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THE 2011 BASKETBALL LOCKOUT: THE UNION LIVES TO FIGHT ANOTHER DAY — JUST BARELY

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Sports in 2011 was synonymous with labor-management relations, which became contentious in two of the three sports in which collective bargaining agreements expired—football and basketball.[1] The National Basketball Association (NBA or the owners), for its part, made it clear that it would utilize a lockout as a means of economic pressure to obtain the kind of agreement it desired. The lockout substantially disadvantaged the National Basketball Players Association (the union), which was nonetheless able to revive at the eleventh hour of collective bargaining due to the threat of antitrust litigation.

Now, as it was nearly thirty years ago when the first "cap" was negotiated between the union and the NBA, economics in basketball have been more perilous than in the other two of the Big Three sports in the United States[2]—baseball and football. Indeed, three decades ago, the 1981 playoff finals between the Boston Celtics and the Houston Rockets were expected to be such a poor television draw that they were broadcast on tape delay, much of it after midnight, even though Celtics superstar Larry Bird was one of the players. Today, basketball revenues are approximately $4 billion annually, compared to football with $9 billion and baseball with more than $7 billion. This contrast in revenue, coupled with losses suffered by some of the less successful teams and teams in small markets, formed one element of the backdrop for the 2011 basketball negotiations.

A second element is the economic disparity between teams that may be partially responsible for the relatively poor competitive balance in basketball.

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1. *See* William B. Gould IV, *Baseball: The Poster Child of Labor Peace*, CHI. TRIB., Dec. 2, 2011, at C27; *cf.* WILLIAM B. GOULD IV, BARGAINING WITH BASEBALL: LABOR RELATIONS IN AN AGE OF PROSPEROUS TURMOIL (2011).

2. For more information, see ROBERT C. BERRY, WILLIAM B. GOULD & PAUL D. STAUDOHAR, LABOR RELATIONS IN PROFESSIONAL SPORTS 161-65 (1986).

That said, although the most prominent dynasty in baseball—the New York Yankees in the 1950s—was associated with low attendance and consequent economic decline in that sport, basketball actually flourished in the wake of the 1983 agreement that introduced a salary cap in the NBA. The Boston Celtics and Los Angeles Lakers formed their own two-team dynasty and faced one another in three memorable playoffs during that decade.[3]

A third factor is the NBA's involvement in small markets, where other major sports leagues fear to tread—i.e., Portland, Sacramento, San Antonio, Salt Lake City, Oklahoma City, Orlando, and Memphis.[4] This has contributed substantially to the NBA's economic perils.

A fourth element in the backdrop for the 2011 basketball negotiations relates to race. The overwhelming percentage of NBA players are black and it is thought that roughly the same percentage of the affluent fan base in the sport is white. Players, rarely the object of fan sympathy in labor disputes, are at more of a disadvantage in NBA labor conflicts, a factor that led an National Basketball Players Association union lawyer and a television personality to liken the commissioner to a plantation owner.[5]

The backdrop for the 2011 negotiations was the economic weapon once regarded as a dirty word in the lexicon of American labor-management relations—the lockout. This economic weaponry, endorsed by the Supreme Court since 1965,[6] became the flavor of the two prior decades; baseball flirted with it in 1990, basketball in 1995 and 1999. One of hockey's lockouts even resulted in the cancellation of the entire 2004-05 season. The lockout again was utilized in 2011 by recently peaceable football as well as by basketball. The owners gravitated towards the lockout tactic because in the event of strike (protesting changes in conditions in employment, which proved ineffective), players who crossed the union picket line could play and still sue in antitrust simultaneously. The lockout put more pressure on the players to settle.

The other major legal framework for the 2011 basketball negotiations was the Supreme Court's 1996 ruling in *Brown v. Pro Football, Inc.*,[7] which recog-

3. *See* Harvey Araton, *Parity, Great for N.F.L., May Hurt N.B.A.*, N.Y. TIMES, Nov. 27, 2011, at SP1 ("The league's most explosive growth years were marked by predictability, the reliance on a handful of transcendent teams and stars relentlessly marketed by the major basketball shoe companies. During the 1970s, the least relished decade in modern N.B.A. history, eight different teams from all corners of the country won the N.B.A. championship. In the ensuing three decades plus, nine have won titles, while league revenue consistently soared.").

4. *See* Lee Jenkins, *'Tis the Season*, SPORTS ILLUSTRATED, Dec. 5, 2011, at 44, 46-48.

5. Harvey Araton, *The Hardening of Easy Dave*, N.Y. TIMES, Nov. 9, 2011, at B13 ("[T]he most inflammatory of comments—HBO's Bryant Gumbel's likening him to 'some kind of modern plantation overseer . . . .'"). Similarly, players' union lawyer Jeffrey Kessler "told The Washington Post that the league was treating the players 'like plantation workers.'" Howard Beck, *N.B.A. Negotiations Resume, with Possible Breakthrough*, N.Y. TIMES, Nov. 10, 2011, at B13.

6. Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).

7. 518 U.S. 231 (1996).

nized players' limited right to sue in antitrust. The Court, over Justice Stevens' strong and persuasive dissent, restricted antitrust law aimed at actions that restrain player mobility under the nonstatutory labor exemption to antitrust law unless collective bargaining was unlikely to revive or the union was moribund.[8] In basketball, the use of the lockout made it clear that, notwithstanding the negotiation of a substantial number of guaranteed individual contracts of employment between players and owners, the same policy prevalent in the rest of industry would apply—i.e., the players would not be paid because of the dominance of the collective bargaining process under federal labor law.

In all the major sports except baseball (though since 1998 baseball was governed by *Brown* by virtue of the Curt Flood Act) this meant that both sides immediately engaged in strategic behavior. Unions would threaten to disclaim interest in representation or decertify as a bargaining tactic, then *mirabile dictu*, revive at the time negotiations concluded since owners insisted upon it given the fact that a collective bargaining agreement with a union was the *sine qua non* for immunity from antitrust law. Scattered decisions addressing the lawfulness of this tactic supported it,[9] but the NBA, soon after the lockout commenced in July, initiated a preemptive strike against it in federal district court. The NBA proceeded in the Southern District of New York because the Court of Appeals for the Second Circuit has been traditionally hospitable to the preservation of the labor exemption in a series of cases involving both football[10] and basketball.[11] Subsequently, the NBA filed charges with the National Labor Relations Board alleging refusal to bargain on the theory that insistence on this tactic was inconsistent with an effort to in good faith consummate a bargaining agreement—the statutorily required objective—just as their football counterparts had done earlier. The union had earlier filed its own refusal to bargain charges alleging a failure of the NBA to open its books[12] and other tactics that, in the union's view, constituted a totality of conduct inconsistent with the duty to bargain.[13]

The road towards an agreement was thus strewn with litigation because of deep-seated differences, perhaps as much between the clubs (as is often the case in sports league-labor disputes) as between the league and the union. The group of teams that were said to be losing lots of money and viewed themselves

8. *Id*. at 250.

9. Powell v. Nat'l Football League, 764 F. Supp. 1351 (D. Minn. 1991); Memorandum from the Office of Gen. Counsel, NLRB, to Gerald Kobell, Reg'l Dir., Region 6 (June 26, 1991), *available at* 1991 WL 144468 ("[T]he fact that the disclaimer was motivated by 'litigation strategy,' i.e., to deprive the NFL of a defense to players' antitrust suits and to free the players to engage in individual bargaining for free agency, is irrelevant so long as the disclaimer is otherwise unequivocal and adhered to.").

10. Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004).

11. Nat'l Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995); Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987).

12. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

13. NLRB v. Gen. Elec. Co., 418 F.2d 736 (2d Cir. 1969).

as unlikely to overtake the top teams included some of the small market teams—i.e., the Portland Blazers, Cleveland Cavaliers, Memphis Grizzlies, Utah Jazz, Denver Nuggets, Indiana Pacers, and Houston Rockets. A subset of this group consisted of owners who had recently bought or wanted to sell and, it was said, sought to drive up the prices of their franchises: the Charlotte Bobcats, Atlanta Hawks, Detroit Pistons, Toronto Raptors, Philadelphia 76ers, and Washington Wizards. Nonetheless, two of the big-market rich teams, the Los Angeles Lakers and the Dallas Mavericks, were in solidarity with this group.

In the summer months, however, the parties were far apart on a host of issues initiated by the owners, who sought to recapture gains made by the players and to rebuild the system. One of the major issues related to revenue sharing, a collective bargaining provision in existence since the time of salary caps in the early 1980s. The most recent agreement provided for a 57% share for the players. The owners proposed a fifty-fifty split, which they characterized as such because they sought a redefinition of revenues. The players maintained that the proposal was in fact somewhere in the mid-forties for most of the agreement, descending to the mid-thirties in the last three years. The owners also proposed a two-tier system for team salary caps, with a target payroll of $62 million, which they characterized as a so-called "flex-cap." The owners' arrangement also would have prohibited the guaranteed contract, previously addressed in both basketball and baseball through individual contract negotiations rather than the collective bargaining process itself. But union officials contended that a prohibition on guaranteed contracts and restrictions on "sign-and-trade" agreements between clubs would amount to a $7 billion decrease in pay over ten years and proposed instead a pay cut of $500 million over a five-year period.

The lockout was declared on July 1 and froze all negotiations with incumbent players as well as draftees. In the wake of the lockout, the parties met sporadically. In late September, it became clear that training camps were unlikely to open in October. By the first week in October, the entire preseason as well as the season's first two weeks were cancelled, with the owners insisting on a 47% share for the players and the players reducing their demand to 53%. At this point the idea of a fifty-fifty split was bandied about, but the union rejected it, according to David Stern.[14] Though the ominous clouds hovering over the negotiations indicated the potential for a cancelled season, as of late October, the parties still hoped for a full eighty-two-game schedule, albeit within a compressed period of time. But with the ongoing difficulties in resolving the parties' differences, the following day, a full season of eighty-two games became "irretrievably out of reach."[15] With the advent of November and what would have been the commencement of the season in that month's first week, beyond

14. Howard Beck, *Regular-Season Games Likely to be Lost as Bid to End Lockout Fails*, N.Y. TIMES, Oct. 5, 2011, at B16.

15. Howard Beck, *N.B.A. Talks Stall, and More Games are Cancelled*, N.Y. TIMES, Oct. 29, 2011, at D4.

the seemingly intractable revenue split issue, the so-called "system issues" came to the front. The NBA sought elimination of sign-and-trade deals involving players like Carmelo Anthony, who had gone from Denver to New York the previous season, where the teams exceeded the basketball luxury tax or "soft cap" threshold. This meant that Anthony would be required to wait six months to sign a guaranteed extension and any player who signed such an extension could not be traded. And the incentive to stay with a team rather than move under a sign-and-trade deal would be provided by a five-year contract and a 6.5% raise with the old team as opposed to a four-year contract and a 3.5% raise with the new team. While abandoning the hard cap concept, the owners sought to reduce the number of so-called "midlevel exceptions" to the cap contained in the collective bargaining agreement as well as to add more punitive luxury tax provisions that would, in the union's view, "strangle" free agency.

In mid-November, matters came to a crunch when the owners presented the union with an alternative: accept either a seventy-two-game schedule or inferior terms on both the revenue split and systems issues in the future. This tactic, containing a two-tier "take it or accept an inferior offer"[16] or regressive bargaining,[17] had the effect of hardening the union's position and moving it towards decertification—a "nuclear winter" as Commissioner David Stern characterized it because of its potential to blow up the entire season through protracted litigation.

The union was under pressure by some players and agents who threatened to file a genuine decertification, which would oust the union permanently under *Brown* and would thus likely constitute a more successful dissident petition or union disclaimer. So the union took steps that were a kind of preemptive strike against the dissident petition. The fact that a dissident petition grounded in opposition to union leadership policy would have been more obviously in opposition to the collective bargaining process within the meaning of *Brown* undoubtedly played a dominant role in the NBA's abandonment of a "take it or leave it" bargaining stance. Thus the union announced a disclaimer and this opened up the door to antitrust litigation, which was then commenced.

The union now was represented by David Boies, who had only a few months before represented the NFL and successfully deprived that union of its only effective antitrust remedy—i.e., an injunction against the lockout, which would have required the owners to open the camps in early summer.[18] Thus the basketball union now would not pursue the injunction remedy, notwithstanding the persuasiveness of Judge Bye's dissenting opinion in the football case.[19] Of

16. Telescope Casual Furniture, Inc., 326 N.L.R.B. 588, 589-92 (1998) (Gould, Chairman, concurring).

17. White Cap, Inc., 325 N.L.R.B. 1166, 1170 (1998) (Gould, Chairman, concurring), *rev. denied*, 206 F.3d 22 (D.C. Cir. 2000).

18. Brady v. Nat'l Football League, 640 F.3d 785 (8th Cir. 2011).

19. *Id.* at 794-800 (Bye, J., dissenting).

course, Boies would have met himself coming around the corner if he argued for it in basketball.

Nonetheless, even though the union was stripped of its most effective antitrust remedy, litigation seems to have moved the parties together. It most certainly called the NBA's bluff, in that the league's regressive or inferior option was quickly forgotten. True, the NBA obtained givebacks that are estimated to be worth more than $300 million. Not only did it win on revenue sharing with the players—the players will possess between 49% and 51% as opposed to 57%—but more stringent luxury tax penalties for violators also have been instituted. As National Basketball Players Association Executive Director Billy Hunter said, the latter element constitutes the "harshest element of the new system."[20] At the same time, guaranteed contracts were preserved, restricted free agents will benefit from the reduction of the so-called "match period" when teams may match competing offers from seven to three days, which may encourage bidding on these players. The cap remains soft in that the so-called incumbent "Bird" players (named for Celtics superstar Larry Bird) may exceed the cap and have more expansive increases and lengths of contracts than other players. A so-called "amnesty" for bad contracts was permitted, in that even though the contracts must be paid, a player on each club may be waived and his salary not counted towards his team's cap. What appeared to be a rout of the players in November emerged as a reasonable face-saving compromise.

20. Memorandum from G. William Hunter, Exec. Dir., Nat'l Basketball Players Ass'n, to "All Players," at 4 (Nov. 28, 2011) (on file with author) ("Tax rates have significantly increased, from the old rate of $1-for-$1 to progressively higher rates that begin at $1.50 for a team $0-5 million over the luxury tax threshold and increase to $3.25 for a team $15-20 million over the threshold. In addition, a repeater tax of $1 will be added on for any team that is a taxpayer in 4 out of 5 seasons. Clearly, fewer teams (if any) are likely to venture very high above the tax threshold, which was a concession the players had to make to reach an overall settlement.").