessary.<sup>531</sup> Decertification of the union would immediately allow the Players as individuals to challenge in court any action by the Owners that alter the current labor system.<sup>532</sup> Suing under antitrust law would also allow the Players to seek treble damages from the NFL. However, decertifying as a union could also have a chilling effect on negotiations.<sup>533</sup> It may also lead some to characterize such a decision as a “sham” decertification<sup>534</sup> intended to circumvent the labor exemption to antitrust law. Although decertification is still possible, Smith insists that his players want to negotiate a new deal, starting with addressing the financials.<sup>535</sup> However, in reality, financial disclosure is not going to occur as the NFL is not alleging an inability to pay and is most likely not in a hurry to negotiate a successor agreement.

Both sides do not seem greatly concerned about how the NHL lockout did serious damage to the goodwill of professional hockey. It is unclear whether the parties are truly ready to sacrifice labor peace for the uncertainty of a prolonged labor conflict, especially

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<sup>530</sup> Liz Mullen, *NFL Filing in American Needle Case Could Affect Labor Relations*, STREET & SMITH'S SPORTSBUSINESS DAILY, Nov. 18, 2009, <http://www.sportsbusinessdaily.com/index.cfm?fuseaction=sbd.main&ArticleID=134981>.

<sup>531</sup> Liz Mullen, *Union Seeks Authority to Decertify*, STREET & SMITH'S SPORTSBUSINESS J., Sept. 13, 2010, at 1, available at <http://www.sportsbusinessjournal.com/article/66916> [hereinafter Mullen, *Union Seeks Authority*].

<sup>532</sup> *Id.*

<sup>533</sup> See Daniel Kaplan, *NFL's Goodell Says NFLPA's Move to Decertify Could Hamper Labor Talks*, STREET & SMITH'S SPORTSBUSINESS DAILY, Sept. 13, 2010, [http://www.sportsbusinessdaily.com/index.cfm?fuseaction=tdi.closingBell&utm\\_source=cb\\_email&utm\\_medium=email&utm\\_content=headlineslink&utm\\_campaign=cbemail](http://www.sportsbusinessdaily.com/index.cfm?fuseaction=tdi.closingBell&utm_source=cb_email&utm_medium=email&utm_content=headlineslink&utm_campaign=cbemail).

<sup>534</sup> Mullen, *Union Seeks Authority*, *supra* note 531.

<sup>535</sup> “The players of the National Football League are still in the dark about why this deal isn’t good enough,” Smith said. “And the easiest way to demonstrate any problem with the deal is the way any business in America demonstrates it: They turn over what the profit or loss numbers are. And if there’s a problem with the model, we’ll fix it.”

Brown & Prine, *supra* note 203.

after the NHL's recent disastrous labor dispute. While professional football enjoys more widespread popularity than the NHL,<sup>536</sup> it is reasonable to imagine that a protracted labor dispute would similarly damage the profitability and popularity of the NFL. The current compositions of the NFL and the Union are not radically different from their respective predecessors. This bargaining relationship is decades long and possesses an emotional history checkered with heated conflicts.<sup>537</sup> Given this past, one struggles to understand why either side wants to reopen the bitter feelings of the past by waiting till the expiration of the current CBA. The current CBA was responsible for billions of dollars in profits for both Owners and players alike,<sup>538</sup> but this Agreement is largely considered broken due to irreconcilable differences between the parties. It remains to be seen whether an uncapped and unfloored 2010 season will allow the parties to mend a relationship that was relatively calm throughout the late 1990s until mid-2008.<sup>539</sup> However, labor peace, when one examines the bargaining history of the parties, has been the exception rather than the rule. Taking this into consideration, the authors expect the NFL to initiate a lockout, signaling the beginning of a protracted dispute that could be significant in duration.

An intense and long-lasting labor stoppage could also significantly impact the other major U.S. sports. As one team executive posits, “[i]f the NFL has substantial labor issues, there will be a dramatic ripple effect—good and bad dependent on where you sit—throughout the sports industry.”<sup>540</sup> Thus, the events in the coming year between the NFL and NFLPA will bear significant consequences for virtually all of professional sports.

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<sup>536</sup> Curtis Eichelberger, *NHL Borrows from NFL as It Pursues Bigger TV Contract (Update 1)*, BLOOMBERG, May 29, 2009, <http://www.bloomberg.com/apps/news?pid=20601109&sid=aGY7pu.INAhA>.

<sup>537</sup> See Goplerud, *supra* note 86, at 13–33.

<sup>538</sup> See *supra* note 12 and accompanying text.

<sup>539</sup> See *supra* notes 38–39 and accompanying text.

<sup>540</sup> *The Sports Business Year That Was: A Look Back at '09*, STREET & SMITH'S SPORTSBUSINESS DAILY, Dec. 17, 2009, <http://www.sportsbusinessdaily.com/index.cfm?fuseaction=sbd.all&ArticleID=135672> (citing Atlanta Braves Executive Vice President, Derek Schiller).