

3-15-2012

## Play Ball: What Can Be Done to Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights On

Alexandra Baumann

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### Recommended Citation

Alexandra Baumann, *Play Ball: What Can Be Done to Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights On*, 32 J. Nat'l Ass'n Admin. L. Judiciary Iss. 1 (2012)  
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# Play Ball: What Can Be Done to Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights On

By Alexandra Baumann\*

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## I. INTRODUCTION

*“Our country is the only one in the world with a national anthem that the last two words are ‘Play Ball!’”<sup>1</sup>*

From Sarah Palin proudly touting herself as a “hockey mom” during her vice presidential run in 2008, to high school kids socializing at Friday night football games, to the President of the United States throwing out the ceremonial first pitch on opening day of the professional baseball season, sports permeate all aspects of American culture. We have Super Bowl parties, proudly wear our favorite team’s jerseys, and even use sports metaphors to describe everything from doing a good job<sup>2</sup> to staying focused.<sup>3</sup> Moments such as Michael Jordan landing a buzzer beater shot to win the game<sup>4</sup> or Tim Tebow’s 80 yard dart-and-run pass in overtime<sup>5</sup> give Americans something to cheer for and our children something to aspire to. So what do we do on a Monday night in the fall if there is no football game to watch? How do we spend our Saturday afternoons each summer if there is no baseball game to go to? Unfortunately, these questions have become an increasing reality as strikes and lockouts in professional sports have become more frequent. In 2011 alone we saw a lockout in both the National Football League (NFL) and the National Basketball Association

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<sup>1</sup> Anonymous, *The Greatest Sports Quotes of All Time*, SPORTS HOLLYWOOD (2000), <http://www.sportshollywood.com/greatquotes.html>.

<sup>2</sup> “He hit that one out of the park.”

<sup>3</sup> “Keep your eye on the ball” or “it’s a marathon, not a sprint.”

<sup>4</sup> See Oly Sandor, *The Greatest Michael Jordan Buzzer-Beater Ever*, HOOPS VIBE (Jan. 14, 2008), <http://www.hoopsvibe.com/features/breaking-down-the-nba/50585-the-greatest-michael-jordan-buzzer-beater-ever>.

<sup>5</sup> Mike Klis, *Broncos, Tim Tebow Stun Steelers in OT, win 29-23 in NFL playoffs*, DENVER POST (Jan. 9, 2012, 6:37 AM), [http://www.denverpost.com/broncos/ci\\_19701689](http://www.denverpost.com/broncos/ci_19701689).

(NBA). In addition, talks have already started about the strong possibility of a National Hockey League (NHL) lockout in 2012.<sup>6</sup>

This comment will analyze the role that the National Labor Relations Board and the Federal Mediation and Conciliation Service play in ending strikes and lockouts caused by collective bargaining in professional sports. It will then look at what can be done to prevent lockouts and strikes in the future, which would not only benefit fans, but also stadium employees, players, and owners, as none of them make money if there are no games.

## II. THE NATIONAL LABOR RELATIONS BOARD

### A. History

In the 1920s, labor strikes were widespread in the United States as tensions between employers and employees ran high, and the use of injunctive relief by courts to end these strikes peaked.<sup>7</sup> Congress put an end to this trend in 1932 with the passage of the Norris-LaGuardia Act, which stated that courts could only issue injunctions to end labor strikes when they included violence or fraud.<sup>8</sup> The Act also declared that the policy of the United States was to allow workers to join unions and engage in collective bargaining.<sup>9</sup> A year later, the National Industrial Recovery Act (NIRA) was passed as part of Roosevelt's New Deal.<sup>10</sup> Under Section 7 of NIRA,

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<sup>6</sup> See Adrian Dater, *Is it too soon to worry about another NHL lockout?*, DENVER POST (July 19, 2010, 11:26 PM), <http://blogs.denverpost.com/avs/2010/07/19/is-it-too-soon-to-worry-about-another-nhl-lockout/4065/>.

<sup>7</sup> *Pre-Wagner Act Labor Relations*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/75th/prewagner.html> (last visited Apr. 1, 2012). Workers in the United States fought to improve working conditions throughout the 18th and 19th centuries. *Id.* The armistice at the end of World War II in 1918 brought an end to the truce between labor and management during the war, leading to major strikes in industries such as coal, steel, and railroads. *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* Collective bargaining is where managers and employees, through a union, engage in a negotiation process to write a collective bargaining agreement, which establishes the rules and regulations of the relationship between the two. WALTER T. CHAMPION, JR., *FUNDAMENTALS OF SPORTS LAW* 497 (2d ed. 2004).

<sup>10</sup> *Pre-Wagner Act Labor Relations*, *supra* note 7.

workers had “the right to organize and bargain collectively through representatives of their own choosing,” but could not be required to or prohibited from joining a union by their employers.<sup>11</sup>

Despite NIRA, employers refused to recognize unions. Thus, the National Labor Board (NLB) was formed to deal with Section 7 violations, to mediate labor negotiations, and to hold elections to choose union representatives.<sup>12</sup> The NLB was unable to get voluntary compliance with Section 7, so in 1934 Congress created the National Labor Relations Board, which had the power to issue “cease and desist” orders in order to prevent unfair labor practices.<sup>13</sup> But, in May of 1935, the Supreme Court held NIRA to be unconstitutional.<sup>14</sup>

In July of 1935, President Roosevelt signed the National Labor Relations Act into law.<sup>15</sup> This Act created the National Labor Relations Board (NLRB), an independent agency with the power to enforce employee rights and to force employers to engage in collective bargaining with a union that represents a majority of the employees.<sup>16</sup> This Act was greatly amended in 1947 with the

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<sup>11</sup> *Id.*

<sup>12</sup> *The NLB and “The Old NLRB”*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/75th/oldnlrb.html> (last visited Apr. 1, 2012). The National Labor Board was chaired by Senator Robert F. Wagner of New York and included three industry representatives and three labor members. *Id.* The NLB’s authority ended in June of 1934. *Id.* During that time NLB settled 1,019 labor strikes, averted 498 labor strikes, and settled 1,800 other labor disputes. *Id.*

<sup>13</sup> *Id.* The National Labor Relations Board was created by Public Resolution No. 44, and later became known as the “Old NLRB”. *Id.* This board consisted of three public members. *Id.* Decisions issued by this board laid the foundation for collective bargaining agreements as the national labor policy. *Id.*

<sup>14</sup> *Id.* See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935).

<sup>15</sup> *The 1935 Passage of the Wagner Act*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/75th/1935passage.html> (last visited Apr. 1, 2012). Senator Wagner introduced the National Labor Relations Act, also known as the Wagner Bill, as a result of his experience on the two previous NIRA boards. *Id.* There were several legal challenges to the National Labor Relations Act, and federal courts issued almost 100 injunctions against its enforcement until it was held to be constitutional by the Supreme Court in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937).

<sup>16</sup> *The 1935 Passage of the Wagner Act*, *supra* note 15. The NLRB has the power to enforce employee rights as opposed to simply mediate disputes, as the

passage of the Taft-Hartley Act.<sup>17</sup> The Taft-Hartley Act included provisions stating that employees could be required to join a labor union as a condition of their employment and provisions that made several significant changes to representation elections.<sup>18</sup> Most importantly, the Taft-Hartley Act put unions, not just employers, under the jurisdiction of the NLRB's unfair labor practice powers.<sup>19</sup> In 1959, the Landrum-Griffin Act was passed, which, among other things, gave state courts and state labor relations boards jurisdiction over disputes that the NLRB declined due to jurisdictional standards.<sup>20</sup>

Today, the NLRB consists of forty Administrative Law

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boards under NIRA had done. *Id.* The NLRB is composed of three members, which are appointed by the President and confirmed by the Senate. *Id.*

<sup>17</sup> *1947 Taft-Hartley Substantive Provisions*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/75th/1947tafthartley.html> (last visited Apr. 1, 2012).

<sup>18</sup> *Id.* While workers could be required to join a union as a condition of employment, they were not required to participate in any union activities. *Id.* Changes to representation elections included excluding supervisors from bargaining units and requiring the NLRB to give professional employees, craftsmen, and guards special treatment in determining bargaining units. *Id.* In addition to this, four new kinds of elections were created: (1) when faced with a union demanding recognition, employers could request the NLRB to conduct elections; (2) employees could hold an election to determine whether to get rid of the current union; (3) employees could vote to give their union the right to enter into an agreement; and (4) employees could vote to withdraw previously granted authorization. *Id.*

<sup>19</sup> *1947 Taft-Hartley Passage and NLRB Structural Changes*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/75th/1947tafthartleypassage.html> (last visited Apr. 1, 2012). Putting both employers and workers under the NLRB's jurisdiction ended the appearance of having a pro-union bias. *Id.* In addition, each side was guaranteed that it would have attorneys to work on the conflict. *Id.* As a result of these changes, the percentage of union victors in NLRB run representative elections decreased from 80% to 70%. *1959 Landrum-Griffin Act*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/75th/1959landrumgriffinact.html> (last visited Apr. 1, 2012).

<sup>20</sup> *Id.* See *Overview of NLRA and NLRB*, AMERICAN BAR ASSOCIATION, A-8, [http://www.americanbar.org/content/dam/aba/migrated/labor/basics/nlra/papers/overview\\_nlra.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/labor/basics/nlra/papers/overview_nlra.authcheckdam.pdf) (last visited Apr. 1, 2012) (gives list of all organizations that fit the current jurisdictional standards of NLRB).

Judges and a Board made up of five members.<sup>21</sup> There are five main functions of the NLRB: (1) hold elections for employees when deciding whether to approve or decertify their union, (2) investigate charges of unfair labor practices, (3) facilitate settlements, (4) adjudicate disputes, and (5) enforce orders of the Board.<sup>22</sup>

### *B. Role in Professional Sports*

Professional sports came under the jurisdiction of the NLRB in the 1970s when it was held by the courts that professional sports have an effect on interstate commerce.<sup>23</sup> This change coincided with the formation of the first collective bargaining agreements (CBA) in professional sports.<sup>24</sup>

Currently, the NLRB deals with two issues in professional sports: (1) unfair labor practices, and (2) the scope of bargaining.<sup>25</sup> During the collective bargaining process, the NLRB acts as a regulator between management and the players' union, usually hearing claims that the other party is not bargaining in good faith.<sup>26</sup>

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<sup>21</sup> *What We Do*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/what-we-do> (last visited Apr. 1, 2012).

<sup>22</sup> *Id.*

<sup>23</sup> CHAMPION, *supra* note 9, at 495. *See also* Flood v. Kuhn, 407 U.S. 258, 282 (1972); Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1971); Radovich v. Nat'l Football League, 352 U.S. 445, 453 (1957); Nassau Sports v. Peters, 352 F.Supp. 870 (E.D.N.Y. 1972). Once professional sports came under the jurisdiction of the NLRB, the legal framework for the collective bargaining process became the National Labor Relations Act. PAUL D. STAUDOHAR, THE SPORTS INDUSTRY AND COLLECTIVE BARGAINING 9 (2nd ed. 1989). In addition to this, hundreds of decisions that the NLRB had written, based on other industries in the United States, interpreting the Act as it applies to collective bargaining, right to strike, and antitrust policy affect the collective bargaining process in professional sports. *Id.*

<sup>24</sup> BERRY GOULD STAUDOHAR, LABOR RELATIONS IN PROFESSIONAL SPORTS 33 (1986). Major League Baseball's first CBA was put in place in 1968. *Id.* A few months later, the National Football League reached its first CBA. *Id.* at 34. CBAs in the National Basketball Association and the National Hockey League soon followed. *Id.*

<sup>25</sup> RAY YASSER ET AL., SPORTS LAW: CASES AND MATERIALS 398 (5th ed. 2003).

<sup>26</sup> *Id.* at 396. Almost all players in professional sports are members of their respective players' union. *Id.* Thus, the unions have played a large role in the



This role usually becomes important as both the players' union and management take extreme positions and demand more rights and money than allocated to them under the previous CBA.<sup>27</sup> In addition, the NLRB is often asked to make a ruling on whether a particular issue is negotiable under the CBA.<sup>28</sup>

### III. FEDERAL MEDIATION AND CONCILIATION SERVICE

In addition to amending the role of the NLRB, the Taft-Hartley Act of 1947 also created the Federal Mediation and Conciliation Service (FMCS).<sup>29</sup> The FMCS is an independent federal agency that was created to provide voluntary mediation and arbitration services to assist in collective bargaining negotiations and to provide labor-management training.<sup>30</sup> Subsequent legislation has

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collective bargaining process. *Id.* Team owners give up most of their rights to the league, but do retain control over decisions that affect their individual team, such as the employment of coaches and player trades. *Id.* In addition, team owners have control over negotiating individual labor contracts with each of their players. *Id.* Professional sports are unique in that the league as a whole operates under a CBA, but individual players have the power to negotiate specific terms of their own employment contract. *Id.* at 395. The teams in each sport come together to negotiate one uniform CBA for the league. *Id.* at 398. The agreements are not industry wide as each sport/league has its own collective bargaining agreement. *Id.* at 399. League commissioners are supposed to act as buffers between the two sides; however, they usually align with management, as that is who they are hired and paid by. *Id.* at 397. Good faith requires that the parties present proposals and counter proposals in a reasonable effort to reach an agreement. *Id.* at 398.

<sup>27</sup> *Id.* at 399. Normally, CBAs include: (1) the length of the contract and when specific provisions will be up for renegotiation, (2) player salaries, including minimum and maximum individual player's salaries and for each team as a whole, (3) rules concerning the utilization of labor including things such as the scheduling of games and practices and free agency of players, (4) individual job rights in areas such as discipline and seniority, (5) the rights of both parties – the union and management, and (6) methods for day to day enforcement of the agreement. *Id.* at 399-400.

<sup>28</sup> STAUDOHAR, *supra* note 23, at 12. Issues that the NLRB has ruled on include things such as wage scales and the use of artificial turf. *Id.*

<sup>29</sup> *Who We Are*, FEDERAL MEDIATION & CONCILIATION SERVICE, <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=21&itemID=15810> (last visited Apr. 1, 2012). See also *1947 Taft-Hartley Passage and NLRB Structural Changes*, *supra* note 19.

<sup>30</sup> *Federal Mediation and Conciliation Service*, FEDERAL GATEWAY, [http://www.fedgate.org/fg\\_fmcs.htm](http://www.fedgate.org/fg_fmcs.htm) (last visited Apr. 1, 2012). Mediation is when

increased its services to include conflict resolution services offered to: (1) other government agencies, (2) international organizations, and (3) foreign nations.<sup>31</sup>

Under the Collyer Doctrine,<sup>32</sup> established in 1971, the NLRB defers decisions on charges of unfair labor practices until after the parties have gone through arbitration with the FMCS.<sup>33</sup> Under this doctrine, the NLRB will “refer resolution of such an issue brought before it to arbitration if the issue is arbitrable under the collective bargaining agreement.”<sup>34</sup> In addition, the NLRB almost always defers a case to the FMCS in a situation where either party in a dispute refuses to bargain.<sup>35</sup>

Today, the FMCS is headquartered in Washington DC and is comprised of ten district offices and sixty-eight field offices.<sup>36</sup> In 2008, the FMCS was involved in over 4,800 collective bargaining negotiations spanning every major industry in the United States.<sup>37</sup>

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a neutral third party is brought into the negotiation process as a facilitator. *Who We Are*, *supra* note 29. When using mediation, the parties may or may not come to an agreement. *Id.* Arbitration is a when the parties agree to allow a neutral third party to impose a binding agreement on them upon the conclusion of the process. *Id.*

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

<sup>32</sup> The Collyer Doctrine is a principle in labor law in which the NLRB will defer an issue to arbitration if it can be resolved under the current CBA. *Collyer Doctrine Law & Legal Definition*, USLEGAL.COM, <http://definitions.uslegal.com/c/collyer-doctrine/> (last visited Apr. 1, 2012).

<sup>33</sup> *Who We Are*, *supra* note 29.

<sup>34</sup> *Collyer Doctrine*, CORNELL UNIVERSITY LAW SCHOOL, [http://www.law.cornell.edu/wex/collyer\\_doctrine](http://www.law.cornell.edu/wex/collyer_doctrine) (last visited Apr. 1, 2012). See also *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

<sup>35</sup> *Id.*

<sup>36</sup> *Field Offices*, FEDERAL MEDIATION & CONCILIATION SERVICE, <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=107&itemID=16282> (last visited Apr. 1, 2012).

<sup>37</sup> *Federal Mediation and Conciliation Service*, PROGRAM ON NEGOTIATION AT HARVARD LAW SCHOOL (Feb. 24, 2010), <http://www.pon.harvard.edu/tag/fmcs/>. See *Arbitration Statistics*, FEDERAL MEDIATION & CONCILIATION SERVICE, <http://www.fmcs.gov/internet/itemList.asp?categoryID=196> (last visited Apr. 1, 2012).

## IV. NATIONAL FOOTBALL LEAGUE

*A. Formation of the Players' Association*

Football came to the United States from England in the 1870s and was originally played by college teams.<sup>38</sup> The first professional league, known as the American Professional Football Association, was founded in 1920.<sup>39</sup> It folded quickly, but in 1921 was reorganized into the National Football League (NFL).<sup>40</sup>

In 1954, Abe Gibron and Dante Lavelli, Cleveland Browns players, decided to start a union for football players and discussed the idea with the team's attorney, Creighton Miller.<sup>41</sup> They organized the National Football Players' Association (NFLPA), with Miller serving as legal counsel, during a meeting that took place prior to the NFL's national championship game in 1956.<sup>42</sup> Initially, team owners were upset by the formation of the union and refused to bargain.<sup>43</sup> In 1957, however, the United States Supreme Court ruled that the NFL was subject to antitrust laws, leading Miller to threaten owners with a \$4.2 million antitrust lawsuit that ultimately resulted in an agreement between the parties.<sup>44</sup> Two years later the NFL also agreed to give the players a pension plan.<sup>45</sup>

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<sup>38</sup> STAUDOHAR, *supra* note 23, at 60. Football originated in England in the 1840s as a derivative of rugby. *Id.* In 1876, the Intercollegiate Football Association was formed. *Id.* Over the years, this Association developed the modern rules of the game. *Id.*

<sup>39</sup> *Id.* at 61. The league consisted of twelve teams and was run by Jim Thorpe, a famous college football player. *Id.*

<sup>40</sup> *Id.* There were a few rival leagues that developed early on, but none of them lasted very long. *Id.* The American Football League was only in business in 1926 and 1936-1937. *Id.* The All-American Football League was founded in 1946. *Id.* When it folded in 1949 three of its teams (Cleveland, Baltimore, and Los Angeles) joined the NFL. *Id.*

<sup>41</sup> *Id.* at 67.

<sup>42</sup> *Id.*

<sup>43</sup> STAUDOHAR, *supra* note 23, at 68.

<sup>44</sup> *Id.* The deal included a minimum salary for players of \$5,000 per season, and \$50 for each exhibition game, along with a clause guaranteeing that if a player suffers an injury, he will still receive his salary and his medical bills will be paid. *Id.* See *Radovich v. National Football League*, 352 U.S. 445, 453-54 (1957).

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

In 1968, the NFL merged with the American Football League (AFL) and the owners tried to take advantage of the fact that two different player's associations were negotiating for players' rights.<sup>46</sup> In July, the players voted to go on strike at the same time that the owners decided to lock them out.<sup>47</sup> The deal they reached not only resulted in the first CBA, but also with the formal recognition of the NFLPA.<sup>48</sup> Two years later the NFLPA merged with the AFL's Players' Association and became the first union in professional sports to receive certification from the NLRB.<sup>49</sup>

### B. 1974 Strike

Edward R. Garvey took over as the NFLPA's executive director in 1971 and adopted a more aggressive negotiation

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<sup>46</sup> April Weiner, *1968 NFL Lockout and Strike*, BLEACHER REPORT (March 10, 2011), <http://bleacherreport.com/articles/631338-nfl-and-the-cba-ranking-the-worst-work-stoppages-in-pro-sports-history/page/5>. Both the NFL and the AFL had their own players' associations when the merger occurred. *Id.* This version of the AFL formed in 1960 and merged into the NFL in 1968. Rich Loup, *The AFL: A Football Legacy*, SPORTS ILLUSTRATED (Jan. 22, 2001, 2:56 PM), [http://sportsillustrated.cnn.com/football/news/2001/01/22/afl\\_history\\_1/](http://sportsillustrated.cnn.com/football/news/2001/01/22/afl_history_1/).

<sup>47</sup> Weiner, *supra* note 46.

<sup>48</sup> *Id.* The CBA included a minimum \$10,000 salary for returning players, a \$9,000 salary for rookies, and a pension fund. *Id.*

<sup>49</sup> Jarrett Bell, *Timeline of NFL Labor Disputes*, USA TODAY (March 12, 2011, 12:36 AM), [http://www.usatoday.com/sports/football/nfl/2011-03-03-nfl-labor-disputes-timeline\\_N.htm](http://www.usatoday.com/sports/football/nfl/2011-03-03-nfl-labor-disputes-timeline_N.htm). There was fear among AFL players that they would not have a voice after the merger. *History*, NFL PLAYERS ASSOCIATION, <https://www.nflplayers.com/About-us/History/> (last visited Jan. 13, 2012). Thus, discussions were tense with NFL players nominating Ed Meador of the Los Angeles Rams as the new president, while AFL players wanted to keep their current president, Jack Kemp. *Id.* The two sides finally agreed that John Mackey of the Baltimore Colts would serve as the new president. *Id.* AFL players consented on the condition that former AFL player Allan Miller be appointed general counsel. *Id.* When the newly merged group met with the owners, they felt that they were being treated unfairly during negotiations and decided to petition the NLRB for certification. *Id.* After certification, players felt that the NFL dominated contract negotiations, and thus, went on strike for two days before owners threatened to cancel the season. *Id.* They later reached a four-year agreement that increased the minimum salary, gave increased pension and insurance benefits to the players, allowed for impartial arbitration for injury grievances, and gave players representation on the Retirement Board. *Id.*

strategy.<sup>50</sup> With specific demands, the players went on strike on July 1st, proclaiming, “No Freedom, No Football.”<sup>51</sup> Believing that they would eventually win the dispute in court, owners did nothing to try to end the strike.<sup>52</sup> Eventually, the NFLPA gave up before any games had to be canceled and the players took the case to court and the NLRB.<sup>53</sup> The five-week strike ended with NFLPA members returning to training camp on August 10, 1974, with no gain in their bargaining position.<sup>54</sup> The dispute, however, lasted through the 1976 season.<sup>55</sup>

The NFLPA was victorious in 1977 when the court declared the NFL owners guilty of violating federal labor and antitrust laws.<sup>56</sup> The NLRB also issued a ruling holding that the owners violated fair labor practices when they traded players to other teams simply because those players had been the teams’ representative to the players’ association.<sup>57</sup> After winning these legal battles, the NFLPA

<sup>50</sup> STAUDOHAR, *supra* note 23, at 68.

<sup>51</sup> Bell, *supra* note 49. Demands included the elimination of the Rozelle Rule (limited free agency), the use of impartial arbitration for disputes, elimination of both the draft and the waiver system, and the creation of individual contracts for the protection of players. *History*, *supra* note 49.

<sup>52</sup> April Weiner, *1974 NFL Strike*, BLEACHER REPORT (March 10, 2011), <http://bleacherreport.com/articles/631338-nfl-and-the-cba-ranking-the-worst-work-stoppages-in-pro-sports-history/page/2>.

<sup>53</sup> *Id.* Players returned to work after non-union members were going after the positions of NFLPA members during training camp. Bell, *supra* note 49. The following year, membership dropped, with less than half of the league’s players paying union dues. *Id.*

<sup>54</sup> *NFL Labor History Since 1968*, ESPN (March 3, 2011), <http://m.espn.go.com/nfl/story?w=1bdwl&storyId=6178748&i=TOP&wjb>.

<sup>55</sup> *History*, *supra* note 49.

<sup>56</sup> *Id.* John Mackey of the Baltimore Colts challenged the Rozelle Rule in court. *Antitrust Labor Law Issues in Sports*, US LEGAL, <http://sportslaw.uslegal.com/antitrust-and-labor-law-issues-in-sports/> (last visited Jan. 13, 2012). The Rozelle Rule stated that if a player signed with a different team after his contract expired, the new team had to adequately compensate the player’s former team. *Id.* Using a test that would later be adopted by other courts, the Eighth Circuit held that the NFL was unreasonably restraining trade. *Id.* See *Mackey v. National Football League*, 534 F.2d 606, 623 (1976).

<sup>57</sup> Brian E. Lee, *A Survey of Professional Sport Player-Control Mechanisms Under Antitrust and Labor Principles: Peace at Last*, 11 VAL. U. L. REV. 373, 411-12 (1977). The NLRB found that NFL owners violated Section 8(a)(3) of the National Labor Relations Act, which states “that it is an unfair labor

was able to get some concessions from the NFL when the parties signed the new CBA in March of 1977.<sup>58</sup>

### C. 1982 Strike

At this time in league history there was very little movement among players for two main reasons: (1) the 1977 CBA's compensation system meant that a first round draft pick was too valuable to a team to trade away for current players, and (2) the fact that teams shared all revenues from television contracts and ticket sales almost equally meant that spending lots of money to sign a big name player would not lead to a large increase in team revenue.<sup>59</sup> These circumstances led to the players switching tactics in negotiations for the new CBA.<sup>60</sup> The NFLPA proposed that players receive fifty-five percent of league revenues to be divided based on individual performance.<sup>61</sup> The owners rejected this proposal.<sup>62</sup>

Negotiations were not progressing, so the NFLPA Board of Player Representatives voted to go on a strike, beginning on September 21st, after just two regular season games had been

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practice for an employer to 'discriminate in regard to hir[ing] or tenure of employment or [to] discourage membership in any labor organization.'" *Id.* See *NFL Management Council and NFLPA*, NLRB case No. 2-CA-13379 (June 30, 1976).

<sup>58</sup> *History*, *supra* note 49. The new agreement eliminated the Rozelle Rule. *Id.* In addition, the agreement substantially increased benefits and made many reforms to the waiver system. *Id.* It included impartial arbitration, as the NFLPA had pushed for, but only for grievances not related to injuries. *Id.*

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

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* The player's share of the revenue would be divided based on years in the NFL, amount of playing time each player received, their individual performance, and how well each team performed overall. *Id.* This meant that players received payment based on how well they actually did, not based on expectations of their performance, such as how high they were chosen in the draft. *Id.*

<sup>62</sup> *Id.* Owners argued that this would turn players into their business partners, which they opposed. *Id.* In addition, the U.S. Football League was starting up at the time and owners feared that players would choose to switch leagues if they could not match or exceed U.S. Football League offers through the traditional individual contract negotiations. *Id.*

played.<sup>63</sup> With the possibility of canceling the season becoming more real, a mediator from FMCS was brought in on the twenty-second day of the strike.<sup>64</sup> On November 16th, the strike ended very suddenly when parties reached a tentative deal.<sup>65</sup> The new CBA was signed on December 5th.<sup>66</sup>

#### D. 1987 Strike

When the 1982 CBA expired in August of 1987, players were still frustrated that the 1982 strike had resulted in few gains.<sup>67</sup> Many issues, most importantly free agency, had yet to be resolved between the NFL and the NFLPA.<sup>68</sup> In hopes that the 1987 CBA would be the first agreement since the founding of the NFLPA that did not

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<sup>63</sup> Bell, *supra* note 49. In response, owners barred players from being on team property for any reason, leading to a complete shutdown of the league and a standoff between the parties. *History*, *supra* note 49.

<sup>64</sup> Douglas Martin, *Sam Kagel, 98, Mediator of 1982 N.F.L. Strike, Is Dead*, NY TIMES (May 31, 2007), <http://www.nytimes.com/2007/05/31/sports/football/31kagel.html?fta=y>. FMCS appointed Sam Kagel to serve as mediator. *Id.* He was said to have lots of experience and that his several dramatic exits from negotiations gave him the upper hand and helped to bring the parties together. *Id.*

<sup>65</sup> Bell, *supra* note 49. The tentative agreement included \$60 million in benefits for the players, which basically covered salaries that players had lost as a result of the strike. *Id.* There were many players in the league who did not support the deal that the NFLPA made with the NFL. *History*, *supra* note 49. While a few teams returned to practice as soon as the deal was reached, the Detroit Lions, Chicago Bears, and New England Patriots refused to return until the signing of the CBA. *Id.*

<sup>66</sup> *Id.* The new CBA did not include the revenue sharing proposed by the players, but instead increased player benefits. *Id.* Players got severance pay for the first time. *Id.* In addition, the players received increases in benefits, such as greater injury protection, a higher minimum salary, higher pensions, and pay for pre-season games. *Id.*

<sup>67</sup> Paul D. Straudohar, *The Football Strike of 1987: The Question of Free Agency*, 111 MONTHLY LAB. REV. 26, 27 (Aug. 1988).

<sup>68</sup> April Weiner, *1987 NFL Strike*, BLEACHER REPORT (March 10, 2011), <http://bleacherreport.com/articles/631338-nfl-and-the-cba-ranking-the-worst-work-stoppages-in-pro-sports-history/page/10>. Owners had conceded to free agency after the 1982 strike, however, it was still very hard for players to move to a different team. *Id.* In fact, only one player had actually moved during the five-year period. *Id.*

involve a strike, negotiations began early in the summer.<sup>69</sup> However, as the season began, negotiations were getting nowhere and the NFLPA voted to strike on September 22nd.<sup>70</sup>

After cancelling one week of games, owners signed replacement players,<sup>71</sup> composed of second-rate players and eighty-nine veteran players.<sup>72</sup> In the twentieth day of the strike, the NFLPA proposed a deal to end the strike.<sup>73</sup> On October 15th, despite having their proposal rejected by the owners, players voted to end the strike without a CBA<sup>74</sup> and filed an anti-trust lawsuit against the NFL.<sup>75</sup> Typically, when a strike ends workers return to work immediately, however, owners banned the players from participating in the games occurring on October 18th and 19th.<sup>76</sup> As a result, the NFLPA contested the legality of this decision with the NLRB.<sup>77</sup> Additionally, during the strike the NFL filed a claim against the NFLPA, stating that the NFLPA had failed to bargain in good faith.<sup>78</sup>

In 1987, the NLRB found that the NFL had discriminated against players by not letting them play in the October 18th and 19th games.<sup>79</sup> The owners appealed to the full NLRB in Washington, but

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<sup>69</sup> Straudohar, *supra* note 67, at 28. Trying to keep negotiations private, meetings were moved from city to city and no press conferences were held. *Id.*

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

<sup>71</sup> *NFL Labor History Since 1968*, *supra* note 54.

<sup>72</sup> Bell, *supra* note 49. Replacement players participated in three regular season games, all of which counted toward the standings. *Id.* Veteran players who crossed the picket line to play in the replacement games included Joe Montana, Lawrence Taylor, and Mark Gastineau. *Id.*

<sup>73</sup> Straudohar, *supra* note 67, at 30. The proposed deal consisted of three parts: (1) reinstatement of all union players for the rest of the season, (2) leaving the 1982 CBA in place, and (3) six weeks of mediation for all current points of contention, followed by arbitration for any unsettled issues. *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* The owners had declared that the players were ineligible to participate in the October 18th and 19th games, stating that after that the players would be out of shape. *Id.* The owners had set October 14th as the last day of eligibility for those games, one day before the NFLPA voted to end the strike. *Id.*

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

<sup>78</sup> STRAUDOHAR, *supra* note 23, at 79-83.

<sup>79</sup> *Id.* The NFL was ordered to pay between \$21 million and \$25 million to the players who had been barred from playing in those games. Matt Yancey, *NLRB Orders Payments to Striking NFL Players*, ASSOCIATED PRESS (Dec. 11,



the decision was upheld in 1990.<sup>80</sup> It was not until 1994 that the NLRB resolved the matter by negotiating a \$30 million settlement.<sup>81</sup> The NLRB also dismissed the owner's claim against the players that they had failed to bargain in good faith.<sup>82</sup>

At the same time that the NLRB review was proceeding, the NFLPA went forward with its anti-trust lawsuit against the NFL. While the NFLPA initially won the anti-trust lawsuit in 1989,<sup>83</sup> the Eighth Circuit overturned the ruling in 1993.<sup>84</sup> As a strategic move, the NFLPA decertified to continue the litigation.<sup>85</sup> After losing two new anti-trust lawsuits, the owners decided it was time to settle with the players.<sup>86</sup> Then, after meeting almost daily for over a month, parties finally signed a new CBA in 1993 and the NFLPA

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1987, 9:42PM), <http://www.apnewsarchive.com/1987/NLRB-Orders-Payments-To-Striking-NFL-Players/id-6476d94e7cf491910d94c88d90041d7a>.

<sup>80</sup> *History*, *supra* note 49. See *Nat'l Football League*, 309 NLRB 78 (1992).

<sup>81</sup> *NFL Players are Awarded \$30 million for 1987 Lock-Out Season*, CBS (Oct. 3, 1994), [http://findarticles.com/p/articles/mi\\_m1355/is\\_n22\\_v86/ai\\_15801051/?tag=content;col1](http://findarticles.com/p/articles/mi_m1355/is_n22_v86/ai_15801051/?tag=content;col1). The agreement was part of a larger \$195 million settlement that included the anti-trust litigation. *Id.* See *Impact of NLRB on Professional Sports*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/75th/prosports.html> (last visited Nov. 12, 2011).

<sup>82</sup> STRAUDOHAR, *supra* note 23, at 82. See *In re National Football League*, NLRB case No. 2-CB-12117 (April 28, 1988).

<sup>83</sup> See *Powell v. N.F.L.*, 678 F. Supp. 777 (D. Minn. 1989). The judge initially declined to grant an injunction against the NFL, waiting for a ruling from the NLRB. STRAUDOHAR, *supra* note 23, at 82.

<sup>84</sup> *History*, *supra* note 49. See *Powell v. N.F.L.*, 930 F.2d 1293 (8th Cir. 1993). The Eighth Circuit held that the NFLPA did not have standing to bring an anti-trust lawsuit against the NFL as long as it was representing the players. *Id.* As a result, the NFLPA decertified and reorganized itself as a professional association with no power to engage in collective bargaining. *Id.* With the anti-trust lawsuits over, the NFLPA decided in January 1993 to gain permission from the players to certify as a union again. *Id.* By March, the majority of the players had approved the re-certification and the NLRB granted approval. *Id.*

<sup>85</sup> *History*, *supra* note 49.

<sup>86</sup> *Id.* In the agreement, owners agreed to allow free agency if there was a salary cap in place. *Id.* In this negotiation the players finally were able to get some concessions from the owners, who agreed that there would only be a salary cap if wages exceeded 67% of league revenues and that there would be no salary cap in 1999. *Id.*

recertified.<sup>87</sup>

### *E. 2011 Lockout*

The 1993 CBA was extended five different times until 2008, when the NFL exercised its option to opt out,<sup>88</sup> which meant that the CBA would only be in effect until the 2010 season.<sup>89</sup> The CBA expired in February 2011, and the NFL filed a charge with the NLRB that the NFLPA failed to bargain in good faith.<sup>90</sup> Later that week, the parties agreed to bring in a FMCS mediator.<sup>91</sup> On March 11th, after negotiations broke down and the parties were unable to reach a new

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<sup>87</sup> *Id.* Games had been played for five years without a CBA in place. *Id.*

<sup>88</sup> *NFL Labor History Since 1968*, *supra* note 54. In 1996 there was a two-year extension to the CBA. *Id.* The CBA was extended another two years in 1998 and again in 2000. *Id.* It was then extended by four years in 2002. *Id.* In 2006, the CBA was extended again and this time included an option to opt-out of the agreement in 2008. *Id.* The Buffalo Bills and Cincinnati Bengals were the only teams to vote against the extension. *Id.*

<sup>89</sup> John Clayton, *NFL Owners Vote Unanimously to Opt Out of Labor Deal*, ESPN (May 20, 2008, 10:10 PM), <http://sports.espn.go.com/nfl/news/story?id=3404596>. In 2006 the CBA was extended through 2012 with a clause allowing either party to opt out by November 2008. *Id.*

<sup>90</sup> *NFL, NFLPA Agree to Enter Mediation*, ESPN (Feb. 18, 2011, 10:39 AM), <http://sports.espn.go.com/nfl/news/story?id=6132690>. The complaint was filed on February 14, 2011 and claimed that the NFLPA's "conduct amounts to surface bargaining and an anticipatory refusal to bargain." *Id.* The NFL cited the NFLPA's potential of decertifying that it is unwilling to bargain in good faith. Bell, *supra* note 49. See Seth Borden, *NFL Files Unfair Labor Practices Charge Against NFLPA*, LABOR RELATIONS TODAY (Feb. 14, 2011, 11:12 PM), <http://www.laborrelationstoday.com/2011/02/articles/nlra/nfl-files-unfair-labor-practice-charge-against-nflpa/print.html>.

<sup>91</sup> *NFL, NFLPA Agree to Enter Mediation*, *supra* note 90. Formal negotiations did not begin until the day before the 2011 Super Bowl. *Id.* The biggest issue between the parties was how to divide the annual revenue of \$9 billion. *Id.* Under the 1993 CBA, the owners automatically received \$1 billion off the top and they wanted it to increase to \$2 billion. *Id.* Other issues included expanding the season by two games, rookie salaries, and retirement benefits. *Id.* The NFLPA was also seeking to have the deal that the NFL made with television networks for \$4 billion, regardless of whether any games were played in 2011, to be made public. *Id.* On March 1, District Court Judge Doty ruled that the NFL would not have access to this \$4 billion that the NFLPA characterized as "lockout insurance." Bell, *supra* note 49.

CBA, the NFLPA applied to the NLRB to decertify as the bargaining agent for the players.<sup>92</sup> Less than two hours later, ten players filed an anti-trust lawsuit against the NFL.<sup>93</sup> The lawsuit, filed in Minnesota, was seeking to prevent a lockout.<sup>94</sup> Seven hours after the NFLPA decertified, the owners locked out the players.<sup>95</sup>

The NFL urged the court not to rule on the lawsuit until the NLRB resolved its case.<sup>96</sup> Despite this, a Minnesota district court judge granted the players' motion for a preliminary injunction on April 25th.<sup>97</sup> On July 8th, however, the Eighth Circuit overturned the

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<sup>92</sup> Bell, *supra* note 49. The decertification of the union meant that the NFLPA became a trade association. Jarrett Bell, *Union or Not, NFLPA Still Could Face Sanction from NLRB*, USA TODAY (Mar. 16, 2011, 12:37 PM), <http://www.usatoday.com/sports/football/nfl/2011-03-15-nflpa-nlr-N.htm>. As a result of this move, the NFL amended its complaint that it had filed with the NLRB. *Id.* The amended complaint alleges that the NFLPA used decertification unfairly as a negotiation strategy. *Id.* Another issue in the NLRB proceedings is that the previous CBA had language that the NFL would not raise the issue of sham decertification in future labor disputes. Judy Battista, *A Second Front to Open in the Labor Battle*, NY TIMES (Mar. 20, 2011), [http://www.nytimes.com/2011/03/21/sports/football/21union.html?\\_r=1&pagewanted=print](http://www.nytimes.com/2011/03/21/sports/football/21union.html?_r=1&pagewanted=print). The NFL claims that this agreement only pertained to anti-trust litigation. *Id.*

<sup>93</sup> *Ten Players Named as Plaintiffs in Antitrust Lawsuit v. NFL*, NFL (Mar. 11, 2011, 6:44 PM), <http://www.nfl.com/news/story/09000d5d81eb9269/article/ten-players-named-as-plaintiffs-in-antitrust-lawsuit-vs-nfl>. Plaintiffs included Tom Brady of the New England Patriots, Drew Brees of the New Orleans Saints, and Peyton Manning of the Indianapolis Colts. *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Bell, *supra* note 49.

<sup>96</sup> Mark Maske, *NFL Urges Judge to Wait for Resolution of NLRB Case*, WASHINGTON POST (Mar. 21, 2011), [http://www.washingtonpost.com/sports/nfl-urges-judge-to-wait-for-resolution-of-nlr-b-case/2011/03/21/ABnLv88\\_print.html](http://www.washingtonpost.com/sports/nfl-urges-judge-to-wait-for-resolution-of-nlr-b-case/2011/03/21/ABnLv88_print.html). Meanwhile, the NFL stated that it did not believe that the union decertification was valid, and they were only willing to resume negotiations with the union. *Id.*

<sup>97</sup> Dionne Cordell-Whitney, *Judge Blows the Whistle on NFL Lockout, Won't Wait for NLRB*, COURTHOUSE NEWS SERVICE (Apr. 25, 2011, 9:39 AM), <http://www.courthousenews.com/2011/04/25/36079.htm>. Owners argued that this was a labor dispute and thus should be handled by the NLRB. *Id.* The judge rejected this argument saying that a lockout would cause irreparable harm to players with very short careers and that the millions of fans were against the lockout. *Id.* See *Brady v. NFL*, 779 F. Supp. 2d 992 (D. Minn. 2011). The owners planned on appealing the ruling to the Eighth Circuit, which is known for being

District Court's ruling and voted to let the lockout continue.<sup>98</sup> During litigation, negotiations had continued between the owners and players,<sup>99</sup> and a deal was reached on July 25th for a new ten-year CBA, ending the lockout.<sup>100</sup> Within days, the players voted to recertify as a union.<sup>101</sup> As a result of the agreement, the NLRB claim was dropped.<sup>102</sup>

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very pro-employer. Sean Jensen, *Former NLRB Chair Says St. Louis Appeals Court Could Favor NFL*, SUN TIMES (Apr. 25, 2011, 7:34 PM), [http://blogs.suntimes.com/bears/2011/04/former\\_nlr\\_b\\_chair\\_says\\_st\\_loui.html](http://blogs.suntimes.com/bears/2011/04/former_nlr_b_chair_says_st_loui.html).

<sup>98</sup> Matt Brooks, *NFL Lockout: 8<sup>th</sup> Circuit Court Rules 2-1 to Allow Lockout to Continue*, WASHINGTON POST (July 8, 2011, 10:50 AM), [http://www.washingtonpost.com/blogs/early-lead/post/nfl-lockout-8th-circuit-court-rules-2-1-to-allow-lockout-to-continue/2011/07/08/gIQARgJa3H\\_blog.html](http://www.washingtonpost.com/blogs/early-lead/post/nfl-lockout-8th-circuit-court-rules-2-1-to-allow-lockout-to-continue/2011/07/08/gIQARgJa3H_blog.html). See *Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011).

<sup>99</sup> Brooks, *supra* note 98.

<sup>100</sup> Adam Schefter, *Sources: Deal to End Lockout Reached*, ESPN (July 25, 2011, 12:14 AM), [http://espn.go.com/nfl/story/\\_id/6797238/2011-nfl-lockout-owners-players-come-deal-all-points-sources-say](http://espn.go.com/nfl/story/_id/6797238/2011-nfl-lockout-owners-players-come-deal-all-points-sources-say).

<sup>101</sup> *NFLPA Recertified as Union*, ESPN (July 30, 2011, 10:55 PM), [http://espn.go.com/nfl/story/\\_id/6818756/report-nfl-players-union-recertified-final-negotiations-nfl](http://espn.go.com/nfl/story/_id/6818756/report-nfl-players-union-recertified-final-negotiations-nfl).

<sup>102</sup> Interview with Roger Cossack, Professor of Law, Pepperdine University (Feb. 1, 2012). On June 6, the NLRB had finished its investigation and forwarded the charges to the national board for a review, but no decision had been released before the CBA was agreed upon. Liz Mullen, *NLRB Regional Office Sends NFL's Charges Against NFLPA to National Board for Review*, SPORTS BUSINESS DAILY (June 6, 2011), <http://www.sportsbusinessdaily.com/Journal/Issues/2011/06/06/Labor-and-Agents?NLRB.aspx>. The NFL's claim that the union's decertification was in bad faith is an area of unsettled law. *Id.* On September 25, Cedric Benson of the Cincinnati Bengals filed a separate claim with the NLRB over the agreement made on August 4 that allowed the NFL to discipline eight players for conduct during the lockout. *Cedric Benson files vs. NFLPA*, ESPN (Sept. 25, 2011), <http://espn.go.com/espn/print?id=7018584&type=HeadlineNews&imagesPrint=off>. As part of the agreement, twenty-five other players were made exempt from discipline. *Id.* A hearing was held on October 11. Mike Florio, *Benson Will Meet With NLRB Today*, NBC SPORTS (Oct. 11, 2011, 8:03 AM), <http://profootballtalk.nbcsports.com/2011/10/11/bensons-will-meetwith-nlr-b-today/>. A decision has yet to be reached.

### F. Overall Trends

Every time that a new labor deal has had to be negotiated since the formation of the NFLPA, there has been a lockout or strike, even before the first CBA was signed in 1968. Out of the four different times that a CBA has expired and a new one negotiated, only one dispute ended within a relatively short period of time and without both a lawsuit and claims filed with the NLRB.<sup>103</sup> In two instances, play eventually continued without a CBA in place as it took years to resolve the litigation and come to a new agreement.<sup>104</sup>

The fact that the NLRB has yet to rule on whether the union may decertify in order to bring an anti-trust lawsuit means that this will probably continue to be used as a negotiation tactic, giving the players more power and making them less likely to bargain. The effects of a ruling would have been widespread, not only in other sports,<sup>105</sup> but with all unions nationwide. As the NFLPA has used this as a successful tool in winning concessions from the owners, and the NLRB has not ruled on the issue, it will most likely be used again in future CBA negotiations. For now at least, fans can rest a little easier knowing that a ten-year deal was reached in late 2011.

## V. NATIONAL BASKETBALL ASSOCIATION

### A. Formation of the Players' Association

Basketball was created in Springfield, Massachusetts in 1891 by Dr. James Naismith.<sup>106</sup> Professional basketball began with the formation of the National Basketball League in 1898.<sup>107</sup> After the

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<sup>103</sup> The 1982 strike ended in just twenty-two days after successful mediation led by the FMCS. All of the other strikes and lockouts have lasted much longer and have resulted in both anti-trust-lawsuits and claims by both parties filed with the NLRB.

<sup>104</sup> The 1974 strike did not see a new CBA until 1977. The 1987 strike did not result in a new CBA until 1993.

<sup>105</sup> The National Basketball Player's Association (NBPA) was waiting for a ruling on the NFLPA's decertification before it took any steps toward decertifying as part of the 2011 NBA lockout. See Berger, *infra* note 152.

<sup>106</sup> STAUDOHAR, *supra* note 23, at 99. Dr. Naismith was working as an instructor at a YMCA at the time that he came up with the game. *Id.*

<sup>107</sup> *Id.* at 100.

league folded in 1903, several other attempts to start professional leagues were made.<sup>108</sup> In 1949, the merger of the National Basketball League and the Basketball Association of America created the National Basketball Association (NBA).<sup>109</sup>

Boston Celtics guard Bob Cousy created the National Basketball Associations' Players' Association (NBPA) as an attempt to improve working conditions in 1954.<sup>110</sup> The owners did not formally recognize the NBPA until 1957, when the union was invited to negotiations in which a minimum salary standard was reached.<sup>111</sup> The NBPA then made significant strides forward in 1960s, when it won several concessions after a few threatened strikes.<sup>112</sup> The NBA and NBPA signed a CBA in 1983 that included the first league-wide salary cap.<sup>113</sup> In 1987, the players filed an anti-trust lawsuit against the NBA and threatened to decertify until the parties finally came to an agreement.<sup>114</sup> By 1991 the NBPA found out that the owners had been under-reporting income, thus leading to the players earning less money under the salary cap agreement.<sup>115</sup> This led to a legal battle that ended with an increase in player salaries and pensions, but laid

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* The National Basketball League was founded in 1937. *Id.* The Basketball Association of America was founded in 1946. *Id.* The NBA had seventeen teams in its first season. *Id.* at 104.

<sup>110</sup> *NBA Lockout*, ESPN (Jan. 3, 2012, 12:29 PM), [http://espn.go.com/nba/topics/\\_/page/nba-labor-negotiations](http://espn.go.com/nba/topics/_/page/nba-labor-negotiations) (found by clicking the "History" hyperlink under the photo). Cousy wanted a minimum salary for players and retirement and health benefits, among other things. *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* Minutes before the 1964 All-Star Game was scheduled to start, the owners averted a strike and agreed to create a pension plan for the players. *Id.* Three years later, players threatened a playoff strike and in return won a limit of eighty-two games per season, increased minimum salaries, medical benefits, and an elimination of exhibition games during the All-Star break. *Id.* The founding of the American Basketball Association (ABA) caused conflict between the owners and the players. *Id.* After a lawsuit was dropped, a CBA was signed that dropped the "options clause" which bound players to a particular team. *Id.*

<sup>113</sup> *Id.* The salary cap guaranteed players between fifty-three and fifty-seven percent of the league's gross revenue. *Id.*

<sup>114</sup> *Id.* The new agreement extended the salary cap, added more players to the league's pension plan, and shortened the length of the draft. *Id.* See *Wood v. NBA*, 809 F.2d 954 (2nd Cir. 1987).

<sup>115</sup> *NBA Lockout*, *supra* note 110.

the foundation for problems when the CBA expired.<sup>116</sup>

### B. 1995 Lockout

The CBA expired at the end of the 1993-1994 season, but was extended for another year.<sup>117</sup> Following the end of the season in 1995, the NBA and NBPA quickly reached a new agreement.<sup>118</sup> Despite this, several players were unhappy with the agreement and launched a successful campaign among all the players to reject it.<sup>119</sup> As part of this campaign, seventeen players filed a petition with the NLRB to decertify the union as the players' bargaining unit and filed suit.<sup>120</sup> After the players' actions, the owners locked them out on July 1st.<sup>121</sup> A decertification vote by the players, held by the NLRB, ultimately failed and the NBPA remained the exclusive bargaining unit for the players.<sup>122</sup> Negotiations continued and, on August 8<sup>th</sup>, a new agreement was reached.<sup>123</sup> On September 12<sup>th</sup>, the players voted to accept the new CBA, ending the lockout.<sup>124</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* The agreement included a luxury tax on bigger player contracts, which big names like Michael Jordan and Patrick Ewing were unhappy with. *Id.*

<sup>120</sup> YASSER, *supra* note 25, at 406-07. The players claimed that more than fifty percent of the players supported the decertification. *Id.*

<sup>121</sup> *NBA Lockout Chronology*, SPORTS ILLUSTRATED (Jan. 6, 1999, 12:20 PM), [http://sportsillustrated.cnn.com/basketball/nba/news/1999/01/05/lockout\\_chronology/](http://sportsillustrated.cnn.com/basketball/nba/news/1999/01/05/lockout_chronology/).

<sup>122</sup> YASSER, *supra* note 25, at 407. The vote failed 226-134. *Id.* See Wendy E. Lane, *NLRB Official Will Make Ruling on NBA Decertification Election*, DESERT NEWS (July 6, 1995, 12:00 AM), <http://www.deseretnews.com/article/426324/NLRB-OFFICIAL-WILL-MAKE-RULING-ON-NBA-DECERTIFICATION-ELECTION.html>.

<sup>123</sup> *NBA Lockout Chronology*, *supra* note 121. The new agreement did not include a luxury tax, the issue that caused the players to reject the original agreement. *Id.*

<sup>124</sup> *Id.* Due to the fact that the lockout occurred during the offseason, no games had to be cancelled. April Weiner, *1995 NBA Lockout*, BLEACHER REPORT (March 10, 2011), <http://bleacherreport.com/articles/631338-nfl-and-the-cba-ranking-the-worst-work-stoppages-in-pro-sports-history/page/4>.

*C. 1996 Lockout*

While a CBA was signed in September 1995, there were still many details that the parties had to work out.<sup>125</sup> On February 28, 1996, the NBPA declared that it was not bound to the terms of the agreement.<sup>126</sup> In response, the owners filed a claim of unfair labor practices with the NLRB and filed a suit in federal district court.<sup>127</sup> By late June, the parties were close to coming to a new agreement.<sup>128</sup> Despite this, due to a dispute over revenues from television contracts, the owners locked out the players on July 11th.<sup>129</sup> Just a few hours later the NBA and the NBPA reached an agreement and the lockout ended.<sup>130</sup> As a result, the lawsuit and NLRB charges were dropped.<sup>131</sup>

*D. 1998-1999 Lockout*

By March of 1998, the owners voted to reopen the CBA at the end of the season.<sup>132</sup> Only nine negotiation sessions were held between March and June, and quickly ended when the players rejected the owners' proposal.<sup>133</sup> On June 30th, the owners

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<sup>125</sup> YASSER, *supra* note 25, at 407.

<sup>126</sup> *Id.*

<sup>127</sup> AARON N. WISE & BRUCE S. MEYER, INTERNATIONAL SPORTS LAW AND BUSINESS, VOLUME 1 102 n.1b (1997), available at <http://books.google.com/books?id=TnkuSogCVyIC&pg=PA102&lpg=PA102&dq=nrlb+1996+nba&source=bl&ots=Mv7dViO5j6&sig=VoR05M3HATWx5DYvcYoH9qxpVoA&hl=en&sa=X&ei=l9YuT-ntPOqriQKu3oCoCg&ved=0CCgQ6AEwATgU#v=onepage&q=nrlb%201996%20nba&f=false>.

<sup>128</sup> *Id.* at 102.

<sup>129</sup> *Id.* at 102-03. The dispute was over how to split the \$50 million in profits from a \$750 million contract with network television. *Id.*

<sup>130</sup> *A Look Back at Professional Sports Labor Disputes*, AMOG (June 9, 2011), <http://amog.com/sports/101341-professional-sports-disputes/>.

<sup>131</sup> WISE & MEYER, *supra* note 127, at 103 n.1b.

<sup>132</sup> *NBA Lockout Chronology*, *supra* note 121. On March 23, 1998 the owners votes 27-2 to reopen the CBA at the end of the 1997-1998 season. *Id.*

<sup>133</sup> *Id.* The last of the meetings lasted only thirty minutes before players walked out. *Id.* The owner's proposal included many new terms, most important of which was a hard salary cap. *Id.* A "hard salary" cap is one in which the cap is



announced that they would impose a lockout the following day, leading the NBPA to file a grievance with a private arbitrator seeking payment of player contracts during the lockout.<sup>134</sup> The lockout began, as scheduled, on July 1st.<sup>135</sup>

Before any negotiations were held, the NBPA filed a claim with the NLRB that “the NBA improperly imposed a lockout without having bargained to an impasse as required under the National Labor Relations Act.”<sup>136</sup> Negotiations resumed on August 6th,<sup>137</sup> and just a week later the NBPA dropped its complaint with the NLRB.<sup>138</sup> After months of no agreement, the pre-season and the beginning of the regular season were cancelled.<sup>139</sup> On October 20th, the arbitrator ruled that the NBA would not have to pay any guaranteed player contracts during the lockout.<sup>140</sup> This ruling did little in improving the

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not to be exceeded for any reason. Matt Witting, *Salary Caps 101 (Part II)*, WASHINGTON HOCKEY.COM (Feb. 10, 2003), <http://www.washingtonhockey.com/200203/features/sc2.htm>. This is opposed to a “soft cap” in which there are certain exceptions that allow a team to go over the salary cap. *Id.*

<sup>134</sup> *NBA Lockout Chronology*, *supra* note 121. The mediator, John Feerick, was serving as Dean of Fordham Law School and was the mediator for several labor disputes, including the 1994 New York City transit negotiations and the NFL salary cap. John D. Feerick, AMERICAN COLLEGE OF CIVIL TRIAL MEDIATORS, <http://www.acctm.org/jfeerick/> (last visited Feb. 7, 2012).

<sup>135</sup> *NBA Lockout Chronology*, *supra* note 121.

<sup>136</sup> *Players Go To NLRB In An Attack on NBA*, PHILLY.COM (July 24, 1998), [http://articles.philly.com/1998-07-24/sports/25735363\\_1\\_promoters-nlrb-s-new-york-injunction](http://articles.philly.com/1998-07-24/sports/25735363_1_promoters-nlrb-s-new-york-injunction). If the NLRB finds that the NBA did violate the NLRA, they can ask a federal judge to issue an injunction and restore the terms of the old CBA. *Id.* The claim was filed on July 24 and negotiations did not resume until August 6. *NBA Lockout Chronology*, *supra* note 121.

<sup>137</sup> *NBA Lockout Chronology*, *supra* note 121.

<sup>138</sup> *NBA Players Drop NLRB Complaint*, SAN FRANCISCO CHRONICLE (August 13, 1998), <http://www.sfgate.com/cgi-bin/article.cgi?f=/e/a/1998/08/13/SPORTS13990.dtl>. The decision to drop the case happened hours before the NLRB’s recommendation was to be made. *Id.*

<sup>139</sup> *NBA Lockout Chronology*, *supra* note 121. On September 24, the NBA cancelled twenty-four pre-season games and announced that they were postponing training camps. *Id.* By October 5, the rest of the pre-season games had been cancelled. Three days later, on October 8, the first two weeks of the regular season were cancelled. *Id.*

<sup>140</sup> *NBA Lockout*, *supra* note 110.

success of the ongoing negotiations.<sup>141</sup> But, after a secret all night negotiation session, the NBA and NBPA announced that they had reached an agreement to end the lockout on January 6, 1999, just one day before the entire season was to be cancelled.<sup>142</sup>

### *E. 2011 Lockout*

The 1999 CBA was modified in 2005, becoming the first CBA negotiation since 1991 that did not result in a lockout.<sup>143</sup> Citing financial hardships, owners wanted major changes to the next CBA, thus, negotiations began two years before the 2005 CBA was set to expire.<sup>144</sup> Despite the early start, little progress was made.<sup>145</sup> In late May of 2011, the players filed a claim with the NLRB seeking an

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<sup>141</sup> *Id.* On December 4, David Stern, the league's commissioner, said that he expected that the entire season would be cancelled. *Id.* The NBA made its final proposal on December 27. *Id.* Just one week later the players made their final proposal. *Id.*

<sup>142</sup> *Id.* The season was shortened from eighty-two games to just fifty games. April Weiner, *1998 NBA Lockout*, BLEACHER REPORT (March 10, 2011), <http://bleacherreport.com/articles/631338-nfl-and-the-cba-ranking-the-worst-work-stoppages-in-pro-sports-history/page/16>. As part of the compromise, a rookie salary was introduced and a salary cap of \$9-14 million was introduced. *Id.*

<sup>143</sup> *NBA Lockout*, *supra* note 110. The new agreement reduced the maximum length and value of player contracts in return for the players getting a larger percentage of revenues. *Id.* It also implemented a minimum age for players entering the draft, which took effect with the 2006 draft. *Id.*

<sup>144</sup> *Id.* The league claimed that many of the teams were losing money, creating a need for major changes. *Id.* These changes that the owners were calling for included a hard salary cap and the elimination of exceptions to the NBA's salary structure. *Id.* Players argued that the league was making record profits from TV contracts and ticket sales, and said that the problem would be best taken care of through a better system of revenue sharing instead of changes to the CBA. *Id.* The owners were looking for a ten-year agreement. *Id.* Players wanted a shorter agreement, and to retain their share in of the league's basketball related income (BRI). *Id.* Under the 2005 CBA, players received 57% of BRI, which was a total of \$2.176 billion during the 2010-2011 season alone. Jeff Zillgitt, *NBA Players President Getting Pressure on Both Sides*, USA TODAY (Oct. 4, 2011), <http://www.usatoday.com/sports/basketball/nba/story/2011-10-04?NBA-players-president-pressured-on-both-sides/50655966/1>. The NBA claims that twenty-two of the thirty teams were projected to have lost money during the 2010-2011 season. *Id.*

<sup>145</sup> *NBA Lockout*, *supra* note 110.

immediate investigation and an injunction against the threatened lockout, claiming that the owners were not bargaining in good faith.<sup>146</sup> The CBA expired on June 30th and the lockout began on July 1st.<sup>147</sup>

On August 2nd, the NBA filed claims against the NBPA, one in federal court and one with the NLRB, claiming that the union was not bargaining in good faith.<sup>148</sup> Negotiations resumed in early September, but as no progress was made, training camps and the pre-season was cancelled.<sup>149</sup> In October, with the beginning of the regular season cancelled, a mediator from the FMCS was brought in to help with negotiations.<sup>150</sup> Although negotiations were making progress,<sup>151</sup> the players rejected the owners' offer and, after much anticipation, voted to decertify the union on November 14th.<sup>152</sup>

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<sup>146</sup> *NBA Players File Claim with NLRB About 'Unfair' League Negotiating*, LOS ANGELES TIMES (May 24, 2011), [http://latimesblogs.latimes.com/sports\\_blog/2011/05/nba-players-file-claim-to-nlr-about-unfair-league-negotiating.html](http://latimesblogs.latimes.com/sports_blog/2011/05/nba-players-file-claim-to-nlr-about-unfair-league-negotiating.html). The players claimed that the league was making demands in a "take it or leave it" bargaining style instead of balancing and trade-offs. *Id.* The players also claimed that the league was going around the NBPA and trying to deal directly with the players. *Id.*

<sup>147</sup> Barry Stavro, *NBA Lockout Timeline*, L.A. TIMES (Nov. 26, 2011), <http://articles.latimes.com/2011/nov/26/sports/la-sp-nba-lockout-timeline-20111127>.

<sup>148</sup> Charlie Zegers, *NBA Sues NBPA*, ABOUT.COM (August 2, 2011), <http://baksetball.about.com/od/nba-vs-nbapa/a/Nba-Sues-Nbpa.htm?p=1>. In addition, the lawsuit was seeking: (1) the court's certification that the lockout was legal, (2) to take away decertification as an option for the NBPA, and (3) to assert the right to nullify all player contracts if a decertification did occur. *Id.*

<sup>149</sup> *NBA Lockout*, *supra* note 110.

<sup>150</sup> *Owners, Union to Meet with Mediator*, ESPN (Oct. 13, 2011), [http://espn.go.com/nba/story/\\_/id/7093566/nba-labor-owners-players-meet-federal-mediator-week](http://espn.go.com/nba/story/_/id/7093566/nba-labor-owners-players-meet-federal-mediator-week). George Cohen, the director of the FMCS, was brought in as the mediator. *Id.* He had previously worked with Major League Baseball in 1994 and 1995. *Id.*

<sup>151</sup> *NBA Lockout*, *supra* note 110. By the end of October the players wanted 52% of basketball related income (BRI), while the owners were only willing to give them 50%. *Id.*

<sup>152</sup> *Id.* As the NBA lockout was following on the heels of the NFL lockout, the NBPA was looking to see what would come of the NFLPA decertification before deciding whether the NBPA should also decertify. See Ken Berger, *NBPA Looks to Learn From NFLPA's Decertification Tactics*, CBS SPORTS (March 29, 2011), <http://www.cbssports.com/nba/story/14875021/postups->

Before any claims were decided,<sup>153</sup> the two sides came to a tentative agreement on November 26th.<sup>154</sup> The final details were hammered out and the new CBA was signed on December 8th.<sup>155</sup> A shortened season began on Christmas Day 2011.<sup>156</sup>

### F. Overall Trends

During the early 1990s, labor relations between the NBA and the NBPA reached a boiling point that led to four lockouts in less than twenty years, two of which led to the cancellation of the beginning of the regular season.<sup>157</sup> These four lockouts resulted from just five different CBA negotiations.<sup>158</sup> Prior to the first NBA lockout in 1995, several lockouts and strikes had been threatened during CBA negotiations.<sup>159</sup> None of the threats came to fruition until 1995 when the players learned that the owners had been untruthful about the amount of revenue that the NBA was bringing

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nbpa-looks-to-learn-from-nflpas-decertification-tactics. There was also a question of whether the NLRB was going to block the decertification of the NLRB. See *NLRB Could Block NBPA Decertification*, CBS SPORTS (October 17, 2011), <http://www.cbssports.com/mcc/blogs/entry/22748484/32788654>. The move to decertify gave the NBPA standing to bring an anti-trust claim against the NBA. *Union Decertification Could Mean No 2011-2012 Season*, L.A. TIMES (November 4, 2011), [http://latimesblogs.latimes.com/sports\\_blog/2011/11/nba-lockout.html](http://latimesblogs.latimes.com/sports_blog/2011/11/nba-lockout.html).

<sup>153</sup> The cases in federal court had yet to occur, and the NLRB had investigated the claims against the NBA and NBPA, but had not announced any decision yet. *NBA Lockout*, *supra* note 110. See *NLRB Reviewing Conduct of Owners*, KJCT8, <http://www.kjct8.com/print/28520046/detail.html>.

<sup>154</sup> *NBA Lockout*, *supra* note 110.

<sup>155</sup> *Id.* The new CBA is a ten-year agreement that lowers players' salaries by \$300 million per season. Howard Beck, *NBA Reaches a Tentative Deal to Save the Season*, N.Y. TIMES (Nov. 26, 2011), <http://www.nytimes.com/2011/11/27/sports/basketball/nba-and-basketball-players-reach-deal-to-end-lockout.html?pagewanted=all>. It also included a fifty-fifty split between the players and owners for basketball related income (BRI). *Id.*

<sup>156</sup> Beck, *supra* note 155.

<sup>157</sup> Both the 1998–1999 lockout and the 2011 lockout included the cancellation of the beginning of the regular season.

<sup>158</sup> CBA negotiations were held in 1995, 1996, 1998, 2005, and 2011. 2005 was the only year that these negotiations did not end in a lockout.

<sup>159</sup> See *NBA Lockout*, *supra* note 110.

in.<sup>160</sup> The next three lockouts were all over the issues of revenue sharing, from both ticket sales and television contracts, and salary caps.<sup>161</sup>

The FMCS only mediated one of the four lockouts.<sup>162</sup> The NLRB was a part of all four of the lockouts. During the 1995 lockout, the NLRB performed one of its major functions when it held elections among the players to decide whether to decertify their union.<sup>163</sup> In the 1996, 1998–1999, and 2011 lockouts, claims were filed by both the NBA and the NBPA that the other side was not bargaining in good faith. Due, however, to the fact that the claims were either dropped by the party or deemed moot when a new CBA was reached, the NLRB has not reached a ruling on any of the NBA or NBPA's claims.

For now, while fans frustrated from the loss of part of the 2011–2012 season can enjoy watching their favorite stars, they should be wary that the NBA's CBAs have often ended earlier than their expiration date. As players' percentage of revenues dropped from 57% to just 50%, we could potentially have another NBA labor dispute in the near future.<sup>164</sup>

## VI. NATIONAL HOCKEY LEAGUE

### *A. Formation of the Players' Association*

The National Hockey League (NHL) was formed in 1917 after the collapse of the National Hockey Association.<sup>165</sup> NHL players made several attempts in the 1950s to get a players' union started, but these attempts failed.<sup>166</sup> In 1957, angered that they were

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<sup>160</sup> *Id.*

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

<sup>162</sup> An FMCS mediator was brought in during the 2011 lockout. A private arbitrator was used during the 1998–1999 lockout.

<sup>163</sup> See Lane, *supra* note 122.

<sup>164</sup> See Beck, *supra* note 155.

<sup>165</sup> STAUDOHAR, *supra* note 24, at 202. The original four teams in the NHL were the Montreal Canadiens, the Montreal Wanderers, the Toronto Arenas, and the Ottawa Senators. *Id.* at 203.

<sup>166</sup> *Id.* at 206. During this era, team owners ran their teams with an iron fist and any attempts to organize a union meant that a player was traded to another

not to receive any money from a contract to televise the games, the players formed the NHL Players' Association (NHLPA).<sup>167</sup>

The NHLPA hired J. Normal Lewis to represent it during dealings with the team owners.<sup>168</sup> Lewis had successfully represented the professional baseball players' association and secured for them a share of television revenues for their pension fund.<sup>169</sup> When the team owners took action against the NHLPA, the Association filed an antitrust lawsuit for \$3 million.<sup>170</sup> A settlement was reached in which the owners increased the amount of money they contributed to the players' pensions, regardless of future television revenues.<sup>171</sup> Despite this success, the NHLPA was unable to effectively represent the players against the owners until a decade later.<sup>172</sup>

When the NHL increased the number of teams in the league in 1967, not only did the membership of the NHLPA increase, but the NHLPA was also able to use this change as leverage to improve its bargaining position.<sup>173</sup> In June of that year the team owners formally acknowledged the NHLPA and recognized it as the representative of the players.<sup>174</sup>

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team or sent down to the minor leagues as punishment. BRUCE DOWBIGGIN, *MONEY PLAYERS: THE AMAZING RISE AND FALL OF BOB GOODENOW AND THE NHL PLAYERS ASSOCIATION* 42–49 (2006).

<sup>167</sup> STAUDOHAR, *supra* note 24, at 206. In 1956, CBS broadcast ten NHL games on television to high ratings. *Id.* The following year, CBS expanded the contract to twenty-one games. *Id.* Under the arrangement at the time, the team owners were to receive all of the revenue from this deal and that players were to receive nothing. *Id.*

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

<sup>169</sup> *Id.* Part of the television revenues from the World Series and the All-Star game were distributed to the players' pension fund. *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 206–07.

<sup>172</sup> STAUDOHAR, *supra* note 24, at 207.

<sup>173</sup> *Id.* By this time, Toronto lawyer Alan Eagleson had been named executive director of the NHLPA, and was able to convince a large number of players to join the NHLPA. *Id.*

<sup>174</sup> *Id.*

### B. 1992 Strike

Prior to 1991, the NHL wielded great power over the players and the NHLPA made no effort to fight back.<sup>175</sup> Then, in 1992, Bob Goodenow took over as president of the NHLPA.<sup>176</sup> He took an “eleventh-hour” strategy in the 1991 CBA negotiations and encouraged players to save money from each of their paychecks to prepare for a strike a year later.<sup>177</sup> In the summer of 1991, Goodenow notified the NHL that the NHLPA was giving 120 days notice of termination for the current CBA.<sup>178</sup> Both sides agreed to start the 1991-1992 season without a CBA and negotiate during the season, but as the Stanley Cup playoffs approached they could not reach a deal.<sup>179</sup> On April 1st, the players overwhelmingly voted to go

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<sup>175</sup> DOWBIGGIN, *supra* note 166, at 93–100. Players were unaware of the salaries of other players, so they had nothing to base their salary negotiations on. *Id.* Each player made this own individual deal with his General Manager up until this point, resulting in much lower salaries for the players. *Id.* at 94–95. At the same time, the team owners were enjoying great freedom to run the league without opposition from the NHLPA. *Id.* at 97. When the NHLPA would ask for a clarification of the CBA, it would send a letter to the NHL’s legal counsel, who would get an answer from the NHL ensuring that all disputes were decided in favor of the owners. *Id.* Eagleson and the NHLPA never challenged this practice. *Id.*

<sup>176</sup> *Id.* at 117. As news of Eagleson’s corrupt practices began to surface, Goodenow became increasingly popular with the players. *Id.* at 118. However, his reputation was not as good with everyone else in the league. *Id.* Harry Sinden, General Manager of the Boston Bruins, has said that he felt that Goodenow was not concerned with what would be best for hockey overall. *Id.*

<sup>177</sup> *Id.* at 124–25. The “eleventh-hour” bargaining that Goodenow engaged in consisted of issuing threats and promises through the media for months and dropping all of them the last day before the CBA needed to be signed and engage in negotiations. *Id.* at 124. Goodenow once said that 98% of negotiations for the new CBA happen in the day before the old CBA is set to expire. *Id.* at 123.

<sup>178</sup> *Id.* at 128.

<sup>179</sup> *Id.* at 130–31. The players wanted higher salaries for playoff games, trading card revenue, increased free agency, a neutral arbitrator to made decisions on the NHL constitution and bylaws, along with a shortening of the amateur draft that took place each June. *Id.* In 1992, players on the team that won the championship, which consisted of at least six weeks of the most intense and dangerous playing of the season, would only receive an additional \$25,000. *Id.* at 126. Players on teams that lost in the playoffs would only receive up to \$10,000 for up to twenty-eight playoff games. *Id.* In contrast, in the 1990-1991 playoffs the NHL made a \$29 million profit; a figure that did not include significant revenue sources such as souvenir sales and rink-board signage nor did it include revenue

on strike.<sup>180</sup>

The NHLPA rejected what the owners declared was their “final” offer on April 8th, claiming that the offer fell short of expectations and would leave the NHL vulnerable to another strike the following season.<sup>181</sup> That same day, a mediator from the FMCS was brought in to facilitate negotiations.<sup>182</sup> After tense talks, a new CBA was signed on April 11th, ending the strike.<sup>183</sup>

### C. 1994-1995 Lockout

After playing the 1993–1994 season without a CBA, the new NHL Commissioner was determined to come to an agreement before the following season began in order to avoid another strike.<sup>184</sup> Team owners were worried not only about their own financial stability, but also about finding buyers for the four new expansion teams, and they feared that the NHLPA was taking away their control over the

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from ancillary companies that made money off of parking and concessions. *Id.* Goodenow educated the players on labor negotiations, leading them to agree to go on strike on the eve of the playoffs. *Id.* at 126–27.

<sup>180</sup> DOWBIGGIN, *supra* note 166, at 132. The vote was 560–4 in favor of the strike. *Id.* It was the first strike, or major threat of a strike, in the twenty-five year history of the NHLPA. Joe LaPointe, *N.H.L. and Union Face Off*, N.Y. TIMES (Feb. 25, 1992), <http://www.nytimes.com/1992/02/25/sports/hockey-nhl-and-union-face-off.html>. See Austin Murphy, *A Striking Change*, SPORTS ILLUSTRATED (March 23, 1992), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1003558/index.htm>.

<sup>181</sup> Filip Bondy, *N.H.L. Players Reject “Final” Offer*, N.Y. TIMES (April 8, 1992), <http://www.nytimes.com/1992/04/08/sports/hockey-nhl-players-reject-final-offer.html?src=pm>.

<sup>182</sup> Joe LaPointe, *No Promises, but Federal Mediator Will Try to Settle N.H.L. Strike*, N.Y. TIMES (April 9, 1992), <http://www.nytimes.com/1992/04/09/sports/hockey-no-promises-but-federal-mediator-will-try-to-settle-nhl-strike.html>. John Martin of the Boston office of the Federal Mediation and Conciliation Service was chosen to be the mediator. *Id.*

<sup>183</sup> DOWBIGGIN, *supra* note 166, at 134–35. The settlement included players receiving the marketing rights that they wanted, increased money for players during the playoffs, and an additional four games during the regular season to pay for the new expenses. *We’ve Been Here Before*, CBC SPORTS, <http://www.cbc.ca/sports/indepth/cba/features/flashback.html> (last visited Jan. 2, 2012). All games that had been missed due to the strike were rescheduled. *Id.*

<sup>184</sup> *Id.*



league's labor system.<sup>185</sup> The main issue in dispute was the owners' proposed payroll tax, which the players were adamantly opposed to, as it acted as a salary cap.<sup>186</sup> On October 1st, the day the NHL's season was scheduled to begin, the owners locked out the players.<sup>187</sup>

The NHL decided not to use a federal mediator to help with the bargaining process.<sup>188</sup> Instead, negotiations took place directly between the NHL Commissioner and the NHLPA President.<sup>189</sup> An agreement was reached, ending the lockout, on January 11, 1995, after 104 days.<sup>190</sup> However, the issue of the salary cap was not fully resolved under the new agreement, laying the groundwork for the 2004–2005 lockout.<sup>191</sup>

#### D. 2004-2005 Lockout

In 1998, the CBA signed in 1995 expired, and the NHL began preparing for a potential lockout.<sup>192</sup> The agreement was extended for

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<sup>185</sup> DOWBIGGIN, *supra* note 166, at 167-68. NHL owners claimed that they were losing money and could not afford to continue with the current labor system, but they refused many requests to open up their books. *Id.* at 171.

<sup>186</sup> *We've Been Here Before*, *supra* note 183. The payroll tax was intended to assist teams in smaller markets. *Id.* It would operate as a sliding tax system, in which teams that exceeded the league's average payroll, about \$15 million, would be fined and the money would be given to cash strapped teams. *Id.* The players argued that this was in practice a salary cap, which they were opposed to, and instead proposed a system of revenue sharing. *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *NHL Rejects Mediator Amid Talk of Reducing Slate*, PHILLY.COM (Oct. 19, 1994), [http://articles.philly.com/1994-10-19/sports/25873489\\_1\\_mediator-freak-injury-downtown-site](http://articles.philly.com/1994-10-19/sports/25873489_1_mediator-freak-injury-downtown-site).

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

<sup>190</sup> *We've Been Here Before*, *supra* note 183. As a result, the season was shortened from eighty-four games to just forty-eight. Frances Romero, *The 1994 Hockey Lockout*, TIME (March 4, 2011), [http://www.time.com/time/specials/packages/article/0,28804,2057092\\_2057090\\_2057135,00.html](http://www.time.com/time/specials/packages/article/0,28804,2057092_2057090_2057135,00.html). Under the new agreement, salary caps were imposed on rookies and players relinquished rights regarding salary arbitration in return for no salary cap or payroll tax. *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Lockout Over Salary Cap Shuts Down NHL*, ESPN (Feb. 16, 2005, 11:41 PM), <http://sports.espn.go.com/nhl/news/story?id=1992793>. In preparation, each team contributed \$10 million to a war chest totaling \$300 million. *Id.*

two seasons, but the salary cap issue was yet to be resolved.<sup>193</sup> Collective bargaining negotiations broke down in early September when the NHL formally rejected the players' proposed luxury tax system instead of a salary cap.<sup>194</sup> Owners insisted that the 2004 season would not start unless the players agreed to a season salary limit of \$31 million per team,<sup>195</sup> and so on September 15, 2004, the owners locked out the players.<sup>196</sup> A mediator from the FMCS was brought in to help facilitate negotiations between the parties.<sup>197</sup> Despite these efforts,<sup>198</sup> on February 16, 2005, the NHL

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<sup>193</sup> *Id.*

<sup>194</sup> *Commish: 'A Luxury Tax Will Not Work'*, ESPN (Dec. 1, 2004, 8:20 PM), <http://sports.espn.go.com/nhl/news/story?id=1935455>. The NHL rejected the luxury-tax, calling it "too unpredictable" and arguing that it would not guarantee cost certainty. *Id.*

<sup>195</sup> Michael K. Ozanian, *Ice Capades*, FORBES (Nov. 29, 2004), [http://www.forbes.com/free\\_forbes/2004/1129/124.html](http://www.forbes.com/free_forbes/2004/1129/124.html). Owners claimed that they collectively lost \$224 million during the 2003-2004 season and that the salary cap was necessary. *Id.* The average total team salary during the 2003-2004 season was \$41 million, and the average player salary was \$1.8 million. *Id.* Despite these claims by owners, Forbes estimated that the combined loss for the thirty NHL teams was only \$96 million from revenue of \$2.2 billion for the season. *Id.* Seventeen of the thirty teams posted a loss. *Id.*

<sup>196</sup> *Lockout Over Salary Cap Shuts Down NHL*, *supra* note 192.

<sup>197</sup> *Federal Mediators Join Labor Talks*, SEATTLE TIMES (Feb. 14, 2005, 12:00 AM), [http://seattletimes.nwsources.com/html/sports/2002179361\\_nhl14.html](http://seattletimes.nwsources.com/html/sports/2002179361_nhl14.html). Scot B. Beckenbaugh was the acting director of FMCS at the time. *Id.* Beckenbaugh mediated talks between Ted Saskin and John McCambridge of the NHLPA and Bill Daily and Bob Battersman of the NHL. *Id.* If they had been able to reach a deal in early February, the league was planning on having a twenty-eight game season and the regular four rounds of playoffs. *Id.*

<sup>198</sup> By November, players had offered a five percent salary cut, along with other concessions that would save teams approximately \$4 million a season. Ozankian, *supra* note 195. In December, players were offering a twenty-four percent rollback in all existing player contracts, along with other concessions, but no salary cap. *NHL Lockout Chronology*, USA TODAY (July 13, 2005, 2:12PM), [http://www.usatoday.com/sports/hockey/nhl/2005-07-13-lockout-chronology\\_x.htm](http://www.usatoday.com/sports/hockey/nhl/2005-07-13-lockout-chronology_x.htm). Owners made a counter proposal that included a salary cap. *Id.* Just days before the season was officially cancelled in February, the players' proposal of a \$49 million salary cap per team was rejected by owners who insisted on \$42.5 million. *Lockout Over Salary Cap Shuts Down NHL*, *supra* note 192. Despite being only \$6.5 million apart on the proposed number, other proposed conditions from both sides left the parties even further from reaching an agreement. *Id.*

Commissioner officially cancelled the entire season.<sup>199</sup>

In late March and early April, the NHL filed two “unfair labor practice” complaints with the NLRB against the NHLPA regarding the use of replacement players.<sup>200</sup> The NHL claimed that the NHLPA violated the National Labor Relations Act, saying that threats to players and players’ agents constituted an unlawful boycott.<sup>201</sup> The first claim was in response to the players being told that if they choose to play during the dispute, they would have to relinquish all benefits that they had received from the NHLPA during the lockout.<sup>202</sup> The second claim involved the players’ agents being told that they could lose their NHLPA certification should they represent replacement players.<sup>203</sup> In late June, the NLRB decided to forward the complaints to their legal counsel to determine what action should be taken in response to the claims.<sup>204</sup>

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<sup>199</sup> *Lockout Over Salary Cap Shuts Down NHL*, *supra* note 192. This was the first time that a major sports league had an entire season cancelled as a result of a labor dispute. *Id.* It was also the first time that the Stanley Cup would not be awarded since a flu epidemic led to the cancellation of the playoffs in 1919. *Id.* In addition to the cancellation of the season, the NHL also cancelled the 2005 draft. *Id.* The 2005 draft had been set to be the year that phenom Sidney Crosby would be drafted. *Id.*

<sup>200</sup> *Another Chapter Added to NHL Labor Story*, USA TODAY (March 28, 2005, 4:21 PM), [http://www.usatoday.com/sports/hockey/nhl/2005-03-26-nlr-complaint\\_x.htm](http://www.usatoday.com/sports/hockey/nhl/2005-03-26-nlr-complaint_x.htm). Had no agreement been reached, the NHL could have used replacement players to start the 2005-2006 season. *Id.* See *NHL Contends Union Threatening Agents*, ESPN (April 4, 2005, 6:39 PM), <http://sports.espn.go.com/nhl/news/story?id=2029749>.

<sup>201</sup> *NLRB: Case Has Prominence, Could Set Precedence*, ESPN (June 30, 2005, 8:55PM), <http://sports.espn.go.com/nhl/news/story?id=2098274>. At the same time, the NHLPA had filed an application with the British Columbia Labor Relations Board to become a certified union. *Id.* This was a strategic move to block the NHL from using replacement players as British Columbia bars “the use of replacement employees during a lockout or strike.” *Id.*

<sup>202</sup> *Another Chapter Added to NHL Labor Story*, *supra* note 200. Players were receiving approximately \$10,000 per month from the NHLPA during the lockout. *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *NLRB: Case Has Prominence, Could Set Precedence*, *supra* note 201. The NLRB wanted to act quickly as it was recognized that this case could set a precedent for all labor negotiations, not just in hockey matters. *Id.* It was predicted that if the NLRB ruled for the NHLPA that replacement players could not be used, both sides would have to keep negotiating. Jamie Fitzpatrick, *Can the NHL Use*

On July 13, 2005, the NHL and the NHLPA reached a deal ending the lockout.<sup>205</sup> The new CBA included, among other things, a salary cap that was linked to league revenues.<sup>206</sup> This settlement mooted the claims that the NHL had filed with the NLRB.<sup>207</sup>

### *E. Overall Trends*

For many years in the NHL's history, players had no bargaining power and had little knowledge of how much their skills were worth.<sup>208</sup> Once the NHLPA took a tough bargaining position with the NHL and saw it through to the end with a strike in 1992, the

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*Replacement Players?*, ABOUT.COM, <http://procehockey.about.com/od/collectivebargainingfaq/f/deadline.htm> (last visited Jan. 13, 2012). If the NLRB ruled for the NHL, then the owners would have the upper hand in bargaining and the NHLPA would have to accept any offer that was put on the table. *Id.*

<sup>205</sup> Jamie Fitzpatrick, *NHL and Players Make a Deal!*, ABOUT.COM (July 13, 2005), [http://procehockey.about.com/od/thelatestonthelockout/a/cba\\_agreement.htm](http://procehockey.about.com/od/thelatestonthelockout/a/cba_agreement.htm). The agreement was reached on the 301st day of the lockout. *Id.* It was the longest work stoppage in professional sports and ended with the most complex CBA ever seen, being over 600 pages. *Id.* The negotiation was the product of ten consecutive days of meetings that involved more than twenty-four hours straight of talks. *NHL Lockout Chronology*, *supra* note 198. Talks had been extensive, including more than thirty meetings in May and June. *Id.*

<sup>206</sup> Fitzpatrick, *supra* note 205. The CBA is a six-year deal, with an option to extend it for a seventh year. *Id.* For the 2005-2006 season, the salary cap was set at \$39 million for each team and would be adjusted each year to guarantee the players 54% of the NHL's total revenue. *Id.* The percentage share that the players received increases at set benchmarks. *Id.* The value of all existing contracts would be rolled back by 24%. *Id.* No individual player would be able to make more than 20% of the team salary cap. *Id.* Other provisions included new drug testing protocols, a lower rookie salary cap (maximum \$850,000 per year with a limit on bonuses), revenue sharing between the ten highest grossing teams and the fifteen lowest grossing teams, a drop in the age that players qualify to be unrestricted free agents (from thirty-one years old to twenty-seven years old or after seven years in the NHL), new rules for buying out contracts after the lockout, and an agreement that the players could participate in the 2006 and 2010 Olympics. *Id.* At the end of negotiations, players ended up with the salary cap proposal that the owners initially put on the table, a much lower amount than they had been close to agreeing on in February.

<sup>207</sup> GLENN M. WONG, *ESSENTIALS OF SPORTS LAW* 522 (4th ed. 2010).

<sup>208</sup> See DOWBIGGIN, *supra* note 166, at 93-100.

result was financial gains for the players.<sup>209</sup> Twice since the 1992 strike, there have been negotiations for a new CBA and both times have resulted in a lockout.<sup>210</sup>

During the 1992 strike, a FMCS mediator was brought in, and just days later an agreement was reached.<sup>211</sup> This success, however, was not replicated during the 2004-2005 lockout, when an FMCS mediator was brought in five months before an agreement was finally reached.<sup>212</sup> The NLRB has only been utilized once during NHL labor disputes, and the claim was ultimately deemed moot when the lockout ended, so no ruling was made.<sup>213</sup> During the 1994-1995 lockout, the NHL and the NHLPA decided not to use the services of the NLRB or the FMCS, but to negotiate directly between the NHL Commissioner and NHLPA President.<sup>214</sup>

The CBA that resulted from the 2004-2005 lockout has already been extended once and is now set to expire in 2012.<sup>215</sup> There have already been talks of the possibility of another lockout.<sup>216</sup> This would be the third lockout in professional sports in a two-year period.<sup>217</sup> Unfortunately for the fans, all we can do is wait and see how it all plays out.

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<sup>209</sup> See *We've Been Here Before*, *supra* note 183.

<sup>210</sup> In 1994-1995, the beginning of the season was cancelled due to a lockout. The entire 2004-2005 season was also cancelled as the result of a lockout.

<sup>211</sup> LaPointe, *supra* note 182.

<sup>212</sup> The FMCS mediator was brought in during the middle of February and an agreement was not reached until the middle of July.

<sup>213</sup> During the 2004-2005 lockout, the NHL filed two claims with the NLRB against the NHLPA. See *Another Chapter Added to NHL Labor Story*, *supra* note 200.

<sup>214</sup> *NHL Rejects Mediator Amid Talk of Reducing Slate*, *supra* note 188.

<sup>215</sup> Pierre LeBrun, *Union Picks Up CBA Extension Option*, ESPN (June 22, 2010, 5:15PM), <http://sports.espn.go.com/nhl/news/story?id=5316505>.

<sup>216</sup> Dater, *supra* note 6.

<sup>217</sup> Both the NFL and NBA had a lockout in 2011.

## VII. MAJOR LEAGUE BASEBALL

*A. Formation of the Players' Association*

While there is much debate over when the modern game of baseball was first played, professional baseball started in the United States in 1876.<sup>218</sup> There were many unsuccessful attempts in the early years of professional baseball to form a players' association.<sup>219</sup> In 1952, however, the players regrouped and founded the Major League Baseball Players Association (MLBPA).<sup>220</sup> However, the MLBPA was not recognized as the players' bargaining representative until 1954.<sup>221</sup> Then, in 1968, under the leadership of Marvin Miller, the MLBPA was able to negotiate the first ever CBA in professional sports.<sup>222</sup> The CBA lasted just two seasons, and a new agreement was signed in 1970.<sup>223</sup>

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<sup>218</sup> STAUDOHAR, *supra* note 24, at 15. The National League was founded in 1876 and the American League was founded in 1899. *Id.*

<sup>219</sup> *History of the Major League Baseball Players Association*, MLBPLAYERS.COM, <http://mlb.mlb.com/pa/info/history.jsp> (last visited Feb. 8, 2012). The Brotherhood of Professional Baseball Players was founded by John Montgomery Ward and eight other players in 1885 to oppose the movement toward a salary cap. *Id.* Other players' unions have included the 1900 Players' Protective Association, the 1912 Fraternity of Professional Baseball Players of America, and the 1946 American Baseball Guild. *Id.*

<sup>220</sup> STAUDOHAR, *supra* note 24, at 25.

<sup>221</sup> Doug Pappas, *A Contentious History: Baseball's Labor Fights*, ESPN (Sept. 8, 2007), <http://static.espn.go.com/mlb/columns/bp/1427632.html>.

<sup>222</sup> *History of the Major League Baseball Players Association*, *supra* note 219. Marvin Miller had been an economist for United Steelworkers of America before joining the baseball players. *Id.* He quickly got the group's finances in order and worked to educate the players about organization and solidarity. *Id.* Marvin Miller negotiated the CBA on the players' behalf. *Id.* The agreement raised the minimum salary from \$6,000 to \$10,000 per season. *Id.* It also put in place a formal arbitration process for player grievances before the Commissioner. Pappas, *supra* note 221.

<sup>223</sup> Pappas, *supra* note 221. While the 1970 CBA was in place, the players went on a strike for better pensions and the institution of binding arbitration. *A Look Back at Professional Sports Labor Disputes*, *supra* note 130. The strike lasted between April 1-13, 1972 and resulted in the cancellation of sixty-eight games league wide. *Id.* While the strike resulted in a salary increase for the players, the 1970 CBA was kept in place.

### B. 1973 Lockout

When negotiations for the new CBA began in 1973, players were seeking to have salary arbitration included in the new agreement.<sup>224</sup> In protest, the owners locked out the players on February 8th.<sup>225</sup> An agreement was reached on February 25th that included binding salary arbitration.<sup>226</sup> As a result of the lockout, spring training began late, but no games were cancelled.<sup>227</sup>

### C. 1976 Lockout

When the 1973 CBA expired on December 1, 1975,<sup>228</sup> players were upset over the reserve clause in their contracts and the fact that free agency had not been included in that previous agreement.<sup>229</sup> A few players refused to sign their 1974 and 1975 contracts, and the reserve clause was sent to arbitration for interpretation.<sup>230</sup> On December 23, 1975, the arbitrator ruled that the reserve clause only bound the players to their team for one year, not indefinitely.<sup>231</sup> This ruling granted free agency to the players who had not signed their

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<sup>224</sup> *History of the Major League Baseball Players Association*, *supra* note 216.

<sup>225</sup> *The Lockout of 1973*, BLOGSPOT.COM (Aug. 5, 2010), <http://mlbcollectivebargainingagreement.blogspot.com/2010/08/lockout-of-1973.html>.

<sup>226</sup> *Id.* A neutral party would carry out arbitration, and the arbitrator would choose one of the two proposals presented. *Id.* See Jeff Euston, 1973-1975, BIZOFBASEBALL.COM (Feb. 2, 2007), [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=682:1973-1975&catid=45:cba-summaries&Itemid=76](http://bizofbaseball.com/index.php?option=com_content&view=article&id=682:1973-1975&catid=45:cba-summaries&Itemid=76).

<sup>227</sup> *Id.*

<sup>228</sup> STAUDOHAR, *supra* note 24, at 27.

<sup>229</sup> Pappas, *supra* note 221.

<sup>230</sup> *Id.* Players who refused to sign their contracts included Sparky Lyle, Bobby Tolan, Andy Messersmith, and Dave McNally. *Id.*

<sup>231</sup> Jeff Euston, 1976-1979, BIZOFBASEBALL.COM (Feb. 2, 2007), [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=683:1976-1979&catid=45:cba-summaries&Itemid=76](http://bizofbaseball.com/index.php?option=com_content&view=article&id=683:1976-1979&catid=45:cba-summaries&Itemid=76). The arbitrator, Peter Seitz, was a private arbitrator who had been hired by the owners to settle disputes with the players. *Peter Seitz*, BASEBALL-REFERENCE.COM, [http://www.baseball-reference.com/bullpen/Peter\\_Seitz](http://www.baseball-reference.com/bullpen/Peter_Seitz) (last visited Feb. 8, 2012).

contracts.<sup>232</sup> A federal district court upheld this ruling on February 4, 1976.<sup>233</sup>

The owners announced that spring training would not begin until a new CBA had been reached with major restrictions to free agency,<sup>234</sup> so on March 1st they locked out the players.<sup>235</sup> Shortly after, on March 10th, the Eighth Circuit affirmed the lower court's ruling that players became free agents after one year.<sup>236</sup> As a result, the Major League Baseball (MLB) Commissioner ordered training camps to start on March 18th, ending the lockout, and the parties agreed to start the season without a CBA in place.<sup>237</sup> On July 12th, a new four-year CBA was signed that included free agency after six years of service.<sup>238</sup>

#### *D. 1980 & 1981 Strikes*

When the 1976 CBA expired in 1980, the owners were looking to restrict the free agency rights that the players received in arbitration.<sup>239</sup> An eight-day strike ended in early April,<sup>240</sup> when the

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<sup>232</sup> *Id.*

<sup>233</sup> Euston, *supra* note 231. See *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 409 F.Supp. 233, 270 (W.D. Mo. 1976).

<sup>234</sup> GLENN M. WONG, *THE COMPREHENSIVE GUIDE TO CAREERS IN SPORTS* 240 (2009).

<sup>235</sup> Euston, *supra* note 231.

<sup>236</sup> *Id.* See *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615, 617 (8th Cir. 1976).

<sup>237</sup> Euston, *supra* note 231. No games were cancelled as a result of the lockout. *Id.*

<sup>238</sup> *Id.* Players who were free agents were able to negotiate with up to twelve different teams. *Id.* Teams were limited in the number of free agents that they were allowed to sign, but they were allowed to replace any free agents that they had lost that season. *Id.* Player salaries began to rise quickly as a result of this new system. Pappas, *supra* note 221. In 1976 the average player salary was \$51,501, but by 1980 the average player salary was \$143,756. *Id.*

<sup>239</sup> STAUDOHAR, *supra* note 24, at 27. Owners were concerned about compensating teams for players that they lost due to free agency. *Id.* at 28. They were hoping that having to compensate the team that the player was coming from would cut down on the number of free agents that were signed, and thus keep salaries from sky rocketing out of control. *Id.*

<sup>240</sup> *Sport-by-Sport Stoppages Chronology*, CBS (Nov. 26, 2011, 1:47 PM), <http://newyork.cbslocal.com/2011/11/26/sport-by-sport-stoppages-chronology/>.



MLB and MLBPA reached a deal on all other issues and agreed to keep free agency separate.<sup>241</sup> No progress was made on the free agency issue when it was reopened in 1981, and the owners announced that they would implement their own compensation plan.<sup>242</sup> In response, the players announced that they would go on strike on May 29, 1981, the opening of the 1981 season.<sup>243</sup>

Meanwhile, the MLBPA filed a claim with the NLRB stating that the MLB refused to bargain in good faith when it refused to disclose financial information.<sup>244</sup> The NLRB took the claim to federal court seeking an injunction, but the motion was dismissed.<sup>245</sup> This lawsuit caused a delay in the strike, and the players did not walk out until June 12th.<sup>246</sup> Both sides remained firm as the strike dragged on.<sup>247</sup> A mediator from the FMCS was brought in to help facilitate negotiations.<sup>248</sup> On July 31st the parties reached a new agreement, ending the strike.<sup>249</sup>

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<sup>241</sup> STAUDOHAR, *supra* note 24, at 28.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* See Silverman v. Major League Baseball Player Relations Comm., 516 F. Supp. 588, 589 (S.D.N.Y. 1981).

<sup>246</sup> *Sport-by-Sport Stoppages Chronology*, *supra* note 240.

<sup>247</sup> STAUDOHAR, *supra* note 24, at 28. The owners purchased \$50 million in strike insurance and put together a war chest of another \$15 million from contributions from the owners. *Id.* They hoped that eventually the players would realize how much money they were losing and give up, but this did not happen. *Id.* In addition, the MLBPA President Marvin Miller and Ray Grebey, the chief negotiator for the owners, exchanged vicious attacks regularly through the media. *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> Jeff Euston, *1980-1983 (Extended to '84)*, BIZOFBASEBALL.COM (Feb. 2, 2007), [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=684:1980-1983-later-extended-to-84&catid=45:cba-summaries&Itemid=76](http://bizofbaseball.com/index.php?option=com_content&view=article&id=684:1980-1983-later-extended-to-84&catid=45:cba-summaries&Itemid=76). The strike lasted for fifty days and caused the cancellation of 712 games league-wide, and the season was split into two parts. *Id.* Under the new agreement, teams would not be compensated for the loss of a free agent, but they could retain a player for six years. *A Look Back at Professional Sports Labor Disputes*, *supra* note 130.

*E. 1985 Strike*

The 1980 CBA was set to expire in 1983, but the MLB and MLBPA agreed to extend it for one year.<sup>250</sup> During negotiations in 1985, owners wanted changes to arbitration and free agency.<sup>251</sup> On August 6th the players went on strike in protest.<sup>252</sup> Just two days later, the strike ended when the owners dropped all but one of their demands.<sup>253</sup>

*F. 1990 Lockout*

Disgruntled after not being able to limit free agency in the 1985 CBA, owners agreed among themselves during the late 1980s not to sign one another's free agents.<sup>254</sup> As this was a violation of the CBA's no-collusion clause, the players successfully took the owners to arbitration three times.<sup>255</sup> Thus, when negotiations began in 1990 for a new CBA, owners wanted to drop salary arbitration in favor of a wage scale for all players who were not yet eligible for free agency.<sup>256</sup> Owners threatened to lock the players out if they did not agree to these changes, and did so on February 15th.<sup>257</sup>

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<sup>250</sup> Euston, *supra* note 249.

<sup>251</sup> Pappas, *supra* note 221. Both parties quickly dropped the compensation-draft as it was too confusing. *Id.* In addition, the owners wanted to raise the eligibility requirement to go to arbitration from two years to three years and limit arbitration raises. *Id.* They also wanted teams that had above average payrolls to be barred from signing free agents for more than the average league salary. *Id.*

<sup>252</sup> *Sport-by-Sport Stoppages Chronology*, *supra* note 240. The strike came in the middle of the season. *Id.*

<sup>253</sup> Pappas, *supra* note 221. The owners dropped the limits on arbitration awarded raises and changes to free agency. *Id.* In return, the players agreed to a three-year eligibility requirement before being able to go to arbitration. *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> Jeff Euston, *1990-1993*, BIZOFBASEBALL.COM (Feb. 2, 2007), [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=686:1990-1993&catid=45:cba-summaries&Itemid=76](http://bizofbaseball.com/index.php?option=com_content&view=article&id=686:1990-1993&catid=45:cba-summaries&Itemid=76). The arbitration cases were held during the 1985, 1986, and 1987 seasons. *Id.* The arbitrator found the amount of damages was over \$100 million. *Id.*

<sup>256</sup> Pappas, *supra* note 221. This plan would have acted as a salary cap. *Id.*

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

As the start of the season was fast approaching, owners became worried about the financial toll of cancelling games and began to lighten their bargaining position.<sup>258</sup> When the lockout ended on March 20th the owners had abandoned all of their demands.<sup>259</sup> In November, the owners settled the three arbitration cases for \$280 million.<sup>260</sup>

### G. 1994-1995 Strike

In 1992, the owners fired the Commissioner of MLB after blaming him for giving into the players in the 1990 CBA.<sup>261</sup> With their new hard bargain strategy, the owners proposed a salary cap in June 1994.<sup>262</sup> As a result, the players went on strike on August 12th.<sup>263</sup> In October, a federal mediator was appointed by President Bill Clinton to help facilitate negotiations.<sup>264</sup> By December 14th,

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<sup>258</sup> *Baseball Labor Relations: The Lockout of 1990*, THE FREE LIBRARY, <http://www.thefreelibrary.com/Baseball+labor+relations%3A+the+lockout+of+1990.-a09214138> (last visited Feb. 9, 2012). The prior five years had seen a major growth in attendance at games and major increases in television revenues. *Id.*

<sup>259</sup> Pappas, *supra* note 221. In fact, salary arbitration was expanded under the new agreement. *Id.*

<sup>260</sup> Euston, *supra* note 255.

<sup>261</sup> Pappas, *supra* note 221. During the 1990 CBA negotiations, commissioner Fay Vincent had pushed for a settlement as he felt it was his duty to the league to not have games cancelled. *Baseball Labor Relations: The Lockout of 1990*, *supra* note 258.

<sup>262</sup> Pappas, *supra* note 221. The proposed salary cap would limit the players to just 50% of revenues. *Id.* At the time the players were making 58% of revenues. *Id.*

<sup>263</sup> *Id.* The strike occurred in the middle of the season. *Id.* Based on past labor negotiations the players figured that the strike would not last long enough to have to cancel the rest of the season. *Id.* However, on September 14th, the rest of the season and the playoffs were cancelled by acting commissioner Bud Selig. *Id.*

<sup>264</sup> James Risen, *Former Labor Secretary Has a Reputation for Getting Results in Difficult Situations*, L.A. TIMES (Oct. 15, 1994), [http://articles.latimes.com/1994-10-15/sports/sp-50613\\_1\\_labor-secretary](http://articles.latimes.com/1994-10-15/sports/sp-50613_1_labor-secretary). Bill Utery agreed to become the mediator. *Id.* Utery was the former Labor Secretary and former head of the FMCS under the Ford Administration. *Id.*

however, negotiations broke down.<sup>265</sup> On December 23rd, the owners unilaterally implemented a salary cap system, claiming that it was not a mandatory subject for collective bargaining.<sup>266</sup>

In response to the unilateral imposition, the MLBPA filed a claim with the NLRB that the owners were not bargaining in good faith.<sup>267</sup> The NLRB then filed in federal district court for “an injunction under Section 10(j) of the [National Labor Relations] Act requiring the baseball club owners to withdraw their unilaterally imposed changes to the negotiated system of setting wages in baseball.”<sup>268</sup> On April 3, 1995, a district court judge granted the injunction and restored the terms of the 1990 CBA, bringing the strike to an end.<sup>269</sup> The 1995 season opened on April 26th.<sup>270</sup>

### *H. Overall Trends*

All six of the CBA negotiations between 1973 and 1995 resulted in either a strike or a lockout.<sup>271</sup> Each time, the major issues in dispute were salary arbitration and free agency.<sup>272</sup> Unique to baseball is the fact that the players seem to hold the majority of the power in these negotiations, as they won major victories in each

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<sup>265</sup> Jeff Euston, *1994-1996*, BIZOFBASEBALL.COM (Feb. 2, 2007), [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=687:1994-1996&catid=45:cba-summaries&Itemid=76](http://bizofbaseball.com/index.php?option=com_content&view=article&id=687:1994-1996&catid=45:cba-summaries&Itemid=76).

<sup>266</sup> Pappas, *supra* note 221. On February 11, 1995 the owners withdrew the salary cap system. Euston, *supra* note 265. Instead, owners unilaterally eliminated other provisions including salary arbitration and the anti-collusion clauses of the old agreement. *Id.*

<sup>267</sup> Euston, *supra* note 265.

<sup>268</sup> *Impact of NLRB on Professional Sports*, *supra* note 81.

<sup>269</sup> Euston, *supra* note 265. The district court judge was future Supreme Court Justice Sonia Sotomayor. *Id.* See *Silverman v. Major League Baseball Player Relations Comm.*, 880 F. Supp. 246 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2nd Cir. 1995).

<sup>270</sup> Euston, *supra* note 265.

<sup>271</sup> CBA negotiations took place in 1973, 1976, 1980-1981, 1985, 1990, and 1994-1995.

<sup>272</sup> See *History of the Major League Baseball Players Association*, *supra* note 219.

negotiation.<sup>273</sup>

The NLRB was used by the MLBPA twice, during the 1981 strike and the 1994-1995 strike. Both times, the NLRB ruled that the owners failed to negotiate in good faith and thus, the NLRB went to the district court seeking an injunction.<sup>274</sup> While this led to the successful end of the 1994-1995 strike, the motion for injunction was denied in 1981. After the injunction was denied in 1981, a mediator from the FMCS was brought in to help with the negotiation process.<sup>275</sup> An ex-FMCS mediator was also brought in to help during the 1994-1995 strike, but was not successful.<sup>276</sup> During all other negotiations, the MLB either brought in a private arbitrator or negotiated directly with the MLBPA.

Since the end of the 1994-1995 strike, the MLB and MLPBA have negotiated four new CBAs without any labor stoppage.<sup>277</sup> The latest agreement was signed on November 22, 2011 and is scheduled to be in place through 2016.<sup>278</sup> As long as the deal is not broken early, this will result in the longest stretch without a work stoppage since the MBLPA was founded.<sup>279</sup>

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<sup>273</sup> Baseball (MLB) is unique as compared to professional football (NFL), basketball (NBA), and hockey (NHL).

<sup>274</sup> See *Silverman v. Major League Baseball Player Relations Comm.*, 880 F. Supp. 246 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2nd Cir. 1995); *Silverman v. Major League Baseball Player Relations Comm.*, 516 F. Supp. 588, 589 (S.D.N.Y. 1981).

<sup>275</sup> STAUDOHAR, *supra* note 24, at 28

<sup>276</sup> See Euston, *supra* note 265.

<sup>277</sup> CBA Summaries, BIZOFBASEBALL.COM, [http://bizofbaseball.com/index.php?option=com\\_content&view=category&id=45&Itemid=76](http://bizofbaseball.com/index.php?option=com_content&view=category&id=45&Itemid=76) (last visited Feb. 9, 2012).

<sup>278</sup> Adam Kilgore, *New Collective Bargaining Agreement Ensures Labor Peace for Major League Baseball, MLB Players Association*, WASHINGTON POST (Nov. 22, 2011, 2:12 PM), [http://www.washingtonpost.com/blogs/baseball-insider/post/new-collective-bargaining-agreement-ensures-labor-peace-for-major-league-baseball-mlb-players-association/2011/11/22/gIQAp00ZIN\\_blog.html](http://www.washingtonpost.com/blogs/baseball-insider/post/new-collective-bargaining-agreement-ensures-labor-peace-for-major-league-baseball-mlb-players-association/2011/11/22/gIQAp00ZIN_blog.html).

<sup>279</sup> *Id.* This would ensure twenty-one years without a strike or lockout in the MLB. *Id.*

## VIII. WHAT CAN BE DONE

A. *The Problem*

Each of the four major sports in the United States has had multiple work stoppages due to strikes and lockouts since the 1970s. Work stoppages mean the owners do not make money, the players do not get paid, and the fans are left with no games to watch. In addition, there are multi-million dollar television contracts that are affected when games are cancelled. Additionally, the advent of social media now allows players and owners to quickly get their comments on the work stoppage out to the public, often with a negative impact on the negotiations.<sup>280</sup>

Inherent inequality is built into the system, as there is a small group of owners on one side and a much larger group of players on the other.<sup>281</sup> The thirty to thirty-two owners are able to present a unified front, as they are all looking to increase revenues and keep player salaries at a minimum.<sup>282</sup> The players' association on the other hand, is made up of a group that is not as unified.<sup>283</sup> This is because there are a few superstars with huge contracts that have different interests than the majority of the team, all of whom make significantly less money and often have shorter careers, which means less time to make money.<sup>284</sup> This inequality among the players often means that they are at a disadvantage during negotiations, and thus willing to take more extreme measures such as decertification of their

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<sup>280</sup> See Doug Gross, *Can NBA Players Really Win the Lockout War on Twitter?*, CNN (Oct. 12, 2011, 9:53 AM), <http://www.cnn.com/2011/10/12/tech/mobile/nba-lockout-twitter/index.html>.

<sup>281</sup> Interview with Roger Cossack, *supra* note 102.

<sup>282</sup> *Id.* The NFL has thirty-two teams, while the NBA, NHL, and MLB all have thirty teams. *List of Professional Sports Teams in the United States and Canada*, ENOTES, [http://www.enotes.com/topic/List\\_of\\_professional\\_sports\\_teams\\_in\\_the\\_United\\_States\\_and\\_Canada](http://www.enotes.com/topic/List_of_professional_sports_teams_in_the_United_States_and_Canada) (last visited Feb. 9, 2012).

<sup>283</sup> Interview with Roger Cossack, *supra* note 102.

<sup>284</sup> *Id.* For example, the average length of a career for an NFL player is 3.3 years. Kent Ninomiya, *How Long is the Average Career of an NFL Player?*, LIVESTRONG (Aug. 11, 2011), <http://www.livestrong.com/article/15527-long-average-career-nfl-player/>. Thus, a lockout or strike that lasts an entire season would mean a loss of almost one-third of his playing career and lifetime salary.

union and filing anti-trust lawsuits.

Currently, professional sports fall under the jurisdiction of the NLRB and subsequently the FMCS.<sup>285</sup> In order for the NLRB or the FMCS to participate in CBA negotiations, either the league or the players' association has to request a mediator or file a claim that the other party is not bargaining in good faith.<sup>286</sup> Although professional athletes and team owners have filed many bad faith claims, the majority of these claims are dropped or deemed moot before a ruling is made. This has left many open questions, such as whether players' associations can use decertification as a bargaining tactic without violating the duty to bargain in good faith.<sup>287</sup>

### B. Possible Solutions

Many different plans have been suggested to avoid lockouts and strikes in professional sports in the future. One sports writer suggested that the solution for the NBA is to decrease the number of teams from thirty to twenty-six.<sup>288</sup> Another has suggested that the players start their own league, reasoning that if the players were also the owners, there would be no lockouts.<sup>289</sup> As neither of these suggestions seem very plausible, we will evaluate four suggestions that could make an impact and prevent work stoppages in professional sports: (1) bringing sports under the Railway Labor Act

<sup>285</sup> Champion, *supra* note 9, at 495.

<sup>286</sup> Yasser, *supra* note 25, at 398.

<sup>287</sup> Berger, *supra* note 152.

<sup>288</sup> Jonathan Powell, *NBA Solutions: Contraction is Necessary to Stop Future Lockouts*, BLEACHER REPORT (Nov. 7, 2011), <http://bleacherreport.com/articles/929050-nba-solutions-contraction-is-necessary-to-stop-future-lockouts>. The plan is to drop two teams from each conference because there are too many teams with too few talented players. *Id.* The decision of which teams to drop is based on which teams have been contenders for the championship. *Id.*

<sup>289</sup> Peter Keating, *Power to the People*, ESPN (Oct. 20, 2011, 10:59 AM), [http://insider.espn.go.com/nba/story?id=7123870&\\_slug\\_=nba-peter-keating-plausibility-players-league-espn-magazine&action=login&appRedirect=http%3a%2f%2finsider.espn.go.com%2fna%2fstory%3fid%3d7123870%26\\_slug\\_%3dnba-peter-keating-plausibility-players-leag](http://insider.espn.go.com/nba/story?id=7123870&_slug_=nba-peter-keating-plausibility-players-league-espn-magazine&action=login&appRedirect=http%3a%2f%2finsider.espn.go.com%2fna%2fstory%3fid%3d7123870%26_slug_%3dnba-peter-keating-plausibility-players-leag). In 1890, a group of basketball players started their own league and shared revenues amongst themselves and a group of investors. *Id.* Other industries also employ this model, including publishing and music. *Id.*

of 1926, (2) penalties for missing contract deadlines and set dates for bringing in federal mediators from the FMCS, (3) mandatory binding arbitration, and (4) changes to the NLRB process.

George Yorgakaros of the New York Times suggested that professional sports be brought under the jurisdiction of the Railway Labor Act of 1926 instead of the National Labor Relations Act (NLRA), which it is currently under.<sup>290</sup> He argues that professional sports operate differently from the other industries that currently fall under the jurisdiction of the NLRA, and thus also fall under the NLRB.<sup>291</sup>

Industries that fall under the NLRA jurisdiction, such as the automobile industry, are highly competitive.<sup>292</sup> Thus, the wide variety of options that are available to both employers and employees under the NLRA are effective economic weapons in the collective bargaining process.<sup>293</sup> Labor stoppages hurt the companies that are competing in huge industries as consumers have other choices when it comes to purchasing a product.<sup>294</sup> For example, if there is a labor stoppage at Ford Motor Company, consumers can purchase cars from many other companies, including Toyota, BMW, and Honda. At the same time, labor stoppages hurt the workers who are not getting paychecks and who, if necessary, can be replaced easily by other workers with similar skills.<sup>295</sup> While there might be some training involved in doing their jobs, most workers can be easily replaced by a wide variety of individuals who can be trained to do the same job just as effectively. Thus, employers have a very powerful bargaining chip during negotiations, especially in hard economic times when there is a large number of people looking for jobs who would be

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<sup>290</sup> George Yorgakaros, *Avoiding the Next Sports Lockout*, N.Y. TIMES (July 26, 2011), [http://www.nytimes.com/2011/07/27/opinion/27Yorgakaros.html?\\_r=2](http://www.nytimes.com/2011/07/27/opinion/27Yorgakaros.html?_r=2). It would require an act of Congress to change the jurisdiction that professional sports fall under. *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

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

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

<sup>295</sup> Yorgakaros, *supra* note 290. If automobile industry workers go on strike, or demand too much from their employers, the employer can always find other workers with the same or similar skill level to take those jobs. *Id.*



willing to work for less than what the current employees are demanding. Professional sports, Yorgakaros argues, are different because there is only one major league for each sport, eliminating competition, and not enough talented players to replace the players that would be affected by a work stoppage.<sup>296</sup>

Thus, Yorgakaros believes that professional sports are better equated to those industries that fall under the Railway Labor Act of 1926.<sup>297</sup> The National Mediation Board is the oversight body for the Railway Labor Act and the two industries that fall under it, the airline industry and railway industry.<sup>298</sup> These industries provide a “vital public good that can’t easily be replaced in the event of a labor dispute.”<sup>299</sup> Thus, the National Mediation Board, unlike the NLRB, has greater control over the negotiation process and can intervene even if the parties to the dispute do not request it.<sup>300</sup> Once the National Mediation Board gets involved, the parties go through the mediation process.<sup>301</sup> If that fails to resolve the issue, the dispute is sent to arbitration.<sup>302</sup> In the event that either party refuses arbitration, there is a thirty-day cooling off period before either side can engage in self-help and institute a lockout or a strike.<sup>303</sup>

If this model were applied to the sports industry, CBAs would not expire until a new agreement has been reached.<sup>304</sup> Thus, games would continue to be played while the parties were negotiating a new CBA.<sup>305</sup> This would benefit not only the players and the owners, but also the fans and the secondary employees, such as concession workers and ticket takers, as it lessens the economic impact of a

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

<sup>297</sup> *Id.*

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

<sup>299</sup> *Id.*

<sup>300</sup> *National Mediation Board*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/National+Mediation+Board> (last visited Feb. 10, 2012).

<sup>301</sup> *Id.*

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

<sup>303</sup> *Id.* This cooling off period can be extended if the President steps in and appoints an emergency board to investigate the situation. *Id.*

<sup>304</sup> Yorgakaros, *supra* note 290.

<sup>305</sup> *Id.*

dispute.<sup>306</sup> In addition, this plan would level the playing field between the owners and the players, as players would not have to worry about a work stoppage cutting into their already short careers.<sup>307</sup> In addition, strikes and lockouts could no longer be used as effectively by a party to increase its bargaining position, as there is a long process that the party must go through before the work stoppage could be implemented. Thus, threats of work stoppages would have less power behind them, as they are less likely to occur. This also would mean that the parties could spend more time negotiating as they would not need to worry about protecting themselves from the possibility of a work stoppage, which can often be very time consuming.<sup>308</sup>

Despite these benefits, Yorgakaros does mention two possible problems with this plan.<sup>309</sup> First, the parties would probably not welcome government intervention,<sup>310</sup> and a private model would not be sustainable over time.<sup>311</sup> Second, he also cautions that this model could drag out negotiations, as there is no real pressure on either side to settle if there is no economic loss caused by a work stoppage.<sup>312</sup> Either way, he argues that a delay in negotiations is much better than the economic effects of games being cancelled.<sup>313</sup>

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<sup>306</sup> *Id.*

<sup>307</sup> Interview with Roger Cossack, *supra* note 102. This refers to the average athlete, not those few who are lucky enough to play for many years. *Id.* Either way, professional athletes' careers are usually much shorter than the careers of those people in other industries. *Id.*

<sup>308</sup> *Id.* Preparing for strikes and lockouts can often occur years in advance as one side starts saving up a war chest. When the work stoppage comes into being, both sides spend countless hours organizing their strategies and voting on what should be done instead of spending that time at the negotiation table trying to reach a deal.

<sup>309</sup> Yorgakaros, *supra* note 290.

<sup>310</sup> *Id.* Currently, mediation under the NLRB and FMCS is voluntary instead of mandatory. In addition, the parties are not sent to arbitration in the event that mediation fails and neither party needs to go through this system of almost getting the government's permission before it can institute a strike or a lockout.

<sup>311</sup> *Id.* Under the private model, the leagues would institute this system with a non-federal agency instead of Congress passing legislation to bring professional sports under the jurisdiction of the National Mediation Board.

<sup>312</sup> *Id.*

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

There are other flaws in Yorgakaros's reasoning. First, replacement players might be easier to get than he expects. Replacement players, composed of both retired players and players that had not made the original team, were used during the 1987 NFL strike.<sup>314</sup> There are always many players who do not earn spots in the professional leagues and players at the minor league level who would gladly step in and play for less money than major league players are demanding.<sup>315</sup> In addition, when the replacement players were used, many union members ended up crossing the picket line and playing as well.<sup>316</sup> Second, players would probably be more willing to support this change to the system than the owners would. With the exception of the MLB perhaps, the owners usually hold the advantage in negotiations.<sup>317</sup> Therefore, they would probably be less willing to support a switch to a new system.<sup>318</sup> Finally, it can be argued that while sports are important to us as a society for our entertainment pleasure, the threat of a work stoppage in the NFL, NBA, NHL, or MLB would not cause the same economic and social catastrophe as would occur if, for example, all the airline pilots suddenly went on strike.<sup>319</sup> Therefore, such a level of government control, and even possible intervention by the President of the United States, is not warranted or necessary in collective bargaining in professional sports.<sup>320</sup>

Kurt Helin of NBC Sports discussed a second plausible solution to this problem of how to prevent lockouts and strikes in

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<sup>314</sup> Bell, *supra* note 49.

<sup>315</sup> *Id.* There will of course be a debate over whether replacement players are as skilled as regular players and whether the games are as entertaining to watch with different players.

<sup>316</sup> *Id.*

<sup>317</sup> Interview with Roger Cossack, *supra* note 102. In the MLB, strikes and lockouts have historically ended in major gains for the players while the owners dropped most of their demands. This pattern does not hold true for the NFL, NBA, and NHL.

<sup>318</sup> *Id.* This would mean that a private system would probably not be put into place. In addition, if Congress were seriously considering legislation to bring professional sports under the jurisdiction of the Railway Labor Act of 1926, owners have a lot of money to use to lobby against this change.

<sup>319</sup> Interview with Maureen Weston, Professor of Law, Pepperdine University (Jan. 31, 2012).

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

professional sports.<sup>321</sup> Helin suggested that for every day past the deadline of when the CBA is supposed to be signed that there is no agreement, the league must pay \$500,000 to predetermined group of charities, chosen by the players, in each city that is home to a team from that league.<sup>322</sup> In addition, the players would have to pay \$250,000 for each day that there is no agreement to a predetermined group of charities, chosen by the owners.<sup>323</sup> Each month that no agreement has been reached after this set deadline, the owners' amount of charitable contributions increases by \$250,000 and the players' amount increases by \$125,000.<sup>324</sup> The thought behind this plan is that if the sides both feel a financial burden, they will be more willing to start legitimate negotiations.<sup>325</sup> The second part of this plan is that a FMCS mediator would be brought in the first day after the deadline.<sup>326</sup> Another possible option under this plan is to bring in a federal arbitrator instead of a mediator.<sup>327</sup>

While this may seem like a good plan because it will give both parties incentives to avoid work stoppages and result in a benefit society, there are some major problems with its implementation. First, while this might seem like a lot of money to us, the general public, the penalties are miniscule compared to the money that is lost

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<sup>321</sup> Kurt Helin, *One Man's Suggestions We Like to Stop Future Lockouts*, NBC (Nov. 16, 2011, 8:22 PM), <http://probasketballtalk.nbcsports.com/2011/11/16/one-mans-suggestions-we-like-to-stop-future-lockouts/>.

<sup>322</sup> *Id.* For example, the NBA's CBA is supposed to be signed by July 1. *Id.* For every day after July 1 that the NBA and NBPA have not reached an agreement, the NBA owners must donate this money, to be divided equally among charities in each city that is home to an NBA team. *Id.* These charities cannot be NBA charities. *Id.*

<sup>323</sup> *Id.* The players' amount would be lower since they are the employees and, it is argued, the employers should have to pay more since they are the ones that write the checks in the first place. *Id.*

<sup>324</sup> *Id.* The first month the owners would be paying \$500,000 per day and the players \$250,000 per day. *Id.* The second month the owners would be paying \$750,000 per day and the players \$375,000 per day. *Id.* The third month the owners would be paying \$1,000,000 per day and the players \$500,000 per day, and so on. *Id.*

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

<sup>326</sup> Helin, *supra* note 321.

<sup>327</sup> *Id.*

when games are cancelled.<sup>328</sup> The cancellation of games means that there are no ticket sales, no concession sales, and most importantly no television revenues.<sup>329</sup> Thus, the financial penalties of this plan might not serve as adequate incentive to come to an agreement.

The second problem is that the financial penalties and mandatory mediation cannot be imposed on the leagues without agreement by both players and owners.<sup>330</sup> It is unlikely that either party would agree to put financial penalties on themselves. Also, as long as the leagues are under the jurisdiction of the NLRA, bringing in a federal mediator is optional. This option is rarely exercised during collective bargaining negotiations, as federal mediators often have little grasp on how the professional sports industry works because of the differences from the other industries that they normally deal with. Bringing in an arbitrator is also optional, and there is no incentive for the owners to agree to arbitration as they

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<sup>328</sup> See Sean Leahy, *Roger Goodell: Time Coming Soon to Cancel First NFL Game Due to Lockout*, USA TODAY (May 25, 2011), <http://content.usatoday.com/communities/thehuddle/post/2011/05/roger-goodell-time-coming-soon-to-cancel-first-nfl-game-due-to-lockout/1#.T5Mk1e1OE20> (stating that if the NFL had cancelled a game or two at the beginning of the 2011 season the league could have lost in excess of \$1 billion.)

<sup>329</sup> From the 2002-2003 season through the 2007-2008 season, the NBA's television contracts alone were worth approximately \$766 million per season. *NBA TV Contracts*, INSIDEHOOPS.COM, <http://www.insidehoops.com/nba-tv-contracts.shtml> (last visited March 19, 2012). This included a contract with TNT worth \$2.2 billion over six years and a contract with network television for \$2.4 billion over six years. In comparison, the NFL receives approximately \$4 billion a year in television revenues, including \$1.9 billion from ESPN for the rights to Monday Night Football. Dex McLuskey & Aaron Kuriloff, *NFL Signs Nine-Year Extensions of Television Contracts with CBS, FOX, NBC*, BLOOMBERG (Dec. 14, 2011, 9:00 PM), <http://www.bloomberg.com/news/2011-12-14/nfl-renews-television-contracts-with-cbs-fox-nbc-networks-through-2022.html>. The NHL receives \$200 million per season for its television contracts. Travis Hughes, *NHL, NBC/Versus Ink 10-Year, \$2 Billion National TV Rights Contract*, SB NATION (April 19, 2011, 1:42 PM), <http://www.sbnation.com/nhl/2011/4/19/2120467/nhl-nbc-versus-tv-contract>. In 2006, MLB signed a deal in which they earn \$670 million per season for national television rights fees. *Going Inside MLB's Latest \$3 Billion TV Agreement*, FOX (July 13, 2006), [http://www.sportsbusinessnews.com/\\_news/news\\_347260.php](http://www.sportsbusinessnews.com/_news/news_347260.php).

<sup>330</sup> This would be something that the parties would have to agree to and write into a CBA to indicate that this plan would take affect upon expiration of the agreement.

have too much to lose from the process.<sup>331</sup> Thus, Helin's plan will probably not have a chance at being implemented. Even if it was, it is unlikely that it would that it will serve as enough of an economic incentive to either party to lessen their bargaining position to reach an agreement any quicker.

A possible way of preventing lockouts and strikes is subjecting professional sports to mandatory binding arbitration. There are two ways that this system could be implemented: through agreement by the parties or by an act of Congress. As discussed above, it is unlikely that the parties, especially the owners, would be willing to agree to binding arbitration as there is little incentive to let a third party make a final decision on what provisions to include in their CBA, and under what terms those provisions would be implemented. The MLBPA fought a hard battle just to have salary arbitration, so it would be even harder to implement arbitration for the entire CBA, which affects almost every aspect of the player-league relationship in professional sports. In addition to both sides having to agree to implement arbitration, they would also have to agree to the structure of the arbitration process, a task that would be nearly impossible, as both sides would want to structure it to their advantage.<sup>332</sup>

Professor Jean Sternlight, of the William S. Boyd School of Law, discussed the possibility of Congress imposing binding arbitration on certain classes of companies.<sup>333</sup> While the arbitration process would not be mandatory, one of the options that she suggests is passing a law that would require arbitration if the employees requested it.<sup>334</sup> This could be a very effective way to prevent work stoppages, as it would greatly shorten the process, should the players

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<sup>331</sup> Interview with Roger Cossack, *supra* note 102.

<sup>332</sup> *Id.*

<sup>333</sup> Jean R. Sternlight, *In Defense of Mandatory Arbitration (If Imposed on the Company)*, 8 NEV. L.J. 82, 85-87 (2007).

<sup>334</sup> *Id.* Under this plan, if the players ask for arbitration, the owners would have to go through the process. *Id.* The league would be responsible for paying the arbitrator, instead of having one provided from federal funds. *Id.* However, Congress would not lay out specifics for the process, leaving it to the parties to design the terms together. *Id.* One possible model would be the salary arbitration used in the MLB, where both parties submit an offer and the arbitrator picks one of them. Interview with Roger Cossack, *supra* note 102. This gives incentives for both parties to make their most reasonable offer. *Id.*

invoke arbitration. This is because the negotiations, which can drag on for years if allowed, would end, and the arbitration process, with a more definite time frame, would take its place. However, for players to choose arbitration, they would have to believe that it provides equal or better odds of improving their position when compared to the benefits of a strike. If that were the case, then the owners would be opposed to entering arbitration. Therefore, the penalties for not doing so would have to be high enough to serve as incentive to participate in arbitration. Additionally, should Congress consider this legislation, the owners would have a lot of money at their disposal to campaign against its passage.

The final possible solution to preventing strikes and lockouts in professional sports would be a change to the NLRB process. Currently, most of the complaints that have been filed with the NLRB have been dropped or deemed moot before a ruling from the Board is released.<sup>335</sup> Twice, the MLBPA received a favorable ruling and both times, the NLRB went to court seeking an injunction to end the lockout.<sup>336</sup> The NLRB was also successful in winning a \$30 million settlement for the NFLPA after owners refused to allow players to return to work following the end of the 1987 strike.<sup>337</sup> Only three out of seventeen combined work stoppages, some with multiple claims, received rulings on claims of bad faith negotiating. This is a very small percentage.

In addition, this low rate of deciding claims has left open many different questions of what can and cannot be done during CBA negotiations. One major question that has been left open is the question of whether players' associations can decertify as the official bargaining agents for the players, then simply file an anti-trust lawsuit against the league, only to recertify again once a new CBA is in place.<sup>338</sup> Thus, it remains a point of contention as the players

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<sup>335</sup> Interview with Roger Cossack, *supra* note 102. Claims are deemed moot when a new agreement is reached. *Id.*

<sup>336</sup> In the 1981 strike, the NLRB's motion for an injunction was denied. See *Silverman v. Major League Baseball Player Relations Comm.*, 516 F. Supp. 588 (S.D.N.Y. 1981). In the 1994-1995 strike, the NLRB's motion was granted, which brought a successful end to the labor stoppage. *Impact of NLRB on Professional Sports*, *supra* note 81.

<sup>337</sup> *Impact of NLRB on Professional Sports*, *supra* note 81.

<sup>338</sup> See Berger, *supra* note 152.

threaten to use and have used a lawsuit as a bargaining tactic because a lawsuit can be faster than an NLRB ruling.<sup>339</sup>

Regardless of whether the NLRB's process is intentionally slow, hoping that the parties can reach a settlement on their own, or it is just a time consuming process, something needs to be done to speed up the process. More rulings on whether practices do or do not constitute bargaining in good faith would benefit both the players and the owners. Both would have a better understanding of what tactics they could employ and would be able to cry foul when the opposing party employs a tactic that has been deemed a violation of the duty to bargain in good faith, without all the current uncertainty. These rulings would affect the CBA negotiations process of all of the industries that fall under the jurisdiction of the NLRB, as the agency's rulings are applied as precedent in all industries within NLRB jurisdiction.

#### IX. LOOKING AHEAD

While the NFL, NBA, and MLB appear to be safe for a while, as they just put a new CBA in place, the NHL could be looking at a strike or a lockout sometime within the next year.<sup>340</sup> This possibility has fans worried, as the last NHL work stoppage meant the loss of the entire season.<sup>341</sup> Short of the NHL and NHLPA coming to an agreement on their own, some change needs to be made to ensure that no games are lost. Also, the NFL, NBA, and MLB CBAs will eventually expire, and no change to the system of CBA negotiations will most likely yield the same results: lockouts and strikes.

The best option for both parties would be an expedited NLRB claims process. This would help avoid litigation, which has been the faster method of ending work stoppages. It would also give parties more guidelines, while still retaining autonomy and freedom to structure the bargaining process in the way that is most beneficial to the league and its individual situation at the time. An expedited process would mean more rulings on what actions constitute

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<sup>339</sup> In the 2011 NFL lawsuit, the judge decided to rule on the case without waiting for a decision from the NLRB. *See Brady v. Nat'l Football League*, 779 F. Supp. 2d 992 (D. Minn. 2011).

<sup>340</sup> Dater, *supra* note 6.

<sup>341</sup> *Lockout Over Salary Cap Shuts Down NHL*, *supra* note 192.



bargaining in good faith, and thus can be used, and which actions do not. This would give the parties better guidance through the process of negotiating, without taking away control of the process from the parties, allowing them to make their own decisions of which tactics they should employ to try to gain the best possible position.

The next best solution would be to bring professional sports under the Railway Labor Act of 1926, which would allow the parties the freedom to go through the negotiations process, while laying out a backup procedure should no agreement be reached. This would also negate the economic consequences on the cities and workers who rely on games taking place for their income as the old CBA would stay in place until a new agreement is reached. This system provides freedom for the individual parties, yet ensures that a solution will be reached with the smallest disruption possible.

Neither of the other two proposed solutions would be effective. Imposing fines on both the players and the owners for not reaching a deal by the deadline and imposing mandatory mediation and/or arbitration would be near impossible. Neither side wants to give up any of the power that they currently hold, and would fight adamantly against it – especially since so much money is at play. While Congress imposing binding arbitration is always in option, it is unlikely to occur and it would take away party autonomy during the negotiations process.

Whichever solution is chosen, it could fundamentally change the way that CBAs are negotiated in professional sports, and perhaps in other industries as well. Everyone would benefit from the NFL, NBA, NHL, and MLB continuing without strikes and lockouts in the future, whether that is in just a few months or ten years down the road. This is especially true for the fans, who can quickly become disheartened when watching their favorite athletes fight over and complain about amounts of money that most of us would be absolutely thrilled to be making. As long as the system stays the same, we will continue to see work stoppages in the future. There is no telling how big an economic impact future work stoppages could have on not only the parties to the CBA, but also on the cities and states that rely on revenues from being home to a professional sports team.

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X. CONCLUSION

Collectively, the NFL, NBA, NHL, and MLB have had seventeen work stoppages resulting from CBA negotiations in the past forty years. That represents how many times that we the fans have not been able to put on our war paint and cheer on our teams. It represents how many stadium and arena employees had to find other paychecks. It represents huge economic losses for both the players and the owners. With multi-millions of dollars at stake in each negotiation process, both sides have a lot to lose and a lot to gain from holding out for a bigger piece of the pie. While the ever-growing television contracts provide a big incentive for an agreement to be reached, something else needs to be done to prevent lockouts and strikes for the future of professional sports.

