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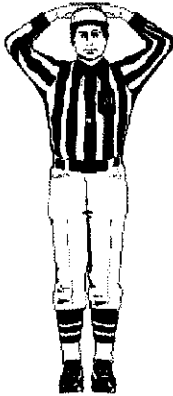
Illegal Substitution: Did the NFL Replacement Referees Create an Abnormally Dangerous Working Condition for Players Under Federal Law?

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Illegal Substitution

Did the NFL Replacement Referees Create an Abnormally Dangerous
Working Condition for Players Under Federal Law?

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Introduction

Prior to the commencement of the 2012 National Football League (NFL) season, it became clear that a collective bargaining agreement (CBA) between the NFL and the NFL Referees Association (NFLRA) was far from being signed. As in various sports, including the NFL in 2011, when the NFL struggled with the National Football League Players Association (NFLPA), collective bargaining is expected. It creates drama for fans and commentators alike as they nervously speculate as to whether there will be a strike or lockout and, if so, when to expect the sport to resume. In 2012, when it became obvious that the referees would not have an agreement in time, the NFL hired replacement referees to initiate the preseason and eventually, they called the first three weeks of regular season games. During these weeks, the replacement referees were berated by spectators, including NFL executives, for the calls that were missed, ignored, or made improperly.

While fans complained fruitlessly, DeMaurice Smith, the NFLPA Executive Director, also recognized the larger issue that the replacement referees posed: player safety.¹ Looking past inaccuracies that affected only teams' records, Smith focused on the inadequacy of calls that left players vulnerable to injury.² Smith threatened a league wide player strike until the NFL and NFLRA reached a CBA and the referees were back.³ However, what commentators noticed was that the threat seemed hollow due to the apparent inability of the players to strike under their own collective bargaining agreement.⁴

¹ Simon Samano, *DeMaurice Smith doesn't rule out strike over referee lockout*, USA TODAY, (Aug. 29, 2012), <http://content.usatoday.com/communities/thehuddle/post/2012/08/demaurice-smith-nfl-strike-replacement-refs/1#.UQQIVuivwh1>.

² *Id.*

³ *Id.*

⁴ Alicia Jessop, *Take The Field: Why the NFLPA Cannot Strike Over Replacement Referees*, FORBES, (Aug. 29, 2012), <http://www.forbes.com/sites/aliciajessop/2012/08/29/take-the-field-why-the-nflpa-cannot-strike-over-replacement-referees/>.

The CBA agreed to by the NFLPA and the NFL in 2011 explicitly includes a “No Strike” Provision.⁵ In this, excluding a Union Security exception, any “strike, work stoppage, or other concerted action interfering with the operations of the NFL” is impermissible.⁶ Thus Smith’s threat of a strike immediately seemed to trigger a violation of the NFLPA’s collective bargaining agreement.

However, §143 of the National Labor Relations Act, added by the Labor-Management Relations Act in 1947,⁷ designates a specific instance during which a work stoppage is not considered a strike.⁸ Under this section, an employee may refuse work, in good faith, if he perceives an abnormally dangerous condition exists in the work environment.⁹ Assuming this law is applicable, the NFLPA would have had to establish that the replacement referees constituted an abnormally dangerous condition for the players in order for a strike to be permissible under their collective bargaining agreement. Ultimately, whether or not an abnormally dangerous condition exists turns on the interpretation of this law under existing precedent. If established, a strike would have been a permissible option for the players during the time the replacement referees were used.

Part I of this Note will offer a detailed analysis of the NFL’s response to injury, such as rule alterations to adjust to game changes to protect players. It will also explore the NFL’s broader response to injury in the game. Using the past behavior of the League, and the seriousness with which it takes injury, the section will also analyze of the replacement referees’ fitness for their positions. Part II will consider the development in the relevant rules of law regarding work stoppages. Finally, Part III will apply the facts in the NFLPA’s situation to the

⁵ NFLPA Collective Bargaining Agreement, Art. 3 §1, August 4, 2011.

⁶ *Id.* at Art. 3 §1; *Id.* at Art. 47 §1, §6.

⁷ 61 Stat. 162 (June 23, 1947) (codified at 29 U.S.C.A. §143 (West 2012)).

⁸ 29 U.S.C.A. §143 (West 2012).

⁹ *Id.*

standards that have been developed regarding work stoppage in the presence of a “No Strike” provision.

I. NFL Injury History

Most recently, the NFL has not taken the seriousness of potential injury lightly, specifically with regard to hits that have tendencies to produce concussions. With this in mind, the NFL rules are often altered to adopt safety precautions. As early as 1962 the NFL implemented a rule prohibiting grabbing a player’s facemask.¹⁰ For the next 15 years, sporadic rules were implemented to accommodate safety until player protection became a predominant interest of rule makers in 1979.¹¹ This was further emphasized in 1980 with the implementation of the personal foul rule that prohibited “striking, swinging, or clubbing on the head, neck or face.”¹² The progress of player safety concerns continued and, in 1996, helmet-to-helmet contact was designated a personal foul.¹³ However, before the interests of the NFL changed and this rule was officially implemented, the NFL “turned a blind eye” to the behavior while coaches encouraged it.¹⁴ Yet, collectively, these rule changes testify to the NFL’s intention to avoid injuries as it acknowledged that particular contact, specifically head to head contact, does cause serious, preventable injury.¹⁵

¹⁰ *History of the NFL Rules*, SPORTSATTIC.COM, <http://www.sportsattic.com/araig/NflRulesHistory.htm> (last visited Nov. 1, 2012).

¹¹ *Id.* (In 1977, the rules implemented to lessen injuries included: outlawing the head slap, prohibition of offensive linemen thrusting their hands at an opponent’s neck, face, or head, prohibition of wide receivers clipping, and defenders only being permitted to make contact with eligible receivers once.); *See also* Jennifer Ann Heiner, *Concussions in the National Football League: Jani v. Bert Bell/Pete Rozelle NFL Player Ret. Plan and a Legal Analysis of the NFL’s 2007 Concussion Management Guidelines*, 18 SETON HALL J. SPORTS & ENT. L. 255, 271 (2008) (“In 1979, the NFL adopted major changes to increase player safety. The rules prohibited players from blocking below the waist during kickoff and punt returns, and prevented the players from wearing damaged equipment that could be potentially hazardous. Officials were also to call a player dead when the quarterback was in the potentially dangerous grasp of a defensive tackler.”).

¹² SPORTSATTIC.COM, *supra* note 10; Heiner, *supra* note 11 at 271.

¹³ SPORTSATTIC.COM, *supra* note 10; Heiner, *supra* note 11 at 271.

¹⁴ Jeremy P. Gove, *Three and Out: The NFL’s Concussion Liability and How Players Can Tackle the Problem*, 14 VAND. J. ENT. & TECH. L. 649, 657 (2012).

¹⁵ *Id.*

Superficial injuries such as broken bones or torn muscles, whether or not they are career ending, do not compare to the side effects of multiple concussions. A concussion, though frequently regarded as a bruise to the brain from collision with a hard surface, can in fact happen without any collision at all and often will produce little to no swelling or bleeding in a radiological scan.¹⁶ A concussion is common when “the head either accelerates rapidly and then is stopped, or is spun rapidly.”¹⁷ Without direct collision, what the brain is actually being “stopped” by is the skull and with that, no helmet can truly protect a player.¹⁸ What *does* protect players are the rules implemented by the NFL to prevent concussions and the referees that are trained to enforce these rules.

Additionally of concern is that, according to neurologists, after one concussion, individuals are up to four times more likely to suffer another—and with each successive concussion, the required force to sustain a future concussion decreases.¹⁹ In a 2000 study of former NFL players, it was found that “60 percent had suffered at least one concussion in their careers and 26 percent had had three or more.”²⁰ The individuals who had reported concussions also reported symptoms of memory, concentration, and neurological problems far more than those who had never suffered from a concussion.²¹ In 2009, another study revealed that symptoms of Alzheimer’s disease and other memory-related illnesses occur in the NFL’s former players “vastly more often” than in the general population.²² And in 2007, a study found that retired NFL players who had sustained three or more concussions during their careers were three

¹⁶ *Head Injuries in Football*, THE NEW YORK TIMES, (Oct. 21, 2010), http://topics.nytimes.com/top/reference/timestopics/subjects/f/football/head_injuries/index.html.

¹⁷ *Id.*

¹⁸ Kevin Cook, *Dying to Play*, THE NEW YORK TIMES, (Sept. 11, 2012), <http://www.nytimes.com/2012/09/12/opinion/head-injuries-in-football.html>.

¹⁹ THE NEW YORK TIMES, *supra* note 16.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

times more likely to have clinical depression.²³ These conditions, clearly the result of brain injury, have manifested themselves repeatedly in former NFL players.²⁴ The result of these studies led the NFL to announce in 2009 the imposition of its most “stringent rules to date on managing concussions,” about which awareness was heightened the following year after several concussions, inside the NFL and out, became popular concern.²⁵ The injuries across the sport have led to the designation that, “football has become the site of perhaps the gravest health crisis in the history of sports.”²⁶

Many spectators, sports analysts and physicians alike have commented on player injuries sustained during NFL games. Naturally, these statements increase in seriousness as the injury being discussed increases in severity. Dr. James Kelly, of the Rehabilitation Institute of Chicago, has noted,

Shots to the head must be outlawed and penalized with suspension, and even expulsion, from the sport. The seriousness of concussion needs to be addressed with serious consequences for those who inflict them. As we see, a career can be ended by concussion. So should the career of habitual head injury perpetrators.²⁷

As Director of the Brain Injury program, Dr. Kelly is an expert in the matter at hand.²⁸ Dr. Kelly is not alone in his harsh opinion of rule violators that are prone to cause injury. The NFL itself takes a similar, albeit diluted stance. Today, penalties for personal fouls are punishable by 15

²³ *Id.*

²⁴ *Id.*; See also Cook, *supra* note 18 (“John Mackey, the pioneering president of the N.F.L.’s Players’ Association, was found to have frontal temporal dementia in his early 60’s. Former Bears safety Dave Duerson was 50 years old when he committed suicide, shooting himself in the chest so that his brain could be studied. (It showed signs of C.T.E.) Junior Seau, a 12-time Pro Bowler for the Chargers, was 43 when he shot himself in the chest last spring.”).

²⁵ *Head Injuries in Football*, THE NEW YORK TIMES, *supra* note 16 (“In October 2010 [a] helmet-first collision caused the paralysis of a Rutgers University player.”).

²⁶ *Lawyers refer to concussions in NFL as ‘gravest health crisis in history of sports’; Football There are more than 5,000 individuals suing the National Football League*, THE TELEGRAPH-JOURNAL, Nov. 1, 2012, at B6.

²⁷ Alexander N. Hecht, Article, *Legal and Ethical Aspects of Sports-Related Concussions: The Merrill Hoge Story*, 12 SETON HALL J. SPORTS & ENT. L. 17, 60 (2002).

²⁸ *Id.*; See also *Brain Injury Rehabilitation Services*, REHABILITATION INSTITUTE OF CHICAGO, <http://www.ric.org/conditions/brain/services/> (Last visited Mar. 18, 2013)(The Rehabilitation Institute of Chicago’s Brain Injury Program is both part of a teaching and a research institution with specialties in concussions as well as other traumatic brain injury.).

yards, with the potential addition of a fine if the hit is severe enough.²⁹ Additionally, NFL Commissioner Roger Goodell has implemented player suspensions for unnecessary roughness in the NFL's quest to limit and discipline potential injury-causing conduct.³⁰

As players' salaries have grown to seven figures, their longevity has also become a larger concern for the league.³¹ Even in 1995, then Buffalo Bills coach, Marv Levy, remarked, "The Competition Committee [of the NFL] [is] consistently making a concerted effort to help protect players from injury."³² According to Commissioner Goodell in the NFL's 2012 Health and Safety Report, in addition to the longevity of players' careers, the NFL has an explicit interest in ensuring that players are safe to pursue their goals off of the field.³³ In keeping with this interest, the NFL has already invested \$22 million in funding to research and improve player safety with an additional \$100 million to be invested within the next ten years.³⁴ Of this \$100 million, \$30 million has already been granted to the Foundation for the National Institute of Health—making it the largest donation in the history of the league.³⁵ The amount of capital being invested in the safety of players reflects the NFL's concerns with the rate of injury in the league. And perhaps it is in fact genuinely concerned, considering that rule changes are implemented despite harsh reactions from fans and players alike who view attempts to limit contact to be destructive of the game.³⁶

²⁹ Linda S. Calvert Hanson & Craig Dornis, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?* 6 SETON HALL J. SPORTS & ENT. L. 127, 159 (1996).

³⁰ Ray Fittipaldo, *Players question NFL's call on stand-in referees*, PITTSBURGH POST-GAZETTE, (Sept. 26, 2012), <http://www.post-gazette.com/stories/sports/steelers/players-question-nfls-call-on-stand-in-referees-654908/>.

³¹ Hanson & Dornis, *supra* note 29 at 159.

³² *Id.* at 160.

³³ Roger Goodell, *Foreward*, NFL FALL 2012 HEALTH & SAFETY REPORT, 2 (2012).

³⁴ John York, M.D., *Welcome to the Fall 2012 NFL Health & Safety Report*, NFL FALL 2012 HEALTH & SAFETY REPORT, 3 (2012).

³⁵ *Id.*

³⁶ Chris Chase, *NFL players speak out on the NFL's awful, new dangerous hit rule*, YAHOO! SPORTS BLOG, (Oct. 20, 2012, 10:35 AM), http://sports.yahoo.com/nfl/blog/shutdown_corner/post/NFL-players-speak-out-on-the-NFL-s-awful-new-da?urn=nfl-278498.

However, without implementation by coordinated, trained, and prepared referees, these rule changes are likely to be ineffective. The referee corps that the NFL regards so highly is the only force standing between the rules on paper and the rules in play. According to the NFL, referee applicants must have a minimum of ten years of officiating experience, five of which must be conducted on a collegiate or professional field.³⁷ Yet, for all intents and purposes, it appears that the group of 2012 replacements barely meets the lowest requirements. Allegedly, this group consists of some college officials, none of whom had any experience in Division 1 football, one former Lingerie Football League (LFL) official who was released by the LFL for incompetence, and even some who had only officiated “glorified high school games.”³⁸

Regardless of whether the League had successfully collected the most qualified group of available substitute referees willing to officiate, the NFL’s support of these replacements led to much secrecy regarding their résumés.³⁹ Although the NFL defended the credentials of its replacements, its credibility suffered as information surfaced.⁴⁰ In August 2012, as the preseason opened and rumors began to spread, specifically regarding official Craig Ochoa and the Lingerie Football League, the NFL immediately denied that he had been let go from his previous position with the LFL.⁴¹ However, in September 2012, LFL commissioner, Mitch Mortaza, came forward

³⁷ *How to Become an Official*, <http://www.nfl.com/help/faq> (last visited Nov. 2, 2012).

³⁸ Rose Eveleth, *What’s the Deal With The NFL’s Replacement Referees?*, SMITHSONIAN MAGAZINE BLOG (Sept. 17, 2012, 9:44 AM), <http://blogs.smithsonianmag.com/smartnews/2012/09/whats-the-deal-with-the-nfls-replacement-referees/>; Houston Mitchell, *NFL referees: Lingerie Football League says NFL is using ref it fired*, LOS ANGELES TIMES, (Sept. 26, 2012), <http://articles.latimes.com/print/2012/sep/26/sports/la-sp-sn-lingerie-football-league-20120926>; Sam Borden, *With Referees Out, N.F.L. Stars Throw Flag on Novice Fill-Ins*, N.Y. TIMES, (Aug. 27, 2012), <http://www.nytimes.com/2012/08/28/sports/football/calls-by-some-nfl-replacement-referees-raise-concerns.html>.

³⁹ *Former NFL Chief Referee: NFL Is Lying About The Experience of Replacement Refs*, CBS CHICAGO, (Aug. 7, 2012), <http://chicago.cbslocal.com/2012/08/07/pereira-replacement-refs-will-only-hurt-the-nfl/>. (Division 1 Referees are unlikely to participate as replacement referees for several reasons, including (1) they know the position is temporary and (2) taking the position could impede their ability to receive a full time NFL position in the future.).

⁴⁰ Mike Florio, *League counters Pereira’s claim of embellished credentials*, NBC SPORTS: PROFOOTBALLTALK, (Aug. 7, 2012), <http://profootballtalk.nbcsports.com/2012/08/07/league-counters-pereiras-claim-of-embellished-credentials/>.

⁴¹ *Id.*

expressing his “shock to see guys that couldn’t officiate in [the LFL] were officiating in the NFL.”⁴² Not only did Mortaza confirm Ochoa had *in fact* been let go, but he alluded also to reasons such as missed calls and poor judgment that “opened up [LFL] players for potential injury.”⁴³ If true, these inadequacies have obvious implications. However, without actual proof of employment and termination for any of the replacements, it becomes impossible to draw the line between truth and embellishment.

In addition to concerns for basic qualification, the replacement referees were unprepared to initiate a professional football season without on-field guidance from veteran officials. Under normal circumstance, a referee would come into the NFL and have the opportunity to gain experience while observing and interacting with those who had already acclimated.⁴⁴ In a typical season, no more than one rookie referee is assigned to an officiating crew.⁴⁵ As Jim Tunney, a retired official with 31 years of NFL experience, stated, “When I started, I had only a few years in Division 1, but I had a lot of other officials around me who could help me. Who are these guys going to ask?”⁴⁶ Replacement referee, Jerry Frump, admitted that the replacements, as a group, were not ready for the challenge ahead of them because they “didn’t have [the] experience.”⁴⁷ The replacements came into the season without the luxury of being able to rely on their more experienced co-officials. Thus, mistakes were overlooked, ignored, or unnoticed. Even the booth

⁴² Borden, *supra* note 38. (“For a number of reasons, high-level college officials are reluctant to moonlight in the N.F.L. as replacements. They do not want to appear disloyal to their college conference supervisors...or jeopardize their current positions with little chance of remaining in the pros after the labor issue is settled.”); Houston Mitchell, *NFL referees: Lingerie Football League says NFL is using ref it fired*, LOS ANGELES TIMES, (Sept. 26, 2012), <http://articles.latimes.com/print/2012/sep/26/sports/la-sp-sn-lingerie-football-league-20120926>.

⁴³ Mitchell, *supra* note 42.

⁴⁴ Craig Wolf, *So you want to be an NFL referee? As the replacement officials showed, it’s not easy*, NJ.COM, (Sept. 30, 2012), http://www.nj.com/giants/index.ssf/2012/09/so_you_want_to_be_an_nfl_refer.html#.

⁴⁵ *Id.*

⁴⁶ Borden, *supra* note 38.

⁴⁷ Sean Gregory, *I Was a Replacement Ref: Inside the NFL’s 7 Weirdest Weeks*, TIME SPORTS BLOG, (Sept. 28, 2012), <http://keepingscore.blogs.time.com/2012/09/28/a-replacement-ref-reflects-did-the-nfl-overlook-an-obvious-experience-gap/>.

review that had been extended to accommodate replacement referees was of little assistance.⁴⁸

Instead of the on-field officials controlling close plays, a booth reviewer had the responsibility of judging whether calls were close enough to warrant a second look. This additional review also allowed for consultation with a rule interpreter; however the system continued to fail to make appropriate calls despite these safety nets.⁴⁹

One of the few individuals supporting the replacements was cornerback Cortland Finnegan.⁵⁰ However, admiration from someone known for “[aspiring] to be the dirtiest player in the league,” is not positive support when his intention is to commend the replacements for not appropriately enforcing the rules.⁵¹ With the reputation of replacements known to players, such as Finnegan, there is a greater risk that their inexperience would be taken advantage of, leading to an increase in injuries.⁵² If the NFL were as concerned with player safety as its public statements warrant, an environment where players were more susceptible to injury should have been actively avoided.

II. NLRA §143: History & Requirements

29 U.S.C.A. §143 is applicable to employees operating under an employment contract or collective bargaining agreement that contains a no strike provision, either expressly or impliedly.⁵³ “[T]he quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or

⁴⁸ Dan Levy, *Horrible NFL Replacement Officials May Be Good for the League Long Term*, BLEACHER REPORT, (Sept. 18, 2012), <http://bleacherreport.com/articles/1338578-nfl-horrible-replacement-officials-may-be-good-for-the-league-long-term>.

⁴⁹ *Id.*

⁵⁰ Michael David Smith, *Cortland Finnegan likes replacements: “They let you play football,”* NBC SPORTS: PROFOOTBALLTALK, (Sept. 19, 2012, 4:40 PM), <http://profootballtalk.nbcsports.com/2012/09/19/cortland-finnegan-likes-replacements-they-let-you-play-football/>.

⁵¹ *Id.*

⁵² Benjamin Hoffman, *Criticism of N.F.L. Replacement Officials Builds*, N.Y. TIMES, (Sept. 18, 2012), <http://www.nytimes.com/2012/09/19/sports/football/criticism-of-nfl-replacement-officials-builds.html>.

⁵³ TNS, Inc. (*TNS I*), 309 NLRB 1348, 1451 (N.L.R.B. 1992); TNS, Inc. v. N.L.R.B. (*TNS II*), 296 F.3d 384, 390 (6th Cir. 2002).

employees [shall not] be deemed a strike.”⁵⁴ Upon a finding of applicability of §143, it is necessary to apply a relevant four-part test that has been established for dangers in the workplace.⁵⁵ The test provides that, for a claim to be successful, based on a preponderance of the evidence, (1) employees must have believed in *good faith* that an abnormally dangerous condition existed in their workplace; (2) this belief must have *caused* the strike; (3) the belief must be supported by *objective, ascertainable* evidence; and (4) the dangerous condition must have posed an *immediate risk* of harm.⁵⁶

Unfortunately, there is no clear definition of “abnormally dangerous.”⁵⁷ Thus, establishing this condition is determined on a case-by-case basis and left to the National Labor Relations Board.⁵⁸ Under these circumstances, courts have relied on a working definition of “abnormal,” which conveys a condition that is “deviating from the normal... or average.”⁵⁹ Football is an inherently dangerous sport. For the replacement referees to constitute an abnormally dangerous condition, they must have created *additional* elements of danger that were not previously present on a regular basis.

The conditions of good faith and causation here can be treated as givens. NFL players have an explicit interest in preserving their own safety. Thus, there was little motive to be dishonest with the NFL in expressing their intent to do so.⁶⁰ The circumstances surrounding the potential 2012 strike did not support the belief that the players may have had an ulterior motive. In the past, ulterior motives have been noted at times when an abnormally dangerous work

⁵⁴ 29 U.S.C.A. §143 (West 2012).

⁵⁵ *TNS II*, 296 F.3d at 389.

⁵⁶ *Id.* at 389 (Emphasis added).

⁵⁷ *TNS I*, 309 NLRB at 1357.

⁵⁸ *Id.*

⁵⁹ John B. Flood, *Revisiting The Right To Refuse Hazardous Work Amidst The Anthrax Crisis of 2001*, 5 U. PA. J. LAB. & EMP. L. 545, 564 (2003).

⁶⁰ See BLACK'S LAW DICTIONARY 762 (9th ed. 2009).

condition surfaced “coincidentally” at the expiration of a collective bargaining agreement.⁶¹ In the immediate case, the NFLPA entered a collective bargaining agreement with NFL only one-year prior.⁶² Therefore, the Player’s Association was not focusing on the issue of safety to disguise its underlying economic interest. Following the assumption of good faith, the strike discussed by the NFL Player’s Association indicated no purpose other than the concern of safety, nor can a valid assumption be made that one existed.⁶³ Thus, what must be analyzed are the requirements of objective and ascertainable evidence, and what constitutes an immediate risk of harm.

a. Objective & Ascertainable Evidence

No matter how honest a belief in danger may be, if it is unreasonable or cannot be substantiated by objective evidence, it will not be upheld.⁶⁴ However, the issue remains as to what will constitute objective and ascertainable evidence.

The test to determine if evidence is objective is whether a reasonable person might also consider the condition abnormally dangerous.⁶⁵ Employees in similar fields would likely share the same opinion as the employee(s) in question as to whether hazards in the work environment were unsafe.⁶⁶ As for form, this evidence can be ascertained through opinion testimony of an employee as to the conditions that he or she observed.⁶⁷ Thus, the evidence presented must meet

⁶¹ *TNS II*, 296 F.3d at 395.

⁶² NFLPA Collective Bargaining Agreement, August 4, 2011.

⁶³ See Fittipaldo, *supra* note 30.

⁶⁴ *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 386 (1974); See also *TNS I*, 309 NLRB at 1357 (“What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered ‘abnormally dangerous.’”); See also *TNS II*, 296 F.3d at 392 (“[T]his circuit has held that the important question... is not whether abnormal danger actually existed, but whether it was shown by objective evidence that employees’ working conditions ‘might reasonably be considered ‘abnormally dangerous.’”)).

⁶⁵ *TNS II*, 296 F.3d at 392.

⁶⁶ *Id.*

⁶⁷ *Nat’l Labor Relations Bd. v. Knight Morley*, 251 F.2d 753, 758 (6th Cir. 1957) (“Laymen may testify as to physical conditions which they themselves have observed.”)

the reasonable person standard, and must be objective enough as to allow the fact finder to identify the facts.

b. Immediate Risk of Harm

In establishing a claim under NLRA §143, it is not necessary to prove that the conditions were “*in fact*” abnormally dangerous, nor does an employee have to “actually manifest physical injury or [be] on the verge of doing so as a result of the conditions.”⁶⁸ A principal case on the matter, *TNS, Inc. v. NLRB*, states that the failure of a regulatory agency to shut a place of business down for health and safety reasons despite its authority to do so does not mean that an abnormal danger does not exist.⁶⁹ In the instance referred to, the abnormally dangerous condition *in fact* was not the question.⁷⁰ The employees’ *belief* of said condition was the predominant issue.⁷¹ However, while the condition does not have to be proven to *in fact* exist, there must be a “presently existing threat” or “immediate danger.”⁷² This does not occur merely because an already existing threat in the work place becomes more than the employee cares to handle.⁷³ Therefore the relevant test is one of establishing that, based on objective evidence, an inherently dangerous condition has “changed significantly for the worse” and now poses “a substantial threat of imminent danger.”⁷⁴

III. Applicability of NLRA §143

⁶⁸ *TNS I*, 309 NLRB at 1356.

⁶⁹ *TNS II*, 296 F.3d at 398.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Gateway Coal*, 414 U.S. at 385.

⁷³ *TNS I*, 309 NLRB at 1358 (“[W]ork which is recognized and accepted by employees as inherently dangerous does not become ‘abnormally dangerous’ merely because employee patience with prevailing conditions wears thin or their forbearance ceases.”).

⁷⁴ *Id.* at 1357 (In its original form, this test had two parts and was applied to workers that were exposed to radioactive and/or toxic substances in the workplace; The test’s two parts for proving an abnormally dangerous condition were “[E]ither (1) that inherently dangerous conditions in the subject workplace had changed significantly for the worse, so as to impose a substantial threat of imminent danger if exposure were continued at the time the employees began to withhold their services, or (2) that the cumulative effects of exposure to those substances had reached the point at which any further exposure would pose an unacceptable risk of future injury to employees.”).

In the first forty years of the statute's existence, there have been only six instances in which abnormally dangerous conditions were actually found.⁷⁵ In these six cases, there were findings of immediate dangers that were "substantially greater than those presented by normally existing conditions" at the employment facility.⁷⁶ Thus, in order to successfully assert that NLRA §143 is appropriate for the NFLPA, it would have had to do the same and establish that the conditions had changed. As stated, in the immediate circumstance good faith and causation need not be questioned.⁷⁷ The focus of the analysis is on whether there is ascertainable, objective evidence that will support a finding of an abnormally dangerous condition, and whether the player employees were at risk of immediate harm because of this condition.⁷⁸

a. Objective & Ascertainable Evidence

To determine whether there was ascertainable and objective evidence, the NFLPA would have had to first look to the standards set forth in prior case law in order to establish its NLRA §143 claim. Objective evidence is that which will convince a person to reasonably decide that a dangerous condition exists.⁷⁹ Such objective evidence is found when a person in a similar field of employment would agree with a statement made regarding the safety of a working condition.⁸⁰ The context that has been described is one in which a truck driver exclaimed that his vehicle was not safe to drive, and based on agreement from other drivers, the evidence was "objective enough... to lead a person to reasonably determine that he should not drive such a truck."⁸¹

1. Players' Opinions Submitted as Objective Evidence

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See* Fittipaldo, *supra* note 30.

⁷⁸ *TNS I*, 309 NLRB at 1357.

⁷⁹ *TNS II*, 296 F.3d at 392.

⁸⁰ *Id.*

⁸¹ *Id.*

With this as a standard for objective evidence, the opinions of all players would have to have been evaluated to determine whether they collectively believed a dangerous condition existed and whether that condition was substantially different from typical on-field experience.⁸² Although the opinions of players were never collectively compiled, their opinions of the replacements were no secret.⁸³ New York Giants defensive end Mathias Kiwanuka expressed that, in reviewing the calls that the replacement referees were missing, “player safety is the big issue.”⁸⁴ Defensive lineman Justin Tuck of the Giants agreed.⁸⁵ He mentioned specifically that he witnessed pass interference “at a high rate” that had not been called, as well as holding.⁸⁶ Tuck stated that, when rules are not followed because the replacements are not making calls, “You get guys that (are) getting pulled down and [getting] hamstring (injuries); you get all these different types of things that could happen and player safety becomes an issue.”⁸⁷ The teammates agreed that, when “you let people get away with stuff, they’re going to continue to do it.”⁸⁸ Philadelphia Eagles receiver Jason Avant reiterated this sentiment.⁸⁹ He even went so far as to say, “Guys are going to kind of cheat” when they know what the replacements are going to ignore.⁹⁰ It is clear that, even if some players were not worried about their safety, they knew that the replacement referees were creating an environment in which rules were not strictly followed and they saw this as an opportunity to be more physical.⁹¹

⁸² *Id.*; *TNS I*, 309 NLRB at 1357.

⁸³ Ian Begley, *Ex-ref: Roger Goodell doesn't care*, ESPN, (Sept, 18, 2012, 8:19 PM), http://espn.go.com/new-york/nfl/story/_/id/8396189/former-referee-jerry-markbreit-blasts-nfl-roger-goodell-use-replacement-officials.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Replacement officials taking heat*, ESPN, (Sept, 18, 2012, 6:27 PM), http://espn.go.com/nfl/story/_/id/8394294/nfl-coaches-players-fed-fill-refs

⁹⁰ *Id.*

⁹¹ Smith, *supra* note 50.

In addition to comments that many players and coaches made regarding the replacements, others took it into their own hands to reprimand the officials for their inadequacies. Linebacker Larry Foote, of the Pittsburgh Steelers, was seen chasing an official off the field to confront him—he believed that an uncalled illegal chop block had injured his teammate.⁹² Cortland Finnegan aside, it is obvious that there was a general concern for the ability of the replacements to officiate in a manner that would protect the safety of players.

2. Replacement Referee Performance

What then must be considered is whether these concerns were reasonable or justified enough to be considered objective. For this, we can look to what actually happened on the field during the reign of the replacement referees. Beyond the errors in marking balls, or the inaccuracy in applying the correct amount of yards to a penalty, what solidified the players' concern for their safety were the missed calls that led to injury. Unfortunately for the players, as well as for the reputation of the replacement referees, injury did in fact happen.⁹³ Fortunately, the injury was not serious enough to end the season of its victim, but it did establish the danger present on the field.⁹⁴ During the last week under the replacement referees, Darrius Heyward-Bey, Oakland Raiders receiver, was hit with helmet-to-helmet contact in such a way that he immediately became unconscious and thereafter suffered a neck strain and concussion.⁹⁵ The hit, even though it ultimately required Heyward-Bey to be taken from the field on a stretcher, was not penalized by the replacements.⁹⁶ This was precisely what the NFLPA feared would be caused

⁹² Fittipaldo, *supra* note 30.

⁹³ Sam R. Quinn, *Darrius Heyward-Bey Injury: Updates on Raiders WR's Head Injury*, BLEACHER REPORT, (Sept. 23, 2012), <http://bleacherreport.com/articles/1345172-darrius-heyward-bey-injury-updates-on-raiders-wrs>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Barry Wilner, *Replacement Refs Create Chaos In NFL Week 3*, Huffington Post, (Sept. 23, 2012), http://www.huffingtonpost.com/2012/09/23/replacement-refs-chaos-nfl-week-3-49ers-challenges_n_1908131.html.

by the inadequacies of the replacement officials. The injury crystallizes the dangerous condition that existed on the field under the control of the replacement referees.

A possible second basis for assessing the adequacy of referees is the rate that the coaches' challenges have overturned a call on the field, but this would be without merit. Over the past five years, the rate of overturned plays have consistently increased—the highest being a 53% rate of plays overturned by coaches' challenges.⁹⁷ In the 2012 season, for the first time in five years, the rate dramatically decreased. With only 31% of plays being overturned through Week 2 of the regular season, it may seem easy to conclude that the replacements were making the appropriate calls because they were upheld.⁹⁸ However, this is not the case. The reason for this decrease is the booth review, in more than one respect.⁹⁹ The statistic neither includes the rate that calls were overturned when the replay was initiated by the booth—instead of the coach—nor does it consider that, in a typical NFL game, the referees on the field review the calls that coaches challenge, not the booth.¹⁰⁰ Therefore, the booth reviewer in this instance is technically a replacement too—at least with respect to the job that he or she is performing when assessing coaches' challenges.¹⁰¹ Additionally, the rate of challenge does not indicate *every* incorrect or missed call.

Alternatively, the league-generated grades based on a play-by-play of each game should be analyzed.¹⁰² In Week 1 alone, before the replacements had made any significant mistakes and

⁹⁷ Kevin Clark, *The NFL Replacement Ref Audit*, THE WALL STREET JOURNAL, (Sept. 19, 2012), <http://online.wsj.com/article/SB10000872396390443816804578004613701813182.html>.

⁹⁸ *Id.*

⁹⁹ Mike Florio, *Replacement ref "audit" misses the point*, NBC SPORTS: PROFOOTBALLTALK, (Sept. 21, 2012), <http://profootballtalk.nbcsports.com/2012/09/21/replacement-ref-audit-misses-the-point/>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

before the brunt force of the criticism had been produced, the average officiating errors *per game* exceeded thirty, as opposed to the single digit averages of the regular officials.¹⁰³

Even setting the statistics aside, the NFL admittedly “trained, championed, and cultivated” its referee corps in order to enhance safety, and without them, that safety became a prominent issue.¹⁰⁴ Players agreed that, with the NFL regarding safety so highly and fining players for safety reasons, it was counterintuitive to have officials on the field that were unable to protect the safety of players.¹⁰⁵

3. Reports from Relevant Regulator Agencies

Additionally, objective evidence has been found in the reports of regulatory agencies regarding safety violations in a work place. In the leading case on the matter, *TNS, Inc. v. N.L.R.B.*, the Sixth Circuit Court of Appeals reviewed a prior decision of the National Labor Relations Board (NLRB) in which the Board found that, although an abnormally dangerous condition may not have existed in fact, the employees provided objective evidence to suggest that their belief in the abnormally dangerous condition was reasonable.¹⁰⁶ The employees in *TNS* were exposed to depleted uranium in their work place, a radioactive and carcinogenic substance.¹⁰⁷ While the employee’s were exposed to this daily, the rates of exposure were regulated by the appropriate state agency.¹⁰⁸ This regulatory agency cited *TNS, Inc.* several times for health and safety violations; however, nothing came of these citations.¹⁰⁹ The employer did

¹⁰³ *Id.*

¹⁰⁴ Matt Brooks, *NFL to teams: Replacement referees will work Week 1*, THE WASHINGTON POST, (Aug. 29, 2012), http://www.washingtonpost.com/blogs/early-lead/post/nfl-to-teams-replacement-referees-will-work-week-1/2012/08/29/13f9669e-f204-11e1-a612-3cfc842a6d89_blog.html.

¹⁰⁵ Begley, *supra* note 83.

¹⁰⁶ *TNS II*, 296 F.3d at 398.

¹⁰⁷ *Id.* at 387.

¹⁰⁸ *Id.* at 397.

¹⁰⁹ *Id.* at 398.

not completely alleviate the circumstances, nor did the employees immediately strike.¹¹⁰

However, when the employer sought to use the employee's continued work as evidence of their acceptance of the safety hazards, and even of the absence of an abnormally dangerous condition, the NLRB instead justified the employee's ultimate strike.¹¹¹ It found that the safety standard violations were enough to establish a good faith belief in the dangerous condition.¹¹² While the Sixth Circuit in *TNS* did not find the evidence provided to be substantial enough to support this finding,¹¹³ the Sixth Circuit did decide that the NLRB does in fact have the *ability* to find objective evidence to support an employee's belief in an abnormally dangerous condition *despite* the inaction of the relevant regulatory agencies.¹¹⁴

Thus, in addition to players' reasonable beliefs as objective evidence regarding the safety on the field, the NFLPA may also look to comments made by the NFL itself in order to implicate the NLRA §143 exception to the no-strike provision. While a fine imposed on a player is not the NFL's "comment" in a strict sense regarding the replacement referees, the fines certainly send a message. This message was obvious after the Week 1 fines were issued, and it clearly stated that, despite replacement officials missing penalties, players would be held accountable for their illegal actions.¹¹⁵ Everson Griffin, Minnesota Vikings defensive lineman, was fined \$15,750 for his only Week 1 hit.¹¹⁶ This hit, although ignored by the replacement officials, was one that inflicted helmet-to-helmet contact to Jacksonville Jaguars quarterback, Blaine Gabbert.¹¹⁷ The NFL, notwithstanding its attempts to circumvent the negative attention already brought upon the

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 403.

¹¹⁴ *Id.* at 400.

¹¹⁵ Griffin Gotta, *Vikings' Everson Griffen, Letroy Guion Fined For Hits Against Jaguars*, SB NATION, (Sept. 14, 2012), <http://minnesota.sbnation.com/minnesota-vikings/2012/9/14/3334110/vikings-vs-colts-everson-griffen-letroy-guion-fined>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

replacement referees, has acknowledged the officials' inadequacies.¹¹⁸ In fining players for illegal activity, the league takes rule interpretation by commentators and transforms it from mere speculation. Once the NFL has imposed a fine, it has also conceded that the activity was *in fact* illegal. Therefore, if such activity was not called during a game, it is not a mere implication that the referees missed the call—it is a fact. Although the NFL does not use the fine system to clean up after officials, as fines are imposed in addition to field penalties, fines were, at times, the only retribution for which players had to fear.

Griffin was not the only player to be fined after a game for a penalty that was not called on the field.¹¹⁹ Golden Tate of the Seattle Seahawks was fined \$21,000 for an illegal block against Sean Lee of the Dallas Cowboys.¹²⁰ Tate used the crown of his helmet to inflict a brutal blindside hit on Lee, violating Rule 12 of the Official Playing Rules of the NFL.¹²¹ The hit was not penalized on the field, but the NFL recognized it as an oversight by replacement officials.¹²² However, this is precisely the dangerous play that *can* occur without proper rule implementation.¹²³ The NFL fining for behavior exhibited on the field indicates its concession that illegal activity *is* occurring, and the publicity of the flagless fines only further magnifies the NFL's knowledge of the replacement referees' failures.

The fines implemented for illegal activity, typically hits made illegal for safety reasons, are comparable to the safety citations in *TNS, Inc.*¹²⁴ The NFL, the ultimate regulatory authority

¹¹⁸ *Id.*

¹¹⁹ Michael David Smith, *NFL fines Golden Tate \$21,000 for block on Sean Lee*, NBC SPORTS: PROFOOTBALLTALK, (Sept. 19, 2012), <http://profootballtalk.nbcsports.com/2012/09/19/nfl-fines-golden-tate-21000-for-block-on-sean-lee/>.

¹²⁰ *Id.*

¹²¹ Roger Goodell, *Official Playing Rules and Casebook of the National Football League*, NFL (2012) ("Rule 12, Section 2, Article 6: Unnecessary Roughness. There shall be no unnecessary roughness. This shall include, but will not be limited to:...(h) using any part of a player's helmet (including the top/crown and forehead/"hairline" parts) or facemask to butt, spear, or ram an opponent violently or unnecessarily").

¹²² Smith, *supra* note 119.

¹²³ *Id.*

¹²⁴ *TNS II*, 296 F.3d at 398.

in the situation, recognized the safety issues by imposing fines for the behavior; however, as an employer, it did not do its utmost to alleviate the dangerous situation.¹²⁵ As in *TNS, Inc.*, the fines may not be enough for the NFLPA to establish that a dangerous working condition in fact existed.¹²⁶ However, the NFL's failure to take more immediate action when signing a CBA with the NFLRA, despite the safety issues posed by the replacements, does not preclude the NFLPA from establishing its belief that an abnormally dangerous condition did exist.¹²⁷

4. The NFL's Prior Dedication to Safety

The NFL has not concealed its intention to make alterations to the game in order to protect the safety of players. DeMaurice Smith, NFLPA Executive Director, has noted, "The NFL has chosen to prevent the very officials that they have trained, championed and cultivated for decades to be on the field to protect players and—by their own admission—further our goal of enhanced safety. That is absurd on its face."¹²⁸ During the 2011 season, the NFL initiated concussion awareness training for referees, most notably due to San Diego Chargers lineman Kris Dielman's seizure after an undiagnosed and unaddressed concussion.¹²⁹ The concussion awareness techniques developed in this training, in addition to a firm grasp of the rules, is something the replacement referees did not have the opportunity to cultivate.¹³⁰ Although they were given "concise" concussion training, this information was in addition to the regular rules

¹²⁵ Smith, *supra* note 119.

¹²⁶ *TNS II*, 296 F.3d at 403.

¹²⁷ *Id.* at 400.

¹²⁸ Samano, *supra* note 1 (Smith notes several points in the safety of the game, "One, the players and the league have made tremendous strides in trying to make the game safer over the last three years... The second fact is, at the players' urging, the National Football League last year gave the referees more power to spot and deal with a concussed or injured player. The third inescapable fact is, over the last 20 years the league has done everything to maintain an experienced referee corps.").

¹²⁹ Mark Maske, *NFL to educate game officials on recognizing players' concussions after Kris Dielman incident*, THE WASHINGTON POST, (Nov. 2, 2011), http://articles.washingtonpost.com/2011-11-02/sports/35284056_1_concussion-kevin-guskiewicz-spine-medical-committee.

¹³⁰ Sean Gregory, *Will Replacement Refs Put NFL Players' Safety at Risk*, TIME BLOG: KEEPING SCORE, (Aug. 31, 2012), <http://keepingscore.blogs.time.com/2012/08/31/will-replacement-refs-put-nfl-players-safety-at-risk/>.

training.¹³¹ The overload of information, coupled with inexperience, high intensity on the field, and the sheer lack of time allotted to absorb the material, meant the replacements were not equipped to apply the condensed version of the training they had been given.¹³²

The league has insisted on creating a safer environment for players, yet while it impliedly and explicitly acknowledged the deficiency in the replacement staff and continued to prolong the CBA negotiations, the safety of players was at risk. For players, there was a vast difference between trained, experienced, properly qualified referees and the less competent replacement staff. The replacements, through no fault of their own, were inherently under-qualified for the positions they were given. Because of their inexperience, they put the players at risk by creating an abnormally dangerous condition on an already dangerous field.

b. Immediate Risk of Harm

In order to fully understand the risk of harm that the players faced, both the causal chain leading to and the severity of the potential injury must be considered. As stated by the concerned players, the higher risk of injury with the replacement referees was the inefficiency in calling fouls.¹³³ Because calls were being missed, players were more inclined to push the replacements in order to see what would and what would not be called. Therefore, they were more physical and, in some cases, disregarded or took advantage of rules that were put in place to prevent injury.¹³⁴ It is true that, if a hit is going to be delivered, whether it is called is irrelevant to the risk that injury will occur. However, injuries were likely to stem from the players' conception that they could "get away with" illegal behavior, and even further, that it was permissible to *try*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Begley, *supra* note 83.

¹³⁴ *See Id.*; *See also* Smith, *supra* note 50.

to get away with this behavior.¹³⁵ Therefore, although the replacements themselves were not directly causing the injury, their lack of control of the game and their reputations among players were the proximate cause of a more physical, unnecessarily dangerous game.

1. Brain Injuries and Their Consequences in Football

Beyond the repercussions of concussions already discussed, newly being studied is Chronic Traumatic Encephalopathy (CTE).¹³⁶ This degenerative brain disease is one that produces symptoms similar to Alzheimer's disease, the difference being that CTE has no genetic cause.¹³⁷ Because repeated brain trauma is the only clear cause of the condition, it is the only avoidable form of dementia.¹³⁸ While the research is still relatively new, it has been found that "any athlete who may have sustained more than one concussive injury may be at risk for CTE."¹³⁹ Unfortunately, at this point in time there is no test to determine whether an individual has CTE while he is alive.¹⁴⁰ However, through studying brain tissue after death, of the 51 confirmed cases of CTE, the condition was found in at least 5 football players.¹⁴¹ Of the confirmed cases, 90 percent of the CTE cases were found in athletes as opposed to the 10 percent found in the general population.¹⁴²

While football players accounted for just over 11 percent of the confirmed CTE cases in athletes, boxers accounted for just fewer than 87 percent of these cases.¹⁴³ Although both sports involve a significant amount of contact, the substantial difference can be attributed to the regulations of each sport with respect to preventing head injury and concussion. Beyond the rule

¹³⁵ See Begley, *supra* note 83.

¹³⁶ Terry Zeigler, *Chronic Traumatic Encephalopathy*, SPORTS MD, (Feb. 1, 2012), <http://www.sportsmd.com/articles/id/44.aspx>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Zeigler, *supra* note 136.

¹⁴³ *Id.*

prohibiting contact while an opponent is down and the implementation of a mouth guard to absorb some of the force to the head, boxing offers little protection to its athletes, especially when it comes to head injury.¹⁴⁴ The regulations of the sport focus on assessment, diagnosis, and treatment rather than prevention.¹⁴⁵ Conversely, the NFL has implemented various rules and regulations to protect its players from head injury and ensure their longevity.¹⁴⁶ The League, in creating these rules, acknowledged the dangers inherent in the sport and sought to limit the potential for occurrence.¹⁴⁷ The Official Playing Rules of the NFL strictly prohibit a player from using his helmet to collide with an opponent, especially when colliding with that opponent's helmet.¹⁴⁸ However, without the appropriate referees to ensure these rules are actually put into action, the regulations become ineffective. The on-field experience begins to mirror that of a boxing match—minimum regulation and maximum contact.

Although broken bones and torn ligaments occur as frequently as head injuries, and perhaps call for longer recovery in terms of games missed, concussions were the immediate risk that players faced due to the replacement referees.¹⁴⁹ The inefficiency in play calling created an environment wherein players' safety was at great risk, more so than the typical risks associated with the sport.¹⁵⁰ The NFL implements rules in order to prevent the risk of head injury and concussion but the rules are merely words on paper without a referee who is trained and experienced enough to enforce them on the field, in real time.

¹⁴⁴ *Boxing Rules & Regulations*, ISPORT, <http://boxing.isport.com/boxing-guides/boxing-rules-regulations> (Last visited Jan. 30, 2013).

¹⁴⁵ Melissa Neiman, *Protecting Professional Boxers: Federal Regulations with More Punch*, 15 SPORTS LAW. J. 59, 77 (2008).

¹⁴⁶ Heiner, *supra* note 11 at 271.

¹⁴⁷ Goodell, *Foreward*, *supra* note 33; Goodell, *Official Playing Rules and Casebook of the National Football League*, *supra* note 121.

¹⁴⁸ Goodell, *Official Playing Rules and Casebook of the National Football League*, *supra* note 121.

¹⁴⁹ Marc Sessler, *Charles Woodson out six weeks with broken collarbone*, NFL.COM, (Oct. 22, 2012), <http://www.nfl.com/news/story/0ap1000000083881/article/charles-woodson-out-six-weeks-with-broken-collarbone>; Ryan Van Bibber, *RGIII injury: Redskins QB needs 'total reconstruction; of right knee, according to report*, SB Nation, (Jan. 9, 2013), <http://www.sbnation.com/nfl/2013/1/9/3854562/rg3-injury-redskins-knee-surgery>.

¹⁵⁰ Begley, *supra* note 83.

IV. Conclusion

Inexperienced officials will inevitably make mistakes in play calls as they grow accustomed to the fast pace and high energy in an NFL game. For this reason, under usual circumstances, the NFL places only one rookie referee in each game.¹⁵¹ The potential for mistakes in employing an entire officiating crew of rookie's is limitless. During the reign of the replacement referees, calls were missed during every game, some more obvious than others.¹⁵² Even the NFL was compelled to release a statement regarding the missed offensive pass interference call in the Green Bay v. Seattle game that resulted in a Seattle touchdown and cost Green Bay the game.¹⁵³ While the "W" was stolen from the Packers, the NFL chose not to alter the record of either team because, without the pass interference call, a lack of which was not reviewable, the elements of the play that were reviewable would not overturn the touchdown.¹⁵⁴ Even amid campaigning, President Obama and Vice Presidential Candidate Paul Ryan took to the media to comment on the performance of the replacement officials after this particularly unfortunate display.¹⁵⁵

The presence of the replacement officials created an abnormally dangerous condition that put the safety of players at risk of immediate harm. As stated, in order to successfully strike due to this condition, despite the NFLPA and NFL's CBA, the NFLPA would have had to establish that (1) players believed in *good faith* that an abnormally dangerous condition existed on the field; (2) this belief must have *caused* the strike; (3) the belief must have been supported by

¹⁵¹ Wolf, *supra* note 44.

¹⁵² Michael David Smith, *Packers fans protest at Lambeau Field*, NBC SPORTS: PROFOOTBALLTALK, (Sept. 25, 2012), <http://profootballtalk.nbcsports.com/2012/09/25/packers-fans-protest-at-lambeau-field/>.

¹⁵³ *NFL Statement on Final Play of Green Bay Packers-Seattle Seahawks Game*, NFL Communications, (Sept. 25, 2012), <http://nflcommunications.com/2012/09/25/nfl-statement-on-final-play-of-green-bay-packers-seattle-seahawks-game/>.

¹⁵⁴ *Id.*

¹⁵⁵ Margaret Chadbourn & Samuel P. Jacobs, *Obama, Ryan agree: NFL's replacement officials need replacing*, Reuters, (Sept. 25, 2012), <http://www.reuters.com/assets/print?aid=USBRE88O1EN20120925>.

objective, ascertainable evidence; and (4) the dangerous condition must have posed an *immediate risk* of harm.¹⁵⁶ The actions of the replacement referees established their under qualification through their inability to perform the necessary tasks of officiating and enforcing the NFL rules that prevent injury and protect safety. All players seem to agree—the rules were not being followed because infractions were not being acknowledged.¹⁵⁷ This lack of discipline and enforcement made for a dangerous field environment where players could not expect the protection afforded by the rules.¹⁵⁸ Thus, an already dangerous game was transformed and the standard risks became substantially greater in all respects. However, most relevantly, the immediate risk of head injury expanded gravely. As in any other circumstance where an individual in a position of power is replaced, individuals will be inclined to see what they can get away with. In this situation, players were aware of the officials' inadequacies and were able to push the limits with certain rules. In doing so, their opponents were put in a preventable position of danger.

The NFLPA would be able to establish that the replacement referees constituted an abnormally dangerous condition within the NFL that put the players' safety at immediate risk of harm. They therefore would have been able to successfully strike, despite the "No Strike" provision of their collective bargaining agreement.

¹⁵⁶ *TNS II*, 296 F.3d at 389 (Emphasis added).

¹⁵⁷ Begley, *supra* note 83.

¹⁵⁸ *Id.*