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A Certifiable Mess: Antitrust, the Non-statutory Labor Exemption and the Tactic of Decertification in Brady v. N.F.L.

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Introduction

Erma Bombeck once summed up America's obsession with football by pointing out that "Thanksgiving dinners take 18 hours to prepare. They are consumed in 12 minutes. Half-times take 12 minutes. This is not coincidence." [1] For over five months of the year, millions of Americans associate Sunday with one word; football. In this country, the National Football League is the only brand of football that matters. It is a brand that has annual revenues in the ten billion dollar range. [2] Yet with all of that popularity and money dancing through the owners' and players' pockets, 2011 was nearly the year without football.

On March 11, 2011 the collective bargaining agreement (CBA) between the thirty two NFL team owners and the National Football League Players Association (NFLPA) expired. [3] With the expiration of the CBA also came the decertification of the NFLPA as the union representing the NFL players. [4] On March 12, 2011, one day after the CBA expired, the NFL owners voted to officially "lock out" the NFL Players. On the same day, Brady v. NFL, a case filed by Tom Brady and seven other current and future NFL players on behalf of the players formerly represented by the National Football league Players Association is filed. [5] With no CBA in place and no union representing the players, the Brady plaintiffs resurrect an "oldie, but goodie" in sports law labor negotiation tactics. They contend that the NFL owners have violated antitrust law and seek an injunction to end the lockout of players by the owners of the thirty two NFL teams. The Brady plaintiffs were able to persuade Judge Nelson, who issued a preliminary

injunction to end the lockout. [6] The Eighth Circuit however, disagreed with Judge Nelson and declared the lockout a legal negotiating tactic by the NFL. [7] Days later, a new collective bargaining agreement was reached, and Sunday was once again, Football night in America.

This note will provide an overview and brief history of antitrust law, particularly in the sports context. The issues raised by both the Brady class and the N.F.L. member teams in the Brady v. N.F.L. lawsuit will be examined. Part II describes the 2011 lockout and how the District Court erred in the conclusion that an injunction is an appropriate remedy for the plaintiff. Part III explores the nonstatutory labor exemption; the cornerstone of any antitrust labor discussion in the sports context. Several key cases and distinct interpretations as to the extent of protection the nonstatutory labor exemption provides are analyzed. Ultimately, this note concludes with the assertion that: (1) the Eighth Circuit correctly set aside the District Court injunction; and (2) the members of the NFLPA used decertification merely for a tactical advantage in labor negotiations during the 2011 N.F.L. lockout and are unlikely to succeed with a similar tactic in future labor disputes.

I. An overview of Antitrust

Long before Scott Norwood kicked wide right, or Broadway Joe guaranteed a win, America was in the thrust of the Industrial Revolution. It was the 19th century and factories were humming while the United States was building. Along with this rapid economic growth, fears that large corporations would create monopolies and work to restrain free trade began to surface. Work conditions were sometimes poor, and more often unimaginable. With the Railroad industry serving as "exhibit a", Congress began to feel a push to put an end to large trusts and the anti-competitive behavior that was growing. [8] The Sherman Antitrust Act was the response

Congress fashioned. [9] The Act has two relevant sections. Section One delineates and prohibits specific means of anticompetitive behavior. [10] Section Two addresses the end results of a company's actions that are anticompetitive in nature. [11] If enforced by a strict reading, Section One of the act is broad enough to prohibit nearly any restraint on free trade. [12] Taken literally in a sports context, the systems of drafts, salary caps, and many league rules would be proscribed as restrains on free trade. Knowing that many forms of business, including professional sports could not survive the restrictions section 1 of the Sherman Act requires, the Supreme Court has concluded that only unreasonable restraints on trade fall within the prohibitions of the act. [13]

In professional sports, the antitrust issue is generally shaped by two distinct positions. On one side is management, with their claim that the league is a single entity. Management in football claims that the NFL as a whole would be unable to function if the teams did not have certain business agreements. The NFL, the member teams and owners assert, must have limitations on player acquisitions, as well as certain player movement among the member teams in order to maintain a competitive product, competitive balance among franchises and to allow the league to function in the marketplace. The NFL further claims that the restrictions they impose are valid, because they were achieved through a collective bargaining agreement with the NFL players union consenting. [14] A statutory exemption created under the Norris-LaGuardia Act insulates from antitrust laws inherently anticompetitive collective activities by employees because they are favored by federal labor policy. [15] As long as the players are represented by the union, there is no antitrust remedy available.

The players, on the other hand, often maintain the position that league members are a combination of individual corporations which each work toward a common goal. The players stress that each franchise puts forth an individual product and is an individual business model

with a distinct agenda of the others. [16] Under this theory, the players maintain that the league created systems such as drafts, salary caps, and league rules, all of which enable an agreement among teams. The contention is each member team is working together with the other member teams to restrict trade. While the players agree that collective bargaining agreements and their representation by a union may ease the antitrust restrictions management must adhere to, the players contend that once the CBA expires or they are no longer represented by a union, management is in violation of antitrust law. [17] The players contend that this line of thought extends to a point where they can instantly dissolve their association with their union during labor disputes, only to resurrect the union once the dispute has been settled. It is this process, the "today we are a union, tomorrow we are not, but possibly the next day" that has been the center of NFL labor disputes over the past thirty years. Thirty years and several work stoppages later, it is the legality of this process that remains unresolved.

As mentioned previously, the United States Supreme Court has cited its unwillingness to follow a strict adherence to section 1 of the Sherman Act. Noting that a literal interpretation would mean nearly all agreements would constitute a restraint on free trade, the court created three antitrust doctrines: The Non-statutory Labor Exemption, a *per se* violation and a rule of reason violation. [18]

A. The Nonstatutory Labor Exemption

The nonstatutory labor exemption allows the players and management to bargain collectively, free of potential antitrust scrutiny. In order for the exemption to apply, there must be good faith and arm's length negotiation between the employer and employee on mandatory subjects of collective bargaining. [19] The mandatory subjects of collective bargaining include

wages, hours, terms and conditions of employment. [20] This protection is coveted by management, because it shields management from most, if not all challenges under the Sherman Antitrust Act. As long as the bargaining relationship continues to exists, the protection management enjoys under the non-statutory labor exemption will also continue. [21] The players however, argue that as soon as they decertify, the bargaining process has ended and the protection of the nonstatutory labor exemption also ends. [22]

B. *Per Se* Violations

Horizontal price fixing and horizontal market division compromise the most common forms of *per se* antitrust violations. These violations occur when the court gives a strict reading of Section One of the Sherman Act. In their simplest form, *per se* violations are agreements, conspiracies or trusts in restraint of trade. Under per se violations, there is no inquiry into the affect the proscribed action has on the market, nor does the intent of the individuals matter. [23] If the *per se* approach had been used on professional football, the system and NFL as we know it could not function. Collective bargaining agreements would fail, and systems put in place by the NFL to promote the game and use methods such as the draft system and salary cap to maintain parity among the teams. Per se would mean that teams with the biggest checkbooks could always get the biggest stars and best prospects. It would also eliminate many of the league rules that keep the game safe, fair and drug free. The *per se* approach has diminished and the rising, modern trend is the court created "rule of reason". [24]

C. The Rule of Reason Approach

The Rule of Reason approach was created by the court to tone down the harshness of a strict interpretation of Section One of the Sherman Act. [25] The analysis was highlighted in the famed antitrust case Standard Oil Co. v. United States, which held:

> If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because the construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied. [26]

This approach holds that only unreasonable restraints on trade are prohibited. To determine unreasonableness, the courts use a balancing test. [27] The inquiry examines the effect the restraint has on competition. Using data and expert testimony, the restraint is compared with the procompetitive effects. [28] The rule of reason is often used in the sport arena. Justice Stevens proved the court's affection for the rule of reason in the landmark case NCAA v. Board of Regents of the University of Oklahoma. [29] Ironically, the Stevens led majority found that the plan by the NCAA regarding television rights was a restraint on trade. [30] But the importance of this case is that the Stevens' majority determined that the rule of reason, not the *per se* analysis was proper. Justice Stevens concluded that although behavior such as setting prices and restraining output are usually illegal *per se*, the rule of reason test was more appropriate because "the case involved an industry where horizontal restraints on trade were essential if the product was to be available at all." [31] Likewise, the First Circuit analysis is similar in M & H Tire Co., Inc. v. Hoosier Racing Tire Corp. [32] In that case, the court applied the rule of reason standard to a rule requiring all auto racing competitors to use the same tire. The court then declared that "in the sports arena various agreed-upon procedures may be essential to survival." [33] Several

Circuits continue to predominantly use the rule of reason standard when entering into the sports context of antitrust law. [34]

II. The 2011 Dispute

So how does all this relate to the 2011 NFL labor dispute? Let's use supermarkets as an example. If all the supermarkets in New Jersey banded together and said that they will not pay any of their clerks' more than Eight dollars an hour, this would be considered price fixing. This type of behavior would most likely be illegal under antitrust law. If the supermarkets than fired all of their clerks and said that they would not rehire them unless they took a fifty cent per hour pay cut, this would be considered a group boycott and illegal under antitrust law.

Using the supermarket example in an analogous fashion demonstrates how simple an antitrust analysis can be. If one substitutes the NFL member teams for the supermarkets and the NFL players for the store clerks, the analysis appears rather elementary and the NFL players should clearly prevail in their antitrust litigation. What complicates the 2011 NFL dispute is that the NFL member teams and the players have entered into a collective bargaining agreement, which, by its very nature, contains agreed upon terms and restrictions that violate antitrust law. The collective bargaining process, though *per se* a violation of antitrust law, is actually an encouraged labor practice and one that is cherished by players alike. The hotly contested nonstatutory labor exemption allows this process to conform to antitrust and labor law.

The players argue that once they decertify as a union, they are all acting as individual players, or, like the previous example, clerks. Following this theory, there is no collective bargaining agreement and the nonstatutory labor exemption does not apply. Under the antitrust

law, the NFL cannot say that each of the players cannot make more than a certain amount of money, which makes league maximum salaries, salary caps and other wage restriction illegal. The players argue that the owners also are engaged in an illegal group boycott because, like the fired clerks, the league also cannot lockout the players if they do not accept certain terms or conditions, they will not be rehired. Differences of opinion on these issues make up a large portion of the 2011 dispute and the subsequent Brady litigation.

On March 11, 2011 the collective bargaining agreement between the National Football League and the National Football League Players Association was set to expire at midnight. [35] Having been in negotiations for nearly two years prior to the expiration of the agreement, both sides were fully aware of the deadline and the possibility that the NFL team owners would "lock out" the players if an agreement was not reached. [36] With this knowledge in hand, the members of the NFLPA strategically decided that they would dissolve and terminate their association with their union and would subsequently file the Brady suit, alleging violations of the Sherman Anti-Trust Act. [37] The players sought an injunction in the District Court to enjoin the lockout as an unlawful group boycott that was causing irreparable harm to the players. [38] The District Court granted the injunction, which was then challenged by the NFL under the primary theories that the District Court lacked jurisdiction to enjoin the lockout under the Norris-LaGuardia Act and that the antitrust claims are barred by the nonstatutory labor exception. [39] Ultimately, the Eighth Circuit agreed with the NFL on the former, but deferred, or in keeping with the theme of this writing, "punted" on the later issue. The lawsuit was ultimately settled and the 2011 NFL season saved, paving the way for the New York Giants to win their fourth championship.

In Brady v. NFL, the players focus their legal arguments on three issues. According to the Brady plaintiffs, the lockout (or illegal group boycott) is causing irreparable harm to the

players; although the doctrine of primary jurisdiction requires deference of the issue to the National Labor Relations Boards, any benefit achieved by obtaining their views is outweighed by the delay; the nonstatutory labor exemption does not apply because the union has decertified. [40] The NFL overcomes these arguments starting with one of the classic weapons of labor law disputes-The Clayton Act and the Norris-LaGuardia Act. Once the NFL proves that the Norris-LaGuardia act undermines the authority of Judge Nelson to grant an injunction, as it successfully did to the appellate court, the NFL can use the favorable case law surrounding the primary jurisdiction issue to discard that issue and move forward to the torturous nonstatutory labor exemption issue.

In the early part of the twentieth century, Congress had seen signs that the federal courts were using their power to interfere with organized labor, work stoppages, and disputes among management and labor forces. [41] By 1914, Congress had already realized that it did not want the federal courts to be able to use injunctive relief as a tool for organized labor to manipulate. [42] The Clayton act began the prohibition on courts entering or upholding injunctions in labor disputes. Congress wants both the employers and employees to have the power to strike and lock out as tools in their negotiating arsenal. [43] The result was section 20 of the Clayton Act of 1914, which states in part that federal courts are barred:

> In any case between an employer and employees, or between employers and employees, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment, from issuing an injunction to prohibit any person or persons from ceasing to perform any work or labor or terminating any relation of employment [44]

Although Congress thought they solved the injunction problem, several cases began to show the loopholes left open by the Clayton Act. Specifically, Duplex Printing showed that the Act lacked authority to prohibit an injunction against a secondary boycott by union members not

proximately and substantially concerned as parties. [45] To resolve the confusion and clearly take the courts out of the labor injunction business, a Senator from Nebraska teamed up with a Representative, later Mayor of New York City, Fiorello LaGuardia, for whom an airport was named, to author the Norris LaGuardia Act of 1932. [46]

Congress enacted the Norris LaGuardia Act of 1932 (NLGA) to completely preclude the courts from using their power of injunctive relief in labor disputes, and to preclude the conversion of labor disputes into antitrust suits. By withdrawing federal jurisdiction, the Norris-LaGuardia Act, 29 U.S.C. §§101 *et seq*., was designed to "take the federal courts out of the labor injunction business". [47] The Act was intended to "drastically curtail the equity jurisdiction of federal courts in the field of labor disputes." [48] As a general rule, one of the fundamental principles of Labor Law is that labor disputes be settled peacefully through voluntary arbitration. [49] Congress intended to promote this policy through acts such as the NLGA by limiting a court's ability to interfere with such disputes. [50] The precedent involving the use of the NLGA to enjoin lockouts is impressive, as the only court to ever enjoin a lockout was promptly reversed. [51] The heart of the NLGA is to disfavor injunctions in all cases "involving or growing out of a labor dispute." [52] The language of section 4, which details the areas where courts do not have the authority to enjoin is clear, concise and unambiguous:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute…from doing…any of the following acts: (a) ceasing or refusing to perform any work or to remain in any relation of employment. [53]

With the background of the NLGA in place and the relevant language spelled out, it is hard to see how the players could possibly convince Judge Nelson that an injunction against the 2011

NFL lockout is permissible. The players' trick was to play games with the wording of the statute and lose sight of the intent.

The issue which the players seek an injunction against unmistakably grows out of a labor dispute. Section 13(c) of the NLGA defines what constitutes a labor dispute. [54] In relevant part, section 13(c) states:

> The term labor dispute includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, charging, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee [55]

The ban on injunctions in the NLGA was extended not only to cases involving a labor dispute, but cases "growing out of" a labor dispute. [56] A plain reading of this phrase would lead to the conclusion that Congress extended to expand the areas covered by the ban, not narrow them. It logically follows that Congress intended the terms in the act to be broad. The Supreme Court has joined in this view as they have "consistently declined to construe them narrowly." [57] As a last ditch attempt to circumvent the clear ban on injunctions in this type of controversy, the players rest their argument on the word "includes" in section (13) of the NLGA. [58] The plaintiffs argue that because the word "includes" is used to introduce the definition of labor dispute, labor dispute is not, in fact, defined at all. [59] The players contend that Congress did not fully define the term and that nearly a quarter century of interpretation by the highest court of the land must be inadequate. [60] With seventy five years of history in which District Courts, Circuit Courts and the United States Supreme Court have never enjoined a lockout and had the decision stand, it appears that Congress must have succeeded in its definition of labor dispute. In fact, the Supreme Court has been quoted as repeatedly describing section (13) as "a definition of labor dispute." [61] The plaintiffs argument that §13(c) merely expanded a definition of labor dispute

that was not codified and extended only to disputes involving organized labor is simply erroneous. [62] The plaintiffs believe that if they can convince the court that sections 13(c) is not a definition, and that the definition was meant to apply only to organized labor, the decertification of the NFLPA (temporarily, of course) would take the dispute out of the labor dispute context because it does not apply to organized labor. The players view is without merit at best and laughable at worst. The players seek relief that affects the terms and conditions of employment of the entire football industry. The dispute involves controversy over compensation for rookie players, the salary cap, the franchise player designation and transitional player designation, among other well-known and standard terms of employment. [63] The players and NFL teams are engaged in the same industry and the dispute is between one or more employers and one or more employees. [64] By the plain terms of the NLGA, it is clear that this case involves a labor dispute. As the NLGA requires, this case involves two parties who are "engaged in the same industry" and the dispute is between "one or more employers and one or more employees." [65] Even accepting the facts as construed by the plaintiff, there is no logical way to argue, as the Brady Litigants have, that this dispute does not at the very least *grow out of* a labor dispute. (Emphasis added). In fact, the relief sought by the plaintiffs is concerning the terms and conditions of employment. [66]Congress created a statute which contained broad terms intentionally, to fulfill their goal of removing equitable relief from the courts in labor disputes. [67] Over and over again the courts have declined to construe the terms of the NLGA narrowly, and have given all of the anit-injunctive provisions of the Act a broad interpretation. [68] Under either a narrow reading supported by the plaintiffs, or a broad interpretation, the lockout at issue here "self-evidently involves or grows out of a labor dispute." [69]

The NFLPA's decertification does not alter the analysis in any way. The plaintiffs' attempt to remove the controversy from the arm of the NLGA because they have decertified does not change the analysis. The District Court bought into the decertification argument by departing from the plain reading and extensive precedent surrounding §13(a). The reading of the statute which turns "one or more employees or association of employees" into "individual unionized employee or employees" is incorrect. The word "unionized" does not predicate or modify the term "employee" in the definition section of the statute and in fact does not appear in the definition at all. [70] The Eighth Circuit found no reason to add "unionized" to an already clear definition in order to give significance to the decertification effort by the NFLPA. [71] Besides the binding ruling by the Eighth Circuit, the support of the NFL's position regarding the definition is significant in precedent.

According to the Supreme Court in Columbia River Packers Ass'n v. Ninton, the protection afforded by the NLGA is triggered by "disputes involving the employer-employee relationship." [72] The relationship, not the union status is the key. The Act speaks of the protection when employees or associations of employees are involved. There is no mention of "unionized" employees. [73] In fact, the court held that the act applied even in cases where the disputants did not stand in the relationship of employer and employee. [74] The argument by the plaintiff that because the act has only been used in cases involving unions, it is meant only to apply to unions is wrong and inaccurate. In fact, the Act has been used in cases in which employees were not members of a union. In New Negro Alliance, the United States Supreme Court held that the NLGA applied to workers who were not unionized, nor was there any indication that there was any dispute between the employer and a union out of which the controversy grew. [75] The Supreme Court declined to substitute "unionized employee" for

"employee" then and the District Court should not have made that substitution now. The United States Supreme Court concluded that when the case involves any conflicting or competing interests in a labor dispute "persons participating or interested therein and its individual members are persons interested in the dispute." [76] Again in NLBB v. Washington Aluminum Co. the Court accepted that a dispute involving seven wholly unorganized and non-unionized workers who held a walkout to protest cold working conditions fit within the definition of a labor dispute and thus the NLGA was applicable. [77]

Even if the players would have convinced the Eighth Circuit that because of the decertification of the NFLPA, there was no current labor dispute, the breadth of the statute also allows for disputes that "grow out of" a labor dispute. [78] Prior to the filing of the Brady litigation, the league and players had a nearly eighteen year relationship under which multiple collective bargaining agreements were hashed out to determine the status of the players' working conditions. By the very nature of collective bargaining, a labor dispute exists. Following the players' line of thinking would mean that over the course of eighteen years of association, every wage work condition and compensation demand by the players was resolved without dispute by the league. Conversely, every salary cap, draft, and compensation issue proposed by the league would have to have been welcomed with open arms by the players. If the exchange reminds many of a work of science fiction: bizarre and unbelievable, but entertaining, it should. Unmistakably the Eighteen year relationship involved labor disputes. [79] Logically, the work stoppage at hand is due to an on-going labor dispute, or, at the very least grows out of a labor dispute. The league and players were engaged in an on-going negotiation and collective bargaining process for nearly two years prior to March 11, 2011. [80] To think that the just hours

before the expiration of the CBA, the dispute suddenly disappeared into a distant memory is preposterous. As the Eighth Circuit court noted:

> Whatever the effect of the union's disclaimer on the leagues immunity from antitrust liability, the labor dispute did not suddenly disappear just because the Players elected to pursue the dispute through antitrust litigation rather than collective bargaining. [81]

The NLGA bars court issued injunctions against employers who lockout their employees, just as the employees enjoy the right to be free from court interference in disputes in which employees initiate strikes against their employees. Even these courts which chose the narrow approach to defining labor disputes have concluded that it is not only interference with the employees' strike which is banned, but also the corollary actions closely related to striking such as boycotts or picketing by labor unions or lockouts by management. [82]Suggesting that the law was not enacted with the protection of employees in mind would be foolish; however, "statutory prohibitions often go beyond the principle evil with which Congress was concerned to cover reasonably comparable evils." [83] Such is the case with the NLGA. Congress crafted a statute which protects not only employees but also employers from interference in labor disputes.

Though the league has successfully convinced the Eighth Circuit that the NGLA does apply to the lockout of players, had they not been successful under section four, section seven of the NLGA still renders Judge Nelson's decision in the District Court incorrect. Section Seven provides that in order for the plaintiffs to achieve their desired result, to enjoin the lockout, the District Court would have to conduct a hearing in open court prior to issuing the injunction. [84] This procedural rule only makes common sense. The league should have the opportunity to counter the plaintiffs' claims of irreparable harm with expert witnesses and cross examination. [85] Section Seven clearly delineates this requirement by stating:

> No injunction can issue in any case involving or growing out of a labor dispute except after hearing the testimony of witnesses in open court (with the opportunity for cross examination) and except after a finding of fact by the court to determine that substantial and irreparable injury to the plaintiff's property will follow from the alleged unlawful act and that the public officers charged with the duty to protect complaintents' property are unable or unwilling to furnish adequate protection. [86]

It is undisputed that the procedure required by section seven did not take place prior to the District Court's ruling. [87] Without even considering the merits of the section four argument, the District Court decision is still incorrect in that it should not have issued the injunction because of the failure to follow the procedural requirements set forth by section seven of the NLGA. The plaintiff's argument that the league waived its right to raise the section seven issue is erroneous because courts will and have considered compliance with the NLGA even when the issues are not raised at the District Court level. [88] An injunction cannot be issued when the requirements of section seven (testimony of witnesses in open court with the opportunity for cross examination) have not been met. [89] The only exception, which does not apply in this situation, is if the league had not contested the fact as undisputed. In this case the league does contest the facts and is entitled to "test the credibility of the players' evidence by cross examination." [90] The injunction is not supported by statute or case law, as evidenced by the Eighth Circuit's ruling on appeal, and was correctly vacated.

III. The Non-statutory Labor Exemption

The nonstatutory labor exemption is the central issue which surrounds most labor disputes in professional sports. [91] Having correctly concluded that Judge Nelson was outside of her judicial authority to issue an injunction against the NFL owners' lockout, the Eighth Circuit yet again left open the nonstatutory labor elephant in the room. The exemption was derived to make collective bargaining work. It removes from antitrust scrutiny restraints on trade that are

the product of a negotiated collective barraging agreement. [92] In order for the NFL to function as a successful Professional Sports league and to maintain economic viability, the NFL must create certain rules restricting player movement and salaries. Without these restraints, players would simply flock to the most popular team or the franchise with the deepest pocket. The result would be an inferior product, and teams that would simply fold for lack of interest, aka profits.

Through the National Labor Relations Act, Congress has endorsed, and promoted the process of collective bargaining. [93] Congress determined that collective bargaining would help to "stabilize competitive wage rates, the purchasing power of wage earners, and working conditions." [94] But the rule presents new challenges in the professional sports context. Undisputedly, the original purpose of the rule was to encourage collective bargaining, which, at the time brought employees on a more even playing field then they had been. [95] In the era when the exemption was created, employers and corporations possessed most of the bargaining power and often imposed poor working condition on employees. [96] The nonstatutory labor exemption made the collective bargaining process work, a process that would help employees in their quest for equality in bargaining power. In the professional sports context, the owners inherently possess a greater bargaining power. The players, because of their unique skills and short shelf life are vulnerable and clearly lack job security. The court dealt with the issue of the non-statutory labor exemption and its effect on players early on in the case of Mackey v. National Football League. [97] The case dealt with the Rozelle rule, a restriction on player movement imposed by the league which limited free agency of a player by allowing the commissioner the ability to award the players' former team one or more players from the acquiring team as compensation. [98] The Mackey court concluded that the Rozelle rule did not fall under the

protection of the nonstatutory labor exemption. [99] The court fashioned a three prong test for determining when the non-statutory labor exemption applies:

- The restraint must primarily affect only the parties to the collective bargaining relationship
- The agreement considered for exemption must concern a mandatory subject of collective barraging
- The agreement must be the product of a bona fide arms' length bargaining. [100]

Because the NFLPA was weak and in no position to effectively challenge the rule, the Mackey court concluded that the agreement was not a bona fide arms' length agreement. [101] This standard created over twenty years ago has survived as a guiding post for determining the validity of the nonstatutory labor exemption when both parties are in the midst of a collective bargaining agreement. But Mackey, the prize jewel of the NFLPA in nonstatutory exemption litigation, leaves open the million, or more appropriately in the context of the NFL, the billion dollar question. What happens when the collective bargaining agreement expires? What if the agreement expires during negotiations? What if the agreement expires after weeks of impasse? When does the antitrust liability of the league kick in? The players would argue immediately or sooner, if there is no union in existence. [102] But does that mean that at any point the players can merely decertify and the league is instantly faced with antitrust liability?

Since the Mackey decision, the courts have conceded that much uncertainty remains around the issue of exactly what point the nonstatutory exemption no longer applies. The Supreme Court has yet to enact a bright line rule and the issue continues to dance around in the Circuit courts. Most courts agree, however, that the exemption does not die the minute the

collective bargaining agreement expires. [103] The timing of the expiration remains open for interpretation. One commentator has pointed to four different points at which antitrust immunity should cease to exist:

- When it is no longer reasonable for an employer to believe that the practice or a close variant of it will be reincorporated in a succeeding collective bargaining agreement
- When negotiations have reached an impasse
- At an indefinite point beyond impasse where a labor relationship no longer continues
- Immediately upon expiration of the agreement [104]

In Bridgeman v. NBA the court explicitly decided to go one step further than the Mackey court. The Bridgeman court conceded that the test enumerated in Mackey is a correct starting point, but that resolution of the issue of how long the nonstatutory exemption lasts requires a further inquiry. [105] Labor law requires maintenance of a status quo until impasse. [106] This requirement means that the terms and conditions of employment which had been subject to a collective bargaining agreement will survive beyond the expiration of the CBA. The history of labor law, and labor law in professional sports in particular is ripe with examples were the status quo and previous terms of employment that were negotiated in a collective bargaining agreement are maintained once the CBA expires and until a new CBA is reached, as long as negotiations continue in good faith. [107] The court points out that

> it would be anomalous for such restraints to enjoy antitrust immunity during the period of the previous agreement, to lose that immunity automatically upon expiration of the agreement, regardless of the status of negotiations for a new agreement-and then to regain immunity upon entry of the new agreement. [108]

Not only is the immediate expiration of immunity unrealistic, it also flies in the face of NLRA, which requires owners to "bargain filly and in good faith before altering a term of employment

that is a mandatory subject of bargaining." [109] Thus the terms and restriction survive the expiration of the CBA. The court concluded that there is no reason to find that restrictions contained in a collective bargaining agreement lose their antitrust immunity the moment the agreement expires. [110] Nonetheless, the court did not reach the unrealistic conclusion sought by the owners that the antitrust immunity extends indefinably.

A second approach to the expiration of the nonstatutory exemption is the "at bargaining impasse" approach discussed in the Powell v. National Football League line of cases. [111] The Powell court shifted the focus away from a specific date and looked to whether the parties were negotiating in good faith and if they had reached a point where the parties have reached a stalemate and have no hope of reaching an agreement. [112] Up until this point, the parties are to maintain the status quo, which includes antitrust immunity. [113] The court sought to maintain an environment which promotes peace by "fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract." [114]

The Eighth Circuit reversed the District Court's decision in Powell and went a step further. The court concluded that the exemption does not apply indefinitely, but does apply at some point beyond impasse as long as a bargaining relationship still existed. [115] This approach meant that to end the liability, the players would have to abandon their bargaining rights. To overcome Powell the players begin the tactic of decertification. The players conclude that if they are not a union, they are not bargaining collectively and thus, in line with the *Powell* decisions, they have ended the bargaining process and antitrust immunity no longer applies. [116]

Brown v. Pro Football Inc. sets forth yet another attempt to define the expiration point of the nonstatutory labor exemption. Again, Brown stresses that the immunity formed as a result of

the nonstatutory labor exemption is consistent with a national policy which favors free and private collective bargaining. [117] The Breyer led majority in Brown stressed the importance of the existence of the nonstatutory exemption in order to fulfill the national policies which exist in Labor Law:

> As a matter of logic, it would be difficult, if not impossible, to require groups of employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any* of the competition-restricting agreements potentially necessary to make the process work. Thus, the implicit exemption recognizes that, to give effect to Federal labor law and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions. [118]

After the Brown court reiterated the necessity for the existence of the nonstatutory labor exemption, the issue of what happens when negotiations reach an impasse became the focus of their discussion. [119] The Court noted that as a general matter, four options are available at impasse:

- Maintain the status quo
- Implement their last offer
- Lock out their workers (and either shut down or hire temporary replacements)
- Negotiate separate interim agreements with the union [120]

The root of the Brown decision was not to determine which of these four options are most appropriate, rather, the Court held that in this particular case, the team owners' actions were "immune from antitrust scrutiny because these actions grew out of and were directly related to the lawful operation of the bargaining process." [121] The conduct at issue took place during and immediately after a collective-bargaining negotiation. [122] The court concluded that the views of the National Labor Relations Board were necessary to decide the issue in a particular case and

they refused "to decide that the exemption would expire immediately upon the collapse of the collective bargaining agreement, as evidence by decertification of the union." [123] The Brown Court also concluded that the exemption "does not expire until a point sufficiently distant in time and circumstances from the collective bargaining process that the prospect of antitrust scrutiny would not interfere with the process." [124] The Brown Court seems to be implying that the union tactic of decertification merely to find antitrust liability is insufficient.

In Brady v. NFL, the union chose to decertify before the expiration of the Collective Bargaining Agreement. Negotiations were still fresh and far from distant. [125] In fact, the negotiations were so fresh that they were literally occurring when the decertification took place. [126] To fall in line with the Brown precedent, the players would have to argue that the negotiations were "distant in time and circumstances" that the prospect of antitrust scrutiny would not affect the process. [127] Since the prospect of a lockout, decertification and an antitrust suit had been contemplated for months prior to the events occurring, the players cannot argue that these issues did not affect on-going negotiations. [128] It is clear, through the history of the NLFPA and through the admissions of both sides of the dispute, that the lockout, decertification, and antitrust action are tactics in negotiations that will ultimately determine the terms, conditions and compensation for both sides. The history of the NFLPA in labor disputes shows that this is a tactic which has been employed before. [129] The union, following their previous decertification, immediately filed antitrust litigation, only to recertify once a settlement was reached. [130] The facts clearly point to the conclusion that the circumstances and tactic being employed are far from distant or unrelated to the collective bargaining process.

The NFLPA decertification does not necessarily mean that the union ceases to exist. While the NFLPA, the player's sole bargaining union for decades has used the word "decertify"

to disclaim their representation of players, the voices of the players paint a different picture. The NFLPA president freely admitted that "the whole purpose of disclaimer is to have that ace in our sleeve… And at the end of the day, guys understand the strategy; it's been a part of the union strategy since I've been in the league." [131] Derrick Mason, another NFL player confirmed that decertification is merely a strategy when he explained "So are we a union? *Per se*, no. But we're still going to act as if we are one." [132] When the disclaimer is clearly made in bad faith, the NLRB may overturn the disclaimer based on other fact of the case. [133] When handing down a ruling, the NLRB "is not compelled to find a valid and effective disclaimer just because the union uses the word." [134] Any strength the decertification act gives the NFLPA in their arguments disclaiming the nonstatutory exemption or in seeking their injunction must be carefully examined and taken with a grain of salt.

IV. Conclusion

During the 2011 NFL lockout and Brady litigation, the NFLPA once again employed the strategy of decertify, sue and recertify. [135] This tactic is old news in the professional football world. When the decertify tactic was employed previously in 1987 by NFLPA, the NFLPA's counsel testified in an affidavit that "the NFLPA's abandonment of collective bargaining rights was permanent and irrevocable, and not designed to put pressure on the NFL to achieve a new collective bargaining agreement." [136] Gene Upshaw, Executive Director of the NFLPA added his assurances that the decertification was genuine and testified that "as far as ever being a labor organization again, that is a permanent status. We have no intentions, in the future or in my lifetime, to ever return to be a labor organization again." [137] Despite these heartfelt pledges by union leadership that they cease to exist, the NFLPA still continued to both finance and direct antitrust litigation. [138] The NFLPA leadership's promises were then completely shattered when

the NFLPA resurrected itself immediately upon negotiating a settlement and new collective bargaining agreement and didn't seem to skip a beat.

The NFLPA has been the sole and exclusive collective bargaining representative of all NFL players since 1970. [139] To think that the union had any intention of permanently decertifying was fictional. What was non-fictional, however, was the NFLPA guide to the lockout, a pamphlet distributed by the union months prior to the lockout, and well in advance of the decertification. [140] The guide, in pertinent part, explains the decertification strategy proposed by the NFLPA:

> The NFLPA…would fund litigation with individual players, or classes of players, as named plaintiffs, just as we did in the McNeil and White cases. We would immediately fund a lawsuit which would seek an injunction…and…claim treble damages on behalf of the players. [141]

Clearly, the union intended to be fully involved in the negotiation of a new collective bargaining agreement and the representation of the NFL players following any decertification and litigation. This action was fully anticipated by the players and the NFLPA.

The Brady litigation brought the added issue of the player's ability to enjoin the lockout. By the Eighth Circuit's ruling, it appears that the injunction avenue has been closed for good. The Eighth Circuit, however, failed to completely address the nonstatutory labor exemption issue, as well as what any lay person can clearly see was a sham decertification. These issues remain unresolved and are sure to resurface at the expiration of the next CBA. For the players, antitrust liability has often been the leverage they have needed to reach a settlement. [142] It is the way in which the players seek to shift the balance of power the owners have maintained over the course of several decades. An antitrust lawsuit has been the avenue through which the NFL players have made some of their biggest strides in compensation and working conditions.[143]

- In the 1950's, unhappy with their pay, an antitrust lawsuit brought about a pay increase
- In the 1960's, an antitrust lawsuit delivered better health benefits which had been desperately needed
- In the 1970s's and early 1980's, and antitrust lawsuit helped the players quash free agency rules which they felt diminished their value and restricted movement among teams [144]

The ability to file expensive antitrust lawsuits against the NFL team owners is an important weapon in collective bargaining negotiations. Continued use of the "sham" decertification, also known as the decertify-sue-recertify strategy could prove a costly mistake. [145] The courts will remember this all too familiar process and will weigh the fact that the NFLPA went through the same exact process before. It is more likely that courts in the future may be reluctant to find that the union has in fact decertified, and that this process is nothing more than a sham. [146] Should courts begin to agree with the owners, the threat of antitrust liability could have far less sting then it did in the past. The players may have used their last "ace in the sleeve," as described by their union president and may need to prepare for a longer, more expensive fight should history repeat itself as it seems to do. This author, for one, welcomes that day, as there is a need for the courts to face the nonstatutory labor exemption head on and decide the issues once and for all. Antitrust liability should not begin immediately upon the magic words "decertify."

The precedent and authority fails to offer a clear picture of what to expect from future antitrust actions similar to Brady. The current state of affairs is unpredictable and unworkable. Countless cases have provided a myriad of timelines for the length of protection provided by the

nonstatutory labor exemption. Furthermore, these timelines can be strongly based on what the NFLPA has chosen to call itself and purport to represent on any given day. Under the current system, the fact that the NFLPA has "decertified" and is no longer a union, but merely an "official trade association" could have been the determining factor as to whether the NFL team owners were subject to antitrust liability. [147] The nonstatutory labor exemption needs to be addressed and the window of protection clearly defined. The NFL players need to tread lightly in their future use of this antitrust strategy. And most importantly, the football Gods must never threaten to take away my football again; after all, what would America do on Thanksgiving once they have finished that twelve minute meal?

[1] Erma Bombeck, Brainyquote.com, http://www.brainyquote.com/quotes/quotes/e/ermabombec105764.html (last visited Apr. 21, 2012)
[2] Kurt Badenhausen, NFL Team Value, The business of Football, Sep.7, 2011 http://www.forbes.com/lists/2011/30/nfl-valuations-11_land.html, (last visited Apr. 21, 2012)
[3] 2011 NFL Lockout Timeline, http://www.cbssports.com/mcc/blogs/entry/22475988/29591570 (last visited Apr. 21, 2012)
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *See generally* Brady v. NFL, 644 F.3d 661, 662-683 (8th Cir. 2011) (overturning the District Court decision and holding that the Norris-LaGuardia Act prohibits the issuance of an injunction)
[8] *See* Robert L. Bradley Jr., The Origins of the Sherman Antitrust Act, Dec. 1990, http://**www**.cato.org/pubs/journal/cj9n3/cj9n3-13.pdf (last visited Apr. 6, 2012)
[9] Sherman Antitrust Act, ch. 647 § 1, 26 Stat. 209 (1890) (codified as amended at 15. U.S.C. § 1 (1988)).
[10] Section One of the Sherman Act provided in relevant part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished…15 U.S.C. §1 (1988)

[11] Section 2 of the Sherman Act provides in relevant part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by…15 U.S.C. § 2

[12] *See*, *e.g*. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 59-60 (1911); Continental T.V. Inc. v. GTE Sylvania, Inc. 443 U.S. 36, 49 (1977).
[13] Standard Oil Co., 221 at 36
[14] *See* Brief of Appellants at 39, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[15] Thomas Picher, Baseball's Antitrust Exemption repealed: An analysis of the Effect on Salary Cap and Salary Taxation Provisions, 20 Vt. L. Rev. 559, 565 (1995)
[16] *See generally* Brief of Appellees Brady v. N.F.L. No. 11-1898 (8th Cir. May 9, 2011)
[17] *Id.*
[18] *See e.g*. NCAA v. Bd. Of Regents, 468 U.S. 85., 103 (1984), Brown v. Pro Football Inc., 518 U.S. 231 (1996), Powell v. NFL, 930 F.2d 1293 (8th Cir. 1989)
[19] *See* Brown, 518 U.S. 231
[20] *See Id.*

[21] *Id.* at 2127
[22] *See* Brief of Appellants at 39, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[23] *E.g.* United States v. Sacony-Vaccum Oil Co., 310 U.S. 150, 223 (1940), also see Standard Oil Co. 221 U.S.
[24] *See* Tim Bezbatchenko, Bend it for Beckham: A look at Major League Soccer and its single entity defense to Antitrust Liability after the designated player rule, 76 U. Cin. L. Rev. 611 (2008)
[25] *See* Standard Oil Co., 221 U.S.
[26] *Id.* at 518
[27] Kierar Corcoran, When does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports, 94 Colum. L. Rev. 1045, 1047 (Apr. 1994)
[28] *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978)
[29] *See* generally NCAA. V. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984)
[30] *Id.*
[31] *Id.*
[32] *See* M & H Tire Co. v. Hoosier Racing Tire Corp., 733 F.2d 973 (1st Cir.1984),
[33] see, e.g., *Id.*at 980, Hatley v. American Quarter Horse Association, 552 F.2d 646, 652 (5th Cir.1977)
[34] *See* Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1318-19 (9th Cir.1996) (employing rule of reason analysis and finding that imposing sanctions for violations of NCAA rules did not violate section 1 of the Sherman Act); Banks v. NCAA, 977 F.2d 1081, 1088-94 (7th Cir.1992) (upholding no-draft and no-agent eligibility rules for student athletes under rule of reason analysis); Justice v. NCAA, 577 F.Supp. 356, 379-82 (D.Ariz.1983) in which the NCAA sanctions against member institution imposed for violations of NCAA rule barring compensation of student athletes did not violate antitrust laws under rule of reason analysis).
[35] *See* Brief of Appellants, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[36] Brief of Appellants at 3, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[37] *Id.* at 7
[38] *Id.* at 3
[39] *See* generally *Id.*
[40] *See* Brief of Appellees, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[41] *See generally* Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Prods., 311 U.S. 91 (1940)
[42] *See* generally The Clayton Antitrust Act of 1914 (Pub.L. 63-212, 38 Stat. 730, enacted October 15, 1914, codified at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53
[43] *Id.*
[44] *Id.* at § 20
[45] *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921)
[46] *See* generally Norris-LaGuardia Act, 29 U.S.C. §§ 101 et. Seq.
[47] Marine Cooks & Stewards v. Panama S.S. Co., 362 U.S.365, 369 (1960).
[48] Milk Wagon Drivers' Union Local No. 753 v. Valley Farm Prods.
[49] Francis Amendola, Labor Relations 51B C.J.S. Labor Relations § 1058
[50] *Id.*
[51] *See e.g.* Chi. Midtown Milk Distribs, v. Dean Foods Co., 1970 WL 2761 at 1-2 (7th Cir., 1970) , Brief of Appellants at 16, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)

[52] *See generally* Norris-LaGuardia Act, 29 U.S.C. §§ 101 et. Seq.
[53] 29 U.S.C. § 104
[54] 29 U.S.C. S 113(c)
[55] *Id.*
[56] 29 U.S.C. § 104
[57] Burlington N. R.R. Co. v. Bh'd of Maint. Of Way Emps., 481 U.S. 429, 441-442 (1987)
[58] Brief of Appellees at 25 , Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[59] *See Id.*
[60] *See* Brief of Appellants at 15-23, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[61] *E.g*. Burlington N. R.R. Co., 481 U.S. at 443, Jacksonville Bulk Terminals Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702, 711 (1982), H.A. Artists & Assocs. V. Equity Ass'n, 451 U.S. 704, 714 (1981)
[62] *See* generally Brief of Appellees, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[63] *See Id.*
[64] *See* Brady, 644 F.3d 661, 662-683
[65] 29 U.S.C. § 101.
[66] Brief of Appellants at 18 Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[67] *See* Burlington N. R.R. Co. v. Bh'd of Maint. Of Way Emps., 481 U.S. 429 (1987)
[68] Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n, 457 U.S. 702,708 (1982)
[69] Brief of Appellants at 18 Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[70] 29 U.S.C § 101
[71] Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145 (1942)
[72] *See Id.*
[73] *See Id.*
[74] *See Id.*
[75] *See* New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938)
[76] *See Id.*
[77] *See* NLBB v. Washington Aluminum Co., 370 U.S. 9 (1962)
[78] 29 U.S.C. §§ 101, 104, 107
[79] *See* Generally e.g. Brown, 518 U.S. 231, Powell v. N.F.L. F2d. 1293 (1989) White v. N.F.L., 585 F.3d. 1129 (8th Cir. 2009)
[80] *See generally* Brief of Appellants at 3, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[81] Brady, 644 F.3d 661, 662-681
[82] United Mine Workers of Am. V. New Beckley Mining Corp., 895 F.2d 942, 945 (4th Cir. 1990)
[83] Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 79 (1998)
[84] 29 U.S.C. § 107
[85] *See* Brief of Appellees at 29, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[86] 29 U.S.C. § 107
[87] *See e.g*. Brief of Appellees at 29, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011), Brief of Appellants, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[88] *See* New Beckley Mining Corp., 895 F.2d at 947
[89] *See Id.*
[90] *See Id.*
[91] *See* Generally e.g. Brown, 518 U.S. 231; Powell, F2d. 1293; White v. N.F.L. 585 F.3d. 1129

[92] *See* Shant Chalian Fourth and Goal: Player Restraints in Professional Sports, A look Back and a Look Ahead, 67 St, John's L. Rev. 593, 595 (1993)
[93] *See* Brief of Appellees at 29, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[94] *Id. at 33*
[95] *See* Thomas Picher, Baseball's Antitrust Exemption repealed: An analysis of the Effect on Salary Cap and Salary Taxation Provisions, 20 Vt. L. Rev. 559, 566 (1995)
[96] *See* generally Mackey v. N.F.L., 434 U.S. 801 (1977)
[97] *See Id.*
[98] *Id.*
[99] *Id.*
[100] *Id. at 615-618*
[101] *See Id. at 615*
[102] *See generally* Brief of Appellees at 57, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[103] *See Generally* e.g. Brown, 518 U.S. 231; Powell, F2d. 1293; White v. N.F.L. 585 F.3d. 1129
[104] *See* Kieran Corcoran, When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports, 94 Colum. L. Rev. 1045 (1994)
[105] *See* Bridgeman v. National Basketball Ass'n., 675 F.Supp. 960, 964 (D.N.J. 1987)
[106] *Id.* at 965
[107] *See* Industrial Union of Marine and Shipbldg. Workers v. NLRB, 320 F.2d 615,620 (3rd Cir. 1963)
[108] Bridgeman., 675 F.Supp. 960, 965
[109] *Id.*
[110] *Id.*
[111]*See generally* Powell v. N.F.L., 678 F.Supp. 777 (D.Minn., 1988)
[112] *See Id.*
[113] *See Id.*
[114] *Id.* at 785, quoting Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co. Inc., 779 F.2d 497, 500 (9th Cir.1985), cert. granted

[115] *See generally* Powell v. N.F.L., 930 F.2d 1293 (8th Cir. 1989)
[116] *See* Brief of Appellees at 57, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[117] *See* Brown, 518 U.S.231 (citing Teamsters v. Oliver, 358 U.S. 283,295)
[118] *Id.* At 237
[119] *Id.* At 245
[120] *See generally Id,* at 245 (citing 1 Hardin, The Developing Labor Law, at 516-520, 696-699.)
[121] *See generally* Brown, 518 U.S.231
[122] *Id.* At 249
[123] *Id.* at 248
[124] *See* Brief of Appellants at 43 Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011) The NFLPA issued its disclaimer and the plaintiffs filed this suit *before* the previous CBA expired
[125] *Id.*.
[126] *Id.*
[127] *See* Brown, 518 U.S.231
[128] *See generally* Brief of Appellants,, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[129] *See generally* e.g. White v. N.F.L., 585 F3d. 1129 *8th Cir. 2009); McNeil v. N.F.L., 764 F.Supp. 1351 (D. Minn. 1991)

[130] *See generally* White, 585 F3d. 1129 (D. Minn)
[131] Brief of Appellants at 8, Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[132] *Id.*
[133] IBEW Local 159 (Textile, Inc.), 119 NLRB 1792 (1958), enf'd 266 F.2d 349 (5th Cir. 1959)
[134] Capital Market No. 1, 145 NLRB 1430, 1431 (1964)
[135] NFLPA recertifies in time to meet with league, close labor deal, available at http://www.nfl.com/news/story/09000d5d82117a95/article/nflpa-recertifies-in-time-to-meet-with-league-close-labor-deal
[136] Brief of Appellants at 5 Brady v. N.F.L., No. 11-1898 (8th Cir. May 9, 2011)
[137] *Id.* at 6, citing (App.211.)
[138] *Id.* at 6
[139] *Id.* at 4
[140] *Id.* at 8.
[141] *Id.*
[142] Steven Ross, A sports Law Dialog About the NFL Labor Dispute and the Pending Brady v. NFL Case, law.psu.edu/_file/Sports%20Law%20Policy%20and%20Research, last visited Mar.20, 2012
[143] Andrew Harline, The NFL Lockout: The Current NFLPA Strategy Lacks Staying Power, available at http://www.jetlaw.org/?p=5938
[144] *Id.*
[145] *See Id.*
[146] *Id.*
[147] *Id.*