

# NFL & NBA LOCKOUTS: A UK LAWYER'S LEGAL RETROSPECTIVE

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It cannot have escaped the attention of sports fans on the East side of the Atlantic, even those who do not follow US sports, that both the National Football League ('NFL') and the National Basketball Association ('NBA') have spent much of 2011 in protracted legal wranglings between the respective leagues (specifically the team owners) and their players as regards Collective Bargaining Agreements ('CBAs'). The media has made much of the West Side Story-esque posturing between the two sides in eventually reaching agreements in both sports, but little has been written of the interesting legal issues underpinning the disputes, particularly for UK lawyers and sports fans. This article will seek to compare and contrast the two sets of disputes and explain the principal legal issues.

## **The US sport model and CBAs**

In the United States the NFL and NBA operate on the principle that no one team or franchise, or a small number of teams or franchises, should dominate their sport for a prolonged period of time, as has been seen in football with Manchester United in England and Barcelona and Real Madrid in Spain. Indeed Robert Kraft, the well-known owner of the New England Patriots NFL team, said, when ending his interest in taking over Liverpool Football Club in 2005, he would not invest in football until there was a level playing field. Indeed I propose that a more appropriate term than level playing field is 'competitive equality'.

The key elements of this US model that seeks to achieve competitive equality are: an absence of promotion/relegation, the drafting of new players out of the US college system each year and a control of salaries. Yet the essential commercial and legal mechanism in place to achieve a competitive equality is that the players are owned by the individual leagues/team owners with agreements made through collective bargaining.<sup>1</sup> This is in complete contrast to the model in European sport where there is individual contractual bargaining between clubs and players (and their agents) which, once agreed, means the ownership of the players rests with the individual clubs and not the league.

CBAs in US sport can be described as the labour blueprint between the players and the owners.<sup>2</sup> They are hotly negotiated, lengthy documents, as they express the complete range of relationships between the management of the league and their athlete employees. They will cover what are termed 'mandatory subjects', and certain other areas, such as: team discipline, injury and non-injury grievances, base salaries, access to club and personal files, medical rights and retirement. It is easy to see why CBAs are very important but surely a league could, if needed, operate without one?

## **CBAs and the Law**

CBAs are a mechanism in US sports which ensures harmony exists between labour (employment) law and antitrust (competition) law, both areas being primarily legislated at the federal level. Over a number of years US sports have been afforded, by both legislators and the courts, a number of special dispensations from antitrust law, the principal instrument being the Sherman Act passed in 1890. Understandably the application of the Sherman Act to sport has generated much controversy and litigation for decades. It is a potent piece of litigation as any damages awarded pursuant to it are automatically trebled (for private claimants), a concept not familiar to many jurisdictions including the UK.

Section 1 (§1) of the Sherman Act makes illegal "every contract, combination in the form of a trust or otherwise, or, conspiracy, in restraint of trade". This is applicable to sports in the US because even though the leagues themselves are unincorporated associations of independently owned organisations, courts have held that they are capable of contracting, combining or conspiring to restrain trade through concerted

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<sup>1</sup> 'What are collective bargaining agreements and how are they used in sport?', [www.inbrief.co.uk](http://www.inbrief.co.uk)

<sup>2</sup> 'NBA lockout: why was the pay deal refused and what happens next?', The Sport Blog, [Guardian.co.uk](http://Guardian.co.uk), 15 November 2011

action.<sup>3</sup> On the other hand, as the teams in a league share certain common interests and business objectives (for instance: preserving the competitive balance, maximising broadcast revenue and promoting the league) then it is inevitable that there is some degree of cooperation and agreement among teams which is fundamentally anti-competitive.<sup>4</sup> Therefore CBAs, which cover the common business objectives of the team owners, are in essence anti-competitive agreements.

However, the Norris-La Guardia Act of 1932 ('NGLA') permits employees to organise as a collective bargaining unit, therefore allowing the employer to negotiate a contract that governs all covered employees as one unit.<sup>5</sup> Indeed Congress (the US legislature) favours the process of collective bargaining rather than having to ask the court to intervene on labour disputes (see *Brown v Pro Football, Inc.*<sup>6</sup>). This is because where the courts have had to intervene in the past<sup>7</sup> it has to, under rule of reason analysis, undertake a complex examination of labour practices in each case and determine whether or not they are reasonable; bearing in mind that some restraints are necessary as legitimate business practices. Therefore, a doctrine known as the 'non-statutory labour exemption' has developed which protects the product of collective bargaining from attack under antitrust law. It is important to note that it is not just the CBAs themselves that are protected but the exemption also extends to where a CBA does not exist, or has expired, as long as a bargaining relationship still exists.<sup>8</sup>

Taking the allowance of a collective bargaining unit one step further, the National Labour Relations Act ('NLRA') passed in 1935 guarantees employees the right to form a labour union and requires employers to deal with a duly-elected union as the bargaining agent for the employees. The players in both leagues have labour unions, the National Football League Players Association ('NFLPA') and National Basketball Players Association ('NBPA'), who as we will see are main actors in the disputes that ensued.

### **So what relevance does this have to the recent NFL & NBA disputes?**

The NFL & NBA disputes were fundamentally related to their respective CBAs that were coming to an end and therefore due for re-negotiation. Many of the legal issues in the two cases were similar but first let's look briefly at the commercial issues and drivers behind the fallouts between players and owners.

The NFL has been described as "one of America's best run businesses"<sup>9</sup> and leads American professional sports in terms of revenue and value. One of the key factors in this success is that approximately 60% of total revenue in the NFL is generated centrally and distributed evenly among the 32 teams. Indeed this business model is unique to the NFL, the NBA for instance does not generate and share such a large quantity of central revenue, rather it relies more on gate receipts and local media.<sup>10</sup> From this it is hardly a surprise that the main bone of contention in the NFL dispute was how this champion revenue should then be split between owners and players.

The NBA faced a similar issue regarding the owner/player split of so-called basketball-related income ('BRI') for each team (e.g. ticket sales, TV contracts, merchandise), but unlike the NFL the NBA was not awash with money due to the differences in the business models. In fact during the previous season the owners claimed that 22 of the league's 30 teams were due to make a loss for the season totalling \$340m. To resolve this the owners wanted a number of fundamental changes made to the league and therefore the CBA (some of which the NFL already had in place) in addition to a change in the BRI split: a 'hard' salary cap, a

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<sup>3</sup> 'Antitrust law looms over sports contract analysis', Pittsburgh Post-Gazette, Carl W. Hittinger and Adam D. Brown, 14 February 2011

<sup>4</sup> 'Antitrust law looms over sports contract analysis', Pittsburgh Post-Gazette, Carl W. Hittinger and Adam D. Brown, 14 February 2011

<sup>5</sup> 'Antitrust Labour Law Issues in Sports', [sportslaw.uslegal.com](http://sportslaw.uslegal.com)

<sup>6</sup> 518 U.S. 231 (1996)

<sup>7</sup> 'Antitrust Labour Law Issues in Sports', [sportslaw.uslegal.com](http://sportslaw.uslegal.com)

<sup>8</sup> 'NFL Lockout: The Legal Issues Behind the NFL-CBA Negotiations', [huffingtonpost.com](http://huffingtonpost.com), Gabriel A. Feldman, 11 March 2011

<sup>9</sup> 'This is the NFL: 2009-2010', page 4, National Football League, 2009

<sup>10</sup> 'The NFL's Current Business Model and the Potential 2011 Lockout', *Economics 360: The Economics of Sport and Entertainment*, Jake I. Fisher, 4 May 2010

diminishment in player compensation and the end of the guaranteed contract (among others). The significance of these proposed radical changes is that the NBA is a league where the players traditionally hold the power. Indeed they are far better paid than their peers in the NFL, with the NBA average salary over 2.5 times greater than the average NFL salary.<sup>11</sup> However, this also means the players had far more to lose financially from a prolonged impasse in negotiations over a new CBA than the NFL players, and conversely the owners could afford to dig their heels and force the players to make some significant concessions.

### **The consequences of a breakdown in negotiations and expiry of CBAs**

In the months leading up to the expiration of their respective CBAs the two sets of owners and players associations attempted to negotiate new deals but ultimately failed. This left the following legal options available to the parties:

- Continue to work and negotiate in the absence of a CBA;
- Players strike using a right under the NLRA, or formally decertify their respective union and bring an antitrust case, or the union essentially walks away from the players by way of a 'disclaimer of interest'; or
- Owners prevent the players from working by way of *lockout* (which would for example include denial of access to training and medical facilities) or impose their 'last, best offer' (which would be forcing the players to take it, leave it or decertify their union).

### **How the NFL lockout arose**

In the case of the NFL CBA drama the players made the first move on 11 March 2011 (seven days after the CBA had formally expired) by decertifying the NFLPA and dissolving the union. Here a further body came into the picture, the National Labour Relations Board ('NLRB'). This is an independent federal agency which administers and enforces the NLRA, with its two primary functions to: conduct elections in which employees decide whether a union is to represent them and to investigate and remedy unfair labour practices by employers.<sup>12</sup>

The players decertifying their own union is very much a means to an end to enable them to avoid the 'non-statutory labour exemption' and bring an antitrust case against the NFL challenging all of the rules that they have in place that restrict a player's ability to make money or otherwise impact a player's working conditions (e.g. salary cap and free agent restrictions).<sup>13</sup> There are several steps required to effect decertification:

1. At least 30% of the players must sign a petition stating that they no longer want the NFLPA to represent them as a union – the NFL players started this 6 months prior to the expiry of the CBA;
2. The petition must then be filed with the NLRB;
3. The NLRB must verify the petition and schedule an election; and
4. 50% of the players must vote in favour of decertification – which the NFL players did.

In response to this the owners and the league then decided to institute a lockout on the same day. A lockout is the withholding of employment by an employer from its employees for the purpose of either resisting their demands or gaining a concession from them. Lockouts are however illegal if they are motivated primarily as an attempt to discourage union membership or interfere with employees' organisational rights<sup>14</sup>, something which the players directed at the owners as we shall see.

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<sup>11</sup> 'The Differences between the NFL and NBA Lockouts', gcobb.com, 27 October 2011

<sup>12</sup> 'Antitrust Labour Law Issues in Sports', sportslaw.uslegal.com

<sup>13</sup> 'NFL Lockout: The Legal Issues Behind the NFL-CBA Negotiations', huffingtonpost.com, Gabriel A. Feldman, 11 March 2011

<sup>14</sup> 'NFL Lockout: The Legal Issues Behind the NFL-CBA Negotiations', huffingtonpost.com, Gabriel A. Feldman, 11 March 2011

To add to the legal complexity on 11 March, having decertified the union, nine current NFL players (including star players and Superbowl winners Tom Brady, Peyton Manning and Drew Brees) and one college player (whose interest was in the upcoming scheduled draft), seeking to represent a class including current NFL players and the next season's rookie class, filed an antitrust case in the State of Minnesota alleging that the lockout constituted an illegal group boycott, as well as alleging a number of anticompetitive restrictions in violation of the Sherman Act §1, and violations of state contract and tort laws.<sup>15</sup> The lawsuit sought a number of remedies including: an injunction prohibiting the lockout; treble damages incurred as a result of antitrust violations; and damages for the contract and tort claims.<sup>16</sup>

In response the league argued that the 'non-statutory labour exemption' was designed to shield the entire bargaining process from antitrust security and so must extend to the current dispute, despite the players assertion that the bargaining relationship was over as they had decertified. Secondly the league argued that as it now had a case pending before the NLRB, claiming the players did not bargain in good faith and that their decertification was a sham, that the NLRB therefore had primary jurisdiction and any antitrust suit should be stayed pending their ruling.<sup>17</sup> Whose arguments do you think the judge found most compelling?

### **An initial victory for the players**

As the title of this section would suggest, alongside negotiations continuing throughout this process, on 25 April Judge Susan Nelson granted the players a preliminary injunction preventing the NFL maintaining the lockout. She found that the "undisputed brevity and precariousness of the players' careers" meant that they would suffer irreparable harm as a result of even a brief suspension of league activity.<sup>18</sup> I suggest this reasoning is questionable particularly when she attempted to justify it by saying that first year players would especially suffer by falling behind their peers through losing the opportunity to gain valuable playing experience. However, her further finding was more persuasive, as she said that the players would likely succeed on the merits of their claims for a permanent injunction since the lockout was "an agreement among competitors to eliminate competition" and "a perpetual horizontal group boycott and price fixing agreement", both of which fall squarely within the Sherman Act §1. Finally, taking a societal outlook, Judge Nelson found that the public interest strongly supported granting the injunction because of the substantial economic impact of professional football in America, ranging from player salaries to ticket sales, concession stands to TV contracts.<sup>19</sup>

### **Back to lockout!**

Having been surprised by Judge Nelson's verdict, as were many commentators, it was hardly unexpected that the NFL appealed the order to the US Court of Appeals for the Eighth Circuit. In doing so the court issued a temporary stay of the injunction therefore reinstating the lockout before oral arguments to be heard at the trial later in the month.<sup>20</sup> Having criticised Judge Nelson's reasoning earlier, it is worth noting that at the trial lawyer for the NFL, Paul Clement, attacked the notion that the players were suffering "irreparable harm" either professionally or financially as they were getting to spend more time with their families and players losing out on money may put pressure to come to a negotiated (relatively) amicable agreement, which is precisely the purpose of a lockout.<sup>21</sup>

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<sup>15</sup> 'United States: anti-competitive agreements – player lockout: Brady v National Football League', *European Competition Law Review*, Volume 32 (9), Douglas Broder & Anthony P. Badaracco, 2011

<sup>16</sup> 'NFL Fans - Are You Ready for Some...Antitrust Litigation? Players Sue, Claiming Lockout is a Group Boycott', *The National Law Review*, Tyler M. Cunningham, 2011

<sup>17</sup> 'NFL Fans - Are You Ready for Some...Antitrust Litigation? Players Sue, Claiming Lockout is a Group Boycott', *The National Law Review*, Tyler M. Cunningham, 2011

<sup>18</sup> 'United States: anti-competitive agreements – player lockout: Brady v National Football League', *European Competition Law Review*, Volume 32 (9), Douglas Broder & Anthony P. Badaracco, 2011

<sup>19</sup> 'United States: anti-competitive agreements – player lockout: Brady v National Football League', *European Competition Law Review*, Volume 32 (9), Douglas Broder & Anthony P. Badaracco, 2011

<sup>20</sup> 'United States: anti-competitive agreements – player lockout: Brady v National Football League', *European Competition Law Review*, Volume 32 (9), Douglas Broder & Anthony P. Badaracco, 2011

<sup>21</sup> 'Analysis: Legality of Current NFL Lockout', *opposingviews.com*, Sports Agent Blog, 7 June 2011

It was little of a surprise that when the court came to a decision on 8 July it found in favour of the NFL by a majority of 2:1 (the Democrat appointed judge dissenting). The two Republican appointed judges, Steven Colloton and William Benton, said that the NLGA does not “require the present existence of a union” and that it can apply simply to disputes arising between employers and employees. Unfortunately for the players’ their strategy of seeking decertification of the NFLPA did not have the effect the players thought it did.<sup>22</sup> Rather they favoured the NFL’s argument that the NLGA, as a federal labour law, applies to prevent federal courts from issuing injunctions while labour and management are at an impasse.

This was a key victory and validation for the NFL’s legal strategy, giving them greater bargaining power as negotiations continued, as it realistically meant that the lockout could, if needed, be maintained into next year. 2012 would also be the earliest time a full trial on the lockout’s merits could be heard.<sup>23</sup> It would be unlikely the players would want to go without pay for that length of time, but the judgment still left open the possibility of some antitrust liability for the league, and so it gave both sides some impetus to get back to the negotiating table and come to an agreement.

The judgment by the Eight Circuit was criticised in some legal quarters for being clearly contrary to the legislature’s intention when the NLGA was originally passed. When the purpose and context of the NLGA is considered, as it was in Judge Kermit Bye’s thorough dissenting opinion, then it is obvious that the legislature did not intend for the NLGA to be used as a means by which employers in violation of federal antitrust law could nonetheless combine together to extract concessions from their employees. The unfortunate consequence of the majority ruling means that any employer, not just the NFL but every employer in the Eighth Circuit, can lockout employees, even in violation of other federal antitrust laws, to pressure employees into accepting worse terms.<sup>24</sup>

#### **Lockout over in time for the new season**

After 132 painful days of negotiation, mediation (more of which I will discuss later) and court actions, the lockout finally came to an end on 25 July 2011 after the NFLPA ratified a new agreement via a vote. The table below shows what was finally commercially agreed between the two parties. From a legal perspective, a condition of the new 10 year CBA was that all pending litigation needed to be settled and to that end the NFL players released their claims without any compensation. Furthermore, the agreement also stipulates that there is to be no judicial oversight of the CBA, and that if there are disputes the NFL and NFLPA are to employ an independent third party arbitrator which they agree upon to settle the dispute. To insure labour peace, the new agreement contains a clause stating that the players will not strike nor will the owners’ lockout the players during the duration of the agreement.<sup>25</sup>

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<sup>22</sup> ‘Lockout ruling validates NFL strategy, puts players in tough spot, SI.com, Michael McCann, 8 July 2011

<sup>23</sup> ‘Lockout ruling validates NFL strategy, puts players in tough spot, SI.com, Michael McCann, 8 July 2011

<sup>24</sup> ‘NFL Lockout Injunction Reversal: Using Labor Law Against Employees’, litigationandtrial.com, Maxwell S. Kennerly, 11 July 2011

<sup>25</sup> ‘New Collective Bargaining Agreement Ends NFL Lock-Out’, ContractsProf Blog, Jeremy Telman & Jared Vasiliauskas, 15 August 2011

Issue	Old CBA	New CBA
Revenue sharing (owners : players)	50:50	53:47
Free agency	Unrestricted after five seasons	Unrestricted after four seasons
Hard salary cap	\$109m	\$120.375m (minimum 89% spend)
Minimum salaries	-	Increase by 10-12%
Rookie compensation	Drafted have 6-4 year mandatory contract length	Drafted / Undrafted have 4/3 year mandatory contract length

The latter mutual provision ensuring labour peace and continuous league activity for the duration of the agreement is all well and good but what will happen again in the lead up to the expiry of this new agreement at the end of the 2020 season? Having won the Eighth Circuit case the NFL may be bullish and force the players to make further concessions. At this stage this is obviously pure conjecture and it will take a decade to see how this same scenario will play itself out.

### The NBA takes the NFL's lead

With expiry of the NBA CBA due at midnight on 30 June 2011, after hours of fruitless negotiations since the beginning of the year, in May the NBPA filed a complaint with the NLRB accusing the league of negotiating in bad faith by failing to provide critical financial data and repeatedly threatening to lockout the players. Unsurprisingly the players were also considering at this time decertifying the union to bring an antitrust action akin to the (unsuccessful) strategy pursued by their NFL counterparts.

In the meantime, negotiations continued throughout May and June, but fundamental differences remained on key issues such as the salary cap and split of basketball related income ('BRI'), and so on 1 July the owners officially began a lockout. Little of note then happened until 2 August whereby the league hardened its stance further by filing two claims, one being a federal lawsuit in the United States District Court for the Southern District of New York and the other at the NLRB. The former sought a declaratory judgment that the lockout was not in violation of federal antitrust laws and that if the NBPA decertified (and the decertification found to be lawful) then all existing player contracts would become void and unenforceable.<sup>27</sup> Interestingly this particular court had previously ruled in favour of the league on similar issues (see *NBA v Williams*<sup>28</sup>). The complaint to the NLRB by the league mirrored that made by the players in that they counter-claimed that the players had not engaged in good faith bargaining.

### The NLRB's presence and influence during the lockout

During the course of the lockout both sides made a series of detailed complaints to the NLRB (and submitted considerable evidence), in addition to those already mentioned, as both sides realised that the Board's decision would produce a dramatic change in bargaining leverage<sup>29</sup>:

<sup>26</sup> 'An Overview and Comparative Analysis of the Collective Bargaining Agreements in the NBA, NFL, and MLB', CMC Senior Theses, Paper 62, Terrence Caldwell, 29 November 2010

<sup>27</sup> 'The NBA Lockout: A momentum-Killing Millionaire v Billionaire Showdown', Illinois Business Law Journal, Cynthia Flores Porco, 2 November 2011

<sup>28</sup> 45 F.3d 684 (2nd Cir. 1995)

<sup>29</sup> 'The NLRB hammer and the NBA lockout', ESPN.com, Lester Munson, 29 October 2011

- The players claimed that the owners were guilty of unfair labour practices in their demands for "draconian demands and changes" and the declaration of a lockout when there was "no impasse in bargaining"; and
- The players also said that the owners were demanding these changes on a "take it or leave it basis" without "appropriate tradeoffs" - in reality the players were claiming that many of the meetings prior to 1 July were simply sham manoeuvres designed to stall progress until a lockout was possible<sup>30</sup> - in labour law this is known as 'surface bargaining'.

Indeed the complaints made by the owners were somewhat unusual as management tend not to participate in early NLRB skirmishes.<sup>31</sup> However, it was only in mid-October that the NLRB gave an indication that they were ready to act. At this stage the split of BRI had all but been agreed but the fundamental changes to the league's structure still remained very much outstanding.

The imminence of a decision from the Board explained why, despite threatening to decertify, the players chose to maintain the union and pursue their case using labour rather antitrust law, which they clearly saw as a source of potential leverage.<sup>32</sup> This is a key difference in the legal approaches of the two players unions to the lockout. The NLRB was never a real factor in the NFL lockout for two reasons; first both the players and owners chose to focus their efforts on court actions challenging the lockouts, and secondly the lucrative contracts that the league had with TV networks that meant the networks had to pay for games even if they were not played!<sup>33</sup>

Interestingly, as with the decision of the Eighth Circuit in the NFL dispute, it was said that politics would have an influence over the anticipated ruling of the NLRB, although the Board would never admit to it.<sup>34</sup> There were two political factors to consider: first the documented union bias from the individuals President Obama (a democrat) had appointed to the Board and secondly the US's increasing antipathy towards wealth, both of which were likely to help the players' case.<sup>35</sup>

### **The NBA chooses the nuclear option**

Throughout the NFL dispute only one game was cancelled, the exhibition Pro Bowl Hall of Fame game scheduled for 7 August, traditionally the first game of the NFL's preseason. The same cannot be said of the NBA. First, partly on 23 September and partly on 4 October NBA Commissioner David Stern cancelled the entirety of preseason. However, the scale of the dispute and the drastic measures did not stop there, and a week later the unthinkable happened with the first two weeks of the regular season being cancelled. Further talks took place in October but once again no agreement was reached and so the whole of November's schedule was also cancelled.

These cancellations created issues for many stakeholders in the sport including the league itself, the players and of course the fans. With the NBA being far less profitable than the NFL it was possible that the owners, having less to lose, were ready and willing to lose an entire season, much like the National Hockey League (ice hockey) owners did in 2004.<sup>36</sup> However, as well as the fans, the general public perception of the ever-lengthening lockout could have hurt the NBA for years to come for the simple reason that, "the NBA is not the NFL; it doesn't have the luxury of extraordinary and unassailable popularity."<sup>37</sup> On the whole all

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<sup>30</sup> 'NLRB now holds key to NBA lockout', ESPN.com, Lester Munson, 21 October 2011

<sup>31</sup> 'NLRB now holds key to NBA lockout', ESPN.com, Lester Munson, 21 October 2011

<sup>32</sup> 'NLRB now holds key to NBA lockout', ESPN.com, Lester Munson, 21 October 2011

<sup>33</sup> 'Legal decisions face NBA players', ESPN.com, Lester Munson, 15 November 2011

<sup>34</sup> 'The NLRB hammer and the NBA lockout', ESPN.com, Lester Munson, 29 October 2011

<sup>35</sup> 'The NLRB hammer and the NBA lockout', ESPN.com, Lester Munson, 29 October 2011

<sup>36</sup> 'The NBA Lockout: A momentum-Killing Millionaire v Billionaire Showdown', Illinois Business Law Journal, Cynthia Flores Porco, 2 November 2011

<sup>37</sup> 'The NBA Lockout: A momentum-Killing Millionaire v Billionaire Showdown', Illinois Business Law Journal, Cynthia Flores Porco, 2 November 2011

stakeholders were losing out due to the lockout but the cancellations made it pretty clear that both sides were more interested in 'winning' than compromising.<sup>38</sup> One may see this as selfish particularly given that even by 25 October it was estimated that around 400 jobs had been lost across the whole of the NBA as a direct result of the lockout.<sup>39</sup>

### **Dissent between the players and the dissolving of the union**

With the prospect of a "nuclear winter" being seriously talked about<sup>40</sup>, meaning no NBA season at all for 2011/12, a split between the players began to surface. Although NBA players on average earn far more than their NFL contemporaries, the players that were taking the hard line stance in the NBA dispute were the superstars and not those on average salaries, who obviously had far more to lose financially from the prolonged lockout and would eventually lose patience with not getting paid.<sup>41</sup> The NFL players, on the other hand, seemed to have support up and down the rosters.

One option discussed whilst the lockout continued was for players to earn a wage by playing in overseas basketball leagues. Legally this would not be straightforward as the overseas teams would likely require any NBA players to sign a contract of at least one year and the amounts they could earn would be considerably less. However, the NBA said players could sign for overseas teams if they wished and the world governing body of basketball FIBA also stated it would allow players under contract to play overseas, provided that the contracts they signed have opt-out clauses that allow players to return once the work stoppage ended.<sup>42</sup> In the end the reality of players moving overseas was overblown with the majority of the 90 or so who decided to take that route being "rookies, middling veterans and fringe players".<sup>43</sup>

Stern did warn though that the overseas possibility, plus a prolonged period without pay, would split the union, and those were prescient words as that is exactly what happened. On 14 November, having rejected the revised final offer by the owners, the NBPA produced its own wild card (to use a popular US sporting term) by filing a disclaimer of interest and dissolving the union.<sup>44</sup> This is different to the decertification that the NFL players had sought. A disclaimer of interest is not a formal legal process and merely means the union itself making a statement that it no longer wishes to represent the players as their collective-bargaining representative in accordance with the NLGA by walking away from the players.<sup>45</sup> The benefit of this procedure over decertification is that the players can immediately bring a court action against the league and the owners, which a number of players did by filing actions in Minnesota and California. One view is this is a change of tact from pursuing a negotiated agreement to waging a war along the same lines as the NFL players claiming the owners are violating antitrust law by locking them out. Alternatively, would this tactical move by the players bring about a renewed vigour to re-negotiate and avoid potential lengthy and costly legal proceedings?

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<sup>38</sup> 'The NBA Lockout: A momentum-Killing Millionaire v Billionaire Showdown', Illinois Business Law Journal, Cynthia Flores Porco, 2 November 2011

<sup>39</sup> 'That 2011-12 NBA Schedule? Never Mind', The New York Times, Howard Beck, 25 October 2011

<sup>40</sup> 'NBA Lockout: Sports Law Expert Explains Decertification Details', welcometoloudcity.com, J.A. Sherman, 15 November 2011

<sup>41</sup> 'The Difference Between the NFL and NBA Lockouts', gcobb.com, 27 October 2011

<sup>42</sup> 'FIBA: NBA stars can play overseas', ESPN.com, 30 July 2011

<sup>43</sup> 'A Lot of Talk, but Few Stars Have Left the Country to Play', The New York Times, Howard Beck, 12 October 2011

<sup>44</sup> 'NBA Lockout: What The Players Union's Disclaimer of Interest Means For The Future', sbnation.com, Andrew Sharp, 14 November 2011

<sup>45</sup> 'NBA Lockout: Sports Law Expert Explains Decertification Details', welcometoloudcity.com, J.A. Sherman, 15 November 2011

## Consensus finally reached and a new agreement signed

Thankfully for all stakeholders the latter scenario prevailed. On 26 November, after 15 hours of talks, a gentleman's agreement was entered into paving a way for the end of the lockout.<sup>46</sup> The NBPA also needed to be re-formed as part of the process, which it duly was on 1 December, meaning the final issues in the new CBA could be finalised:

*Basic changes in key commercial terms of NBA CBA<sup>47</sup>*

<i>Issue</i>	<i>Old CBA</i>	<i>New CBA</i>
Revenue sharing (players %)	57%	49-51%
Luxury tax / soft salary cap (see note)	\$1 for every \$1 above the luxury-tax threshold	Incremental increase from 1:1 for every \$5 million above the threshold
Minimum team salary	75% of salary cap	85-90% of salary cap
Maximum contract length	6/5 years	5/4 years

Note: The NBA salary cap is "soft" as it allows for certain exceptions for the cap to be exceeded. Its luxury tax system levies a dollar-for-dollar charge for any amount that exceeds a specified threshold, proceeds of which are distributed to non tax-paying teams.<sup>48</sup>

It was widely agreed that overall the owners had done very well out of the new CBA and it does little more than fatten the owners' purse strings at the expense of the players.<sup>49</sup> A reduced regular season of 66 games began with tip-off on Christmas Day.

### Did mediation help or hinder in coming to a new CBA?

Mediation is a relatively recent development in sports law but was used extensively during both lockout disputes. Mediation is a voluntary yet confidential process, bringing a neutral third-party into a negotiation as a facilitator and may or may not lead to an agreement between the parties.<sup>50</sup> The overriding aim of workplace mediation is to restore and maintain the employment relationship wherever possible.<sup>51</sup> The mediator in the two cases was George H. Cohen, the director of the Federal Mediation and Conciliation Service (appointed by President Obama), a body that steps in to help end major disputes that are hurting the economy, which shows how important both of these cases were. Mr Cohen is one of the premier men for sports law in America, not just for mediation, having been outside counsel for professional baseball and ice hockey players unions and having mediated in a labour dispute for Major League Soccer.<sup>52</sup> However, how successful was he in bringing the warring parties in each case to an expedited consensus?

Mr Cohen's role in the NFL dispute was universally viewed as a success as the threat to the new season was averted in good time, although in the run up to the expiration of the CBA he failed to avert the lockout happening at all, however he found the NBA and NBPA a different animal to deal with when drafted in. There were accusations that the reason the NLRB took an increasingly prominent role is that he had actually pushed the parties further apart<sup>53</sup>, the "system changes" being too high a hurdle for the process of mediation to overcome. However no-one can question his efforts in both cases, there were some marathon

<sup>46</sup> 'NBA reaches tentative agreement with its players', InsideCounsel, Julie Beck, 28 November 2011

<sup>47</sup> 'Breaking down changes in new CBA', ESPN.com, Larry Coon, 3 December 2011

<sup>48</sup> 'The NBA soft cap and luxury tax: How it increases talent disparity', Harvard Undergraduate Research Journal, John Gobok, 2011

<sup>49</sup> 'NBA lockout almost over but did Michael Jordan and the owners win?', The Sport Blog, Guardian.co.uk, 30 November 2011

<sup>50</sup> 'FAQ', fcms.gov

<sup>51</sup> 'Mediation', acas.org.uk

<sup>52</sup> 'Mediator in NBA Talks Has Strong Sports Pedigree', The New York Times, Steven Greenhouse, 19 October 2011

<sup>53</sup> 'NLRB now holds key to NBA lockout', ESPN.com, Lester Munson, 21 October 2011

negotiations, with single sessions up to 15 hours or more (totalling over 100 hours), which is no mean feat for a man of 77 years old. Perhaps it is telling however that the new NFL CBA contains an arbitration clause to settle future disputes via this binding form of alternative dispute resolution instead.

## Conclusions

As this piece is entitled 'A UK Lawyer's Legal Retrospective' it would be remiss of me not to offer a few thoughts on what legally unfolded in the NFL and NBA in the past year (indeed I could pen a whole new article purely on this). Having been a keen fan of US sports for many years it is fascinating to have analysed the rationale and law behind the view we have that a 'competitive equality' exists. The special exemptions from competition law that exist in sport in the US through labour law are similar to what, especially at the European level, has been justified in certain cases as the 'specificity of sport'. The application of the so-called 'specificity of sport' has always been highly controversial in seeming to allow courts and tribunals to come to rulings that fly in the face of the applicable law as it is written and intended. What is for certain is that if some of the legal elements that bind the players to the owners and the league were in place for other sports in other jurisdictions (including the UK), such as salary caps and revenue sharing, then I for one would find many sports a more attractive competitive spectacle.

## Unanswered questions

I thought it best to end by summarising some of the interesting legal issues that remain outstanding despite the beneficial conclusions of new CBAs:

- What decision would the NLRB come to? – if, as anticipated, it had sided with the NBPA then this would have been in direct contrast with the Eighth Circuit decision against the NFL players – furthermore, which view would ultimately have prevailed had it gone further?;
- How would the two sports operate if they acted solely under antitrust standards instead of labour law?<sup>54</sup> – the intellectual property case of *American Needle v NFL*<sup>55</sup> suggests that the current concerted action of the teams is not categorically beyond the reach of Sherman Act §1<sup>56</sup> - this would lead to increased disparity between teams, less excitement and the NFL becoming less national and more regional (great teams like the Green Bay Packers would likely no longer exist);
- In terms of popularity, growth and indeed survival of the two sports (particularly the NBA) in reality do lockouts make any difference at all? – research suggests lockouts don't cause attendances to change in professional sports.<sup>57</sup>

Finally, from a consumer perspective, and those of many other stakeholders and the good of the sport as a whole, it is easy to see why the NFL and NBA wanted new CBAs keeping the relationship between owners and players in the realms of labour law. It allows all parties to thrive and produce healthy profits while maintaining a presence across the nation<sup>58</sup> and competitive equality across the league.

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<sup>54</sup> 'Labor Law Leads to Efficient Operations in the NFL', JURIST, Erica Menze, 19 December 2011

<sup>55</sup> 130 S.Ct. 2201 (2010)

<sup>56</sup> 'NFL Fans – Are You Ready for Some...Antitrust Litigation? Players Sue, Claiming Lockout is a Group Boycott', The National Law Review, Tyler M. Cunningham, 29 March 2011

<sup>57</sup> 'With the NFL Lockout Just About Over, a Sports Economist Weighs In', freakonomics.com, Mathew Philips, 22 July 2011

<sup>58</sup> 'Labor Law Leads to Efficient Operations in the NFL', JURIST, Erica Menze, 19 December 2011