

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. In the NFL, like other professional sports leagues, collective bargaining is often used to resolve labor disputes. In 2011, the NFL and the National Football League Players Association (NFLPA) also struggled to come to terms on a collective bargaining agreement. Such negotiations create 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, it became obvious that the referees would not reach an agreement in time, and the NFL hired replacement referees for the preseason. Eventually, these replacement referees went on to call 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.³ However, commentators noted that the threat seemed hollow due to the apparent inability of the players to strike under their own collective bargaining agreement.⁴

The NFLPA and the NFL agreed to a CBA in 2011 that explicitly included a "No Strike" Provision.⁵ In this CBA, subject to a Union Security exception, any "strike, work

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/>.

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

stoppage, or other concerted action interfering with the operations of the NFL” is impermissible.⁶ Thus Smith’s threat of an immediate strike seemed to threaten a violation of the NFLPA’s collective bargaining agreement.

However, § 143 of the National Labor Relations Act, added by the Labor-Management Relations Act of 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 created an abnormally dangerous condition for the players in order for a strike to be permissible under their CBA. Ultimately, whether or not an abnormally dangerous condition exists turns on the interpretation of § 143 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 Comment will offer a detailed analysis of the NFL’s response to injuries, such as rule changes to protect players. It will also explore the NFL’s broader response to injuries in the game. Using the League’s past behavior and the seriousness with which the League responds to injuries, this section will also analyze the replacement referees’ qualifications to officiate a professional game. Part II will consider the relevant rules of law regarding work stoppages. Finally, Part III will apply the facts in the NFLPA’s situation to the standards that have been developed regarding work stoppage in the presence of a “No Strike” provision.

I. NFL INJURY HISTORY

In recent years, the NFL has taken seriously the potential for injury during games, specifically with regard to hits that have tendencies to produce concussions. As safety threats became more salient, the NFL frequently adopts rules to further player safety. As early as 1962 the NFL implemented

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

7. Labor Management Relations Act, 61 Stat. 162 (June 23, 1947) (codified at 29 U.S.C. §143 (2012)).

8. 29 U.S.C. §143 (2012).

9. *Id.*

a rule prohibiting grabbing a player's facemask.¹⁰ Over the next 15 years, the League sporadically implemented rules 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 In 1996, player safety concerns ultimately led the NFL to designate helmet-to-helmet contact as a personal foul.¹³ However, before the NFL's interests changed and this rule was officially implemented, the League often "turned a blind eye" to the dangerous plays on the field.¹⁴ Meanwhile, coaches were encouraging this unsafe play.¹⁵ Collectively, these rule changes testify to the NFL's intention to avoid injuries. The NFL has even acknowledged that particular contact, specifically head-to-head contact, does cause serious, preventable injury.¹⁶

Superficial injuries such as broken bones or torn muscles, whether or not they are career ending, do not compare to the effects of multiple concussions. A concussion, though frequently regarded as a bruise to the brain from collision with a hard surface, can in fact occur without any collision at all and often will produce little to no swelling or bleeding in a radiological scan.¹⁷ A concussion is common when "the head

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

11. *Id.* (noting that in 1977, the rules implemented to lessen injuries included: outlawing the head slap, prohibiting offensive linemen from thrusting their hands at an opponent's neck, face or head, prohibiting the clipping of wide receivers, and only permitting defenders 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) (stating that "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 play dead when the quarterback was in the potentially dangerous grasp of a defensive tackler.").

12. SPORTSATTIC.COM, 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.*

16. *Id.*

17. *Head Injuries in Football*, THE NEW YORK TIMES (Oct. 21, 2010), http://web.archive.org/web/20121017050303/http://topics.nytimes.com/top/reference/timestopics/subjects/f/football/head_injuries/index.html (accessed by searching for the

either accelerates rapidly and then is stopped, or is spun rapidly.”¹⁸ Without direct collision, what the brain is actually being “stopped” by is the skull, and thus no helmet can truly protect a player.¹⁹ What does protect players are the rules implemented by the NFL to prevent concussions and the referees 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.²⁰ In a 2000 survey of former NFL players, data indicated that “60 percent had suffered at least one concussion in their careers and 26 percent had had three or more.”²¹ 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.²² 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.²³ Furthermore, in 2007, a study found that retired NFL players who had sustained three or more concussions during their careers were three times more likely to have clinical depression.²⁴ These conditions, clearly the result of brain injury, have manifested themselves repeatedly in former NFL players.²⁵

The result of these studies led the NFL in 2009 to announce the imposition of its most “stringent rules to date on managing concussions.”²⁶ The following year, after several concussions inside of the NFL and out, public awareness

original URL in the Internet Archive index).

18. *Id.*

19. 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>.

20. *Head Injuries in Football*, *supra* note 17.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*; *See also* Cook, *supra* note 19 (“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.”).

26. *Head Injuries in Football*, *supra* note 17.

heightened and the long-term side effects of concussions became a popular concern.²⁷ The injuries across the sport have led to the claim that “football has become the site of perhaps the gravest health crisis in the history of sports.”²⁸

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.²⁹

As Director of the Brain Injury program, Dr. Kelly is an expert in concussions.³⁰

Dr. Kelly is not alone in his harsh opinion of rule violators who are prone to cause injury. The NFL itself takes a similar, albeit diluted, stance. Today, penalties for personal fouls are punishable by 15 yards, with the potential addition of a fine if the hit is severe enough.³¹ 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.³²

While players’ salaries have grown to seven figures, their longevity has also become a larger concern for the league.³³ As

27. *Id.* (“In October 2010 [a] helmet-first collision caused the paralysis of a Rutgers University player.”).

28. *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.

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

30. *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 part of a teaching and a research institution with specialties in concussions as well as other traumatic brain injury.).

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

32. 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/>.

33. Hanson & Dernis, *supra* note 31, at 159.

early as 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.”³⁴ According to Commissioner Goodell’s statement 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.³⁵ 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.³⁶ 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.³⁷

Additionally, prior to the commencement of the 2013 season, the NFL reached a tentative agreement with more than 4,500 retired players regarding concussion-related litigation.³⁸ The agreement provides that the NFL will create a \$756 million fund that will be accessible to retired players and their families.³⁹ The fund will allocate \$10 million for medical and safety research, and, upon a finding of individual necessity, the fund will provide payments for medical benefits and injury compensation.⁴⁰ While the terms of the settlement remain in negotiation, the apparent goal of the NFL is clear. The amount of capital being invested in the safety of players reflects the NFL’s concerns with the rate of injury in the league. Perhaps the NFL’s concern is in fact genuine, considering that rule changes are implemented despite harsh reactions from both fans and players who view attempts to limit contact as destructive to the game.⁴¹

34. *Id.* at 160.

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

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

37. *Id.*

38. NFL, *Retired Players Resolve Concussion Litigation; Court-Appointed Mediator Hails “Historic” Agreement*, NFL COMMUNICATIONS (Aug. 29, 2013), <http://nflcommunications.com/2013/08/29/settlement-of-concussion-litigation/>.

39. *Id.*

40. *Id.*

41. 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 NFL's highly regarded referee corps 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.⁴² For all intents and purposes, it appears that the group of 2012 replacements barely met the lowest requirements. Allegedly, this group consists of college officials, none of who had any experience in Division 1 football, one former Lingerie Football League (LFL) official who was released by the LFL for incompetence, and other referees who had only officiated "glorified high school games."⁴³

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.⁴⁴ Although the NFL defended the credentials of its replacements, its credibility suffered as information about the replacements' history surfaced.⁴⁵ 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.⁴⁶ However, in

42. *Frequently Asked Questions: How Can I Become an NFL Official*, NATIONAL FOOTBALL LEAGUE, <http://www.nfl.com/help/faq> (last visited Nov. 2, 2012).

43. 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>; 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>; 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/>.

44. *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.)

45. 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/>.

46. *Id.*

September 2012, LFL commissioner, Mitch Mortaza, came forward expressing his “shock to see guys that couldn’t officiate in [the LFL] were officiating in the NFL.”⁴⁷ 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.”⁴⁸ 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 officiate a professional football season without on-field guidance from veteran officials. Under normal circumstance, a new referee gains experience while observing and interacting with those who have already adjusted to the job.⁴⁹ In a typical season, no more than one rookie referee is assigned to an officiating crew.⁵⁰ As Jim Tunney, a retired official with 31 years of NFL experience, stated, “[w]hen 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?”⁵¹ 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.”⁵² The replacements came into the season without the luxury of being able to rely on their more experienced co-officials. Thus, penalties were overlooked, ignored, or unnoticed. In addition, the booth review, which had been extended to accommodate replacement referees, was of little assistance.⁵³ Instead of the

47. Borden, *supra* note 43. (“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.”); *see also* Mitchell, *supra* note 43.

48. Mitchell, *supra* note 43.

49. 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#.

50. *Id.*

51. Borden, *supra* note 43.

52. 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/>.

53. Dan Levy, *Horrible NFL Replacement Officials May Be Good for the League Long Term*, BLEACHER REPORT (Sept. 18, 2012),

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 replacements failed to make appropriate calls despite these safety nets.⁵⁴

One of the few individuals supporting the replacements was cornerback Cortland Finnegan.⁵⁵ 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.⁵⁶ With the reputation of replacements known to players such as Finnegan, there was a greater risk that the officials’ inexperience would be taken advantage of, leading to an increase in injuries.⁵⁷ If the NFL was as concerned with player safety as its public statements warrant, an environment where players were more susceptible to injury should have been avoided.

II. NLRA §143: HISTORY & REQUIREMENTS

The statute 29 U.S.C. § 143 applies to employees operating under an employment contract or collective bargaining agreement that contains a no strike provision, either expressly or impliedly.⁵⁸ Under this law, “[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 employees [shall not] be deemed a strike.”⁵⁹ When § 143 is invoked, courts utilize a four-part test to analyze the dangers in the workplace.⁶⁰ For

<http://bleacherreport.com/articles/1338578-nfl-horrible-replacement-officials-may-be-good-for-the-league-long-term>.

54. *Id.*

55. 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/>.

56. *Id.*

57. 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>.

58. 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).

59. 29 U.S.C. §143 (2012).

60. *TNS II*, 296 F.3d at 389.

a claim to be successful, workers must show, based upon a preponderance of the evidence, that: (1) they must have believed in *good faith* that an abnormally dangerous condition existed in their workplace; (2) this belief must have *caused* the work stoppage; (3) the belief must be supported by *objective, ascertainable* evidence; and (4) the dangerous condition must have posed an *immediate risk* of harm.⁶¹

Unfortunately, there is no clear definition of “abnormally dangerous.”⁶² Thus, establishing this condition is determined on a case-by-case basis by the National Labor Relations Board in the first instance.⁶³ Under these circumstances, courts have relied on a working definition of “abnormal,” which conveys a condition that is “deviating from the normal. . . or average.”⁶⁴ 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 may be assumed. NFL players have a strong interest in preserving their own safety. Thus, there was little motive to be dishonest with the NFL in expressing their intent to do so. The circumstances surrounding the potential 2012 strike did not support the belief that the players may have had ulterior motives. In the past, ulterior motives have been noted at times when an abnormally dangerous work condition surfaced *coincidentally* at the expiration of a collective bargaining agreement.⁶⁵ In the 2012 season, the NFLPA had entered a collective bargaining agreement with the NFL only one-year prior.⁶⁶ Therefore, the Player’s Association was not focusing on the issue of safety to disguise its underlying economic interest. Assuming the existence of good faith, the NFL Player’s Association’s strike discussion indicated no purpose other than the concern for safety; no valid assumption can be made that an alternative purpose existed.⁶⁷ Thus, the proper analysis must consider the requirements of objective and

61. *Id.* at 389 (emphasis added).

62. *TNS I*, 309 NLRB at 1357.

63. *Id.*

64. 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).

65. *TNS II*, 296 F.3d at 395.

66. NFLPA Collective Bargaining Agreement, Aug. 4, 2011.

67. *See* Fittipaldo, *supra* note 32.

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.⁶⁸ However, the issue remains as to what constitutes objective and ascertainable evidence.

Evidence is objective if a reasonable person might also consider the condition abnormally dangerous.⁶⁹ 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 abnormal.⁷⁰ This evidence can be ascertained through opinion testimony of an employee as to the conditions that he or she has observed.⁷¹ Thus, the evidence presented must meet the reasonable person standard and must be objective in so far as it will 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 manifes[t] physical injury or [be] on the verge of doing so as a result of [the] conditions.”⁷² 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

68. *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 386 (1974); *see also TNS, Inc. (TNS I)*, 309 NLRB 1348, 1357 (N.L.R.B. 1992) (“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.’”).

69. *TNS II*, 296 F.3d at 392.

70. *Id.*

71. *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.”).

72. *TNS I*, 309 NLRB at 1356.

mean that an abnormal danger does not exist.⁷³ In the instance referred to, the abnormally dangerous condition *in fact* was not in question.⁷⁴ The employees' *belief* of such a condition was the predominant issue.⁷⁵ However, while the condition does not have to be proven to *in fact* exist, there must be a "presently existing threat" or "immediate danger."⁷⁶ This requirement is not satisfied merely because an already existing threat in the work place becomes more than the employee cares to handle.⁷⁷ The relevant test, therefore, must establish, based on objective evidence, that an inherently dangerous condition has "changed significantly for the worse" and now poses "a substantial threat of imminent danger."⁷⁸

III. APPLICABILITY OF NLRA § 143

In the first forty years of the statute's existence, only six instances of abnormally dangerous conditions were found.⁷⁹ In these six cases, there were findings of immediate dangers that were "substantially greater than those presented by normally existing conditions" at the workplace.⁸⁰ 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

73. *TNS II*, 296 F.3d at 398.

74. *Id.*

75. *Id.*

76. *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 385 (1974).

77. *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.").

78. *Id.* at 1357 (Noting that 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.").

79. *Richmond Tank Car Co.*, 264 NLRB 174 (1982); *Combustion Eng'g, Inc.*, 224 NLRB 542 (1976); *Roadway Express, Inc.*, 217 NLRB 278 (1975); *Fruin-Colnon Construction Co.*, 139 NLRB 894 (1962), enforcement denied, 330 F.2d 885 (8th Cir. 1964); *Philadelphia Marine Trade Ass'n*, 138 NLRB 737 (1962), enforced, 330 F.2d 492 (3d Cir. 1964); *Knight Morley Corp.*, 116 NLRB 140 (1956), enforced, 251 F.2d 753 (6th Cir. 1957).

80. *TNS I*, 309 NLRB at 1357.

playing conditions had changed. As previously stated, good faith and causation need not be questioned;⁸¹ the focus of the analysis, therefore, 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.⁸²

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.⁸³ 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.⁸⁴ The case providing this standard involved a truck driver who stated 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.”⁸⁵

1. Players’ Opinions Submitted as Objective Evidence

With this as the standard for objective evidence, the opinions of all players would have to have been evaluated to determine whether they generally believed a dangerous condition existed and whether that condition was substantially different from typical on-field experience.⁸⁶ Although the opinions of players were never collectively compiled, their opinions of the replacements were no secret.⁸⁷ New York Giants defensive end Mathias Kiwanuka said that, in reviewing the calls that the replacement referees were

81. See Fittipaldo, *supra* note 32.

82. *TNS I*, 309 NLRB at 1357.

83. *TNS, Inc. v. N.L.R.B. (TNS II)*, 296 F.3d 384, 392 (6th Cir. 2002).

84. *Id.*

85. *Id.* (quoting *Roadway Express, Inc.*, 217 NLRB 278, 280 (1975)).

86. *Id.*; *TNS I*, 309 NLRB at 1357.

87. 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.

missing, “player safety is the big issue.”⁸⁸ Defensive lineman Justin Tuck of the Giants agreed.⁸⁹ He mentioned specifically that he witnessed pass interference “at a high rate” that had not been called, as well as holding.⁹⁰ Tuck stated that, when rules are not followed because the replacements are not making calls, “[y]ou get guys that (are) getting pulled down and get hamstring (injuries); you get all these different types of things that could happen and player safety becomes an issue.”⁹¹ Kiwanuka agreed that, when “you let people get away with stuff, they’re going to continue to do it.”⁹² Philadelphia Eagles receiver Jason Avant reiterated this sentiment.⁹³ He even went so far as to say, “[g]uys are going to kind of cheat” when they know what the replacements are going to ignore.⁹⁴ It is clear that, even if some players were not worried about their own 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 aggressive.⁹⁵

In addition to comments that many players and coaches made regarding the replacements, others directly reprimanded the officials for their inadequacies. Larry Foote, Pittsburgh Steelers linebacker, was seen chasing an official off the field to confront him—he believed that an uncalled illegal chop block had injured his teammate.⁹⁶ 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. Aside from the

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *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.

94. *Id.*

95. Smith, *supra* note 55.

96. Fittipaldo, *supra* note 32.

errors in marking balls, or the inaccuracy in applying the correct number 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 reputations of the replacement referees, injury did in fact happen.⁹⁷ Fortunately, the injury was not serious enough to end the season or career of its victim, but it did establish the danger present on the field.⁹⁸ During the last week under the replacement referees, Darrius Heyward-Bey, Oakland Raiders receiver, was hit with helmet-to-helmet contact, immediately became unconscious, and thereafter suffered a neck strain and concussion.⁹⁹ The hit, even though it ultimately required Heyward-Bey to be taken from the field on a stretcher, was not penalized by the replacements.¹⁰⁰ This was precisely the kind of injury that the NFLPA feared would be caused by the inadequacies of the replacement officials. The injury establishes 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 at which coaches' challenges overturned a call on the field, but this would be without merit. Over the past five years, the rate of overturned rulings has consistently increased—the highest being a 53% rate of plays overturned by coaches' challenges.¹⁰¹ In the 2012 season, for the first time in five years, the rate dramatically decreased. With only 31% of play calls being overturned through Week 2 of the regular season, it may seem that the replacements were making the appropriate calls.¹⁰² However, the reason for this decrease is the booth review, in more than one respect.¹⁰³ The statistic

97. 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>.

98. *Id.*

99. *Id.*

100. 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.

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

102. *Id.*

103. 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/>.

neither includes the rate at which referees' decisions 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.¹⁰⁴ Therefore, the booth reviewer in this instance is technically also a replacement—at least with respect to the job that he or she is performing when assessing coaches' challenges.¹⁰⁵ Additionally, the rate of challenge does not indicate *every* incorrect or missed call.

Alternatively, the league-generated referee grades, which are based on a play-by-play analysis of each game, should be assessed.¹⁰⁶ In Week 1 alone, before the replacements had made any significant mistakes and before the criticism had reached an apex, the average officiating errors per game exceeded thirty, as opposed to the single digit averages of the regular officials.¹⁰⁷

Setting statistics aside, the NFL admittedly “trained, championed, and cultivated” its referee corps in order to enhance safety, and without them, safety became a prominent issue.¹⁰⁸ Players agreed that, with the NFL regarding safety so highly and fining players to further that interest, it was counterintuitive to have officials on the field who were unable to protect the safety of players.¹⁰⁹

3. Reports from Relevant Regulator Agencies

Additionally, objective evidence in other settings 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

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. 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.

109. Begley, *supra* note 87.

their belief in the abnormally dangerous condition was reasonable.¹¹⁰ The TNS employees were exposed to depleted uranium, a radioactive and carcinogenic substance, in their work place.¹¹¹ While the employees were exposed to this carcinogen daily, the rates of exposure were regulated by the appropriate state agency.¹¹² The regulatory agency issued several citations to TNS for health and safety violations; however, no further action was taken.¹¹³ The employer did not completely alleviate the condition, nor did the employees immediately stop work.¹¹⁴ However, when the employer sought to use the employees' continued work as evidence of their acceptance of the safety hazards, and of the absence of an abnormally dangerous condition, the NLRB justified the employees' ultimate work stoppage.¹¹⁵ It found that the safety standard violations were enough to establish a good faith belief in the dangerous condition.¹¹⁶ While the Sixth Circuit in *TNS* did not find the evidence provided to be substantial enough to support this finding,¹¹⁷ the court did decide that the NLRB may find objective evidence to support an employee's belief in an abnormally dangerous condition, despite the inaction of the relevant regulatory agencies.¹¹⁸

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 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, the fines assessed during the use of replacement referees certainly send a message. The NFL, notwithstanding its attempts to downplay the negative attention generated by the replacement referees, has implicitly acknowledged the officials' inadequacies by issuing fines for penalty-free play. Once the NFL has imposed a fine, it has also conceded that the activity was *in fact* illegal, and, generally speaking, should have been called on the field.

110. *TNS, Inc. v. N.L.R.B. (TNS II)*, 296 F.3d 384, 398 (6th Cir. 2002).

111. *Id.* at 387.

112. *Id.* at 397.

113. *Id.* at 398.

114. *Id.*

115. *Id.*

116. *TNS II*, 296 F.3d at 398.

117. *Id.* at 403.

118. *Id.* at 400.

The League's message was obvious after the Week 1 fines were issued: despite replacement officials missing penalties, players would be held accountable for their illegal actions. Everson Griffin, Minnesota Vikings defensive lineman, was fined \$15,750 for his only Week 1 hit.¹¹⁹ This hit, although ignored by the replacement officials, inflicted helmet-to-helmet contact to Jacksonville Jaguars quarterback, Blaine Gabbert.¹²⁰ Griffin was not the only player to be fined after a game for a penalty that was not called on the field.¹²¹ Golden Tate of the Seattle Seahawks was fined \$21,000 for an illegal block against Sean Lee of the Dallas Cowboys.¹²² Tate used the crown of his helmet to inflict a blindside hit on Lee, violating Rule 12 of the Official Playing Rules of the NFL.¹²³ The hit was not penalized on the field, but the NFL recognized it as an oversight by replacement officials.¹²⁴ This is precisely the dangerous play that *can* occur without proper rule implementation.¹²⁵ The NFL's fines for behavior exhibited on the field indicates its concession that illegal activity *is* occurring, and the publicity of the flagless fines only further exposes 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.*¹²⁶ The NFL, the ultimate regulatory authority 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.¹²⁷ As in *TNS, Inc.*, the fines may not be enough for the NFLPA

119. Tim Yotter, *Griffen fined \$15,750 for Hit on Gabbert*, SCOUT (Sept. 14, 2012), <http://scouthoops.scout.com/a.z?s=75&p=9&c=2&cid=1221595&nid=3286517&fhn=1&g=4&yr=2010>.

120. *Id.*

121. 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/>.

122. *Id.*

123. 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.").

124. Smith, *supra* note 121.

125. *Id.*

126. *TNS II*, 296 F.3d at 398.

127. Smith, *supra* note 121.

to establish that a dangerous working condition in fact existed.¹²⁸ 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 reasonable belief that an abnormally dangerous condition did exist.¹²⁹

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."¹³⁰ 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.¹³¹ The replacement referees did not have the opportunity to internalize the concussion awareness techniques developed in this training, like the rules in general.¹³² Although they were given "concise" concussion training, this information was in addition to the regular rules training.¹³³ The overload of information coupled with inexperience, high intensity on the field, and the lack of time available to absorb the material, meant the replacements were not equipped to effectively apply the condensed version of the training they had been

128. *TNS II*, 296 F.3d at 403.

129. *Id.* at 400.

130. 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.").

131. 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.

132. 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/>.

133. *Id.*

given.¹³⁴

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 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 injuries must be considered. As stated by the concerned players, the higher risk of injury with the replacement referees resulted from their inefficiency in calling fouls.¹³⁵ 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 designed to prevent injury.¹³⁶ Nevertheless, if a player delivers a strong hit, whether said hit is penalized is irrelevant to the potential risk of injury. However, injuries were likely to stem from the players' conception that they could "get away with" illegal behavior, and furthermore, that it was permissible to *try* to get away with this behavior.¹³⁷ 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.

IV. CONCLUSION

Inexperienced officials will inevitably make mistakes in play calls before they grow accustomed to the fast pace and

134. *Id.*

135. Begley, *supra* note 87.

136. *Id.*; *See also* Smith, *supra* note 55.

137. *See* Begley, *supra* note 87.

high energy in an NFL game. For this reason, under usual circumstances, the NFL places only one rookie referee in each game.¹³⁸ The potential for mistakes in employing an entire officiating crew of rookies is limitless. During the reign of the replacement referees, calls were missed during every game, some more obvious than others.¹³⁹ 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.¹⁴⁰ While the “W” was taken 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.¹⁴¹ 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.¹⁴²

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 legally stop work 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 *objective, ascertainable* evidence; and (4) the dangerous condition must have posed an *immediate risk* of harm.¹⁴³ 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

138. Wolf, *supra* note 49.

139. 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/>.

140. *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/>.

141. *Id.*

142. 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>.

143. *TNS, Inc. v. N.L.R.B. (TNS II)*, 296 F.3d 384, 389 (6th Cir. 2002) (emphasis added).

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and protect safety. All players seem to agree—the rules were not being followed because infractions were not being acknowledged.¹⁴⁴ This lack of enforcement created a dangerous field environment where players could not expect the protection afforded by the rules.¹⁴⁵ 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.

144. Begley, *supra* note 87.

145. *Id.*