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Strength in Numbers: The Question of Decertification of Sports Unions in 2011 and the Benefit of Administrative Oversight

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**STRENGTH IN NUMBERS:
THE QUESTION OF DECERTIFICATION
OF SPORTS UNIONS IN 2011 AND
THE BENEFIT OF ADMINISTRATIVE
OVERSIGHT**

ALEXANDER M. BARD*

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I. INTRODUCTION

In 1998, National Basketball Association (“NBA”) commissioner David Stern grew a “lockout beard” for nearly half a year, declaring that it would remain intact until the league and union came to an agreement and resumed the basketball season.¹ Currently, the threat of yet another beard, in addition to another truncated or cancelled season, looms over the NBA and up until very recently, lingered over the National Football League (“NFL”).²

Within the last several months, the NBA and NFL’s collective bargaining agreements (“CBA”) have expired, leaving both leagues with serious doubt regarding the cancellation or delay of their 2011 seasons due to disagreements about several mandatory subjects of collective bargaining between their front offices and unions.³

As of the date of this article, the NBA has instituted a lockout of its players, and the NFL ratified a new ten-year CBA with the National Football League Players Association (“NFLPA”) on July 25, 2011 following a five-month long lockout.⁴

Decertification, or dissolution, of a labor union, is one option available to labor organizations—including players’ associations—during collective bargaining negotiations.⁵ With the owners seemingly holding so much power and with the longstanding history of lockouts present in both leagues, the possibility of decertifying the union with the National Labor Relations Board

1. See Steve Aschburner, *Lockout Revisited, 10 Years Later*, SPORTS ILLUSTRATED (July 8, 2008), http://sportsillustrated.cnn.com/2008/writers/steve_aschburner/07/08/lockout.revisited/ (“But the way most people remember it, the league’s angry and newly vulnerable chief executive let his retro whiskers grow symbolically from bitter start to exhausting finish . . .”).

2. See Laura Clawson, *NFL Lockout Ends*, DAILY KOS (July 25, 2011, 11:36 A.M.), <http://www.dailykos.com/story/2011/07/25/998457/-NFL-lockout-ends> (allowing for current players to remain in the NFL’s medical plan for life a provision which was hotly debated in prior negotiations).

3. See Larry Coon, *Lockout Looms Over 2010-11 Season*, ESPN.COM (Sept. 22, 2010), http://sports.espn.go.com/nba/columns/story?columnist=coon_larry&page=lockout-100922 (explaining that if a new CBA is not agreed upon by the NBA and players’ union prior to the expiration of the current CBA a league-imposed lockout will likely ensue, threatening cancellation of 2011–12 season); *Union Head Says Owners Set for Lockout*, ESPN.COM (Oct. 5, 2010), <http://sports.espn.go.com/nfl/news/story?id=5652700> (explaining that a stumbling block for negotiation of a new CBA is that the NFL, although claiming financial difficulties, will not share its books with the union).

4. See generally, *CBA Expires, NBA Locks Out Its Players*, ESPN.COM (July 1, 2011), <http://sports.espn.go.com/nba/news/story?id=6723645> (detailing both sides of the labor dispute which erupted on Friday, July 1, 2011, when its CBA expired); Judy Battista, *As the Lockout Ends, the Scrambling Begins*, N.Y. TIMES, July 25, 2011), at B10, available at <http://www.nytimes.com/2011/07/26/sports/football/NFL-Union-Labor-Deal.html?pagewanted=all> (“After nearly five months of inactivity by all but a handful of negotiators, the NFL sprang to life again Monday when [thirty-two] player representatives voted unanimously to recommend approval of a [ten]-year labor deal that owners largely approved last Thursday.”).

5. See GLENN M. WONG, *ESSENTIALS OF SPORTS LAW* 528–29 (4th ed. 2010) (explaining that if a union votes to decertify, players would no longer have any “affiliation with the union and no collective bargaining agreement would be in place”).

("NLRB" or "Board") may appear to be the best option for players.⁶ Based on the likelihood of the owners instituting a lockout following the expiration of the CBA, a decertification of the NBA Players Association ("NBPA") is arguably the only tool left to ensure a 2011 season.⁷ Recent decertification efforts in both leagues reveal, however, that such a move can result in a negative economic impact on players' salaries and free agency status.⁸ Thus, the legal options available to a players' union via the NLRB and provide a more stable and successful alternative in dealing with the current labor situations in the NBA and the NFL.

This Article will examine, analyze, and propose a solution for the NBPA by considering the interplay between the National Labor Relations Act ("NLRA" or "Act"), the NLRB, and the history of labor disputes in the NBA and the recently revived NFL. Part II will provide a background on collective bargaining under the Act, the jurisdiction of the NLRB, and how it applies to the unique circumstances of the sports industry.⁹ Part III will outline the labor histories of the NBPA and the NFLPA, including important legal challenges to collective bargaining and antitrust restraint claims, and will discuss the current situation facing the NBA and NBPA.¹⁰ Part IV will analyze the likely negative results of decertification in comparison to the strength of a certified players' association, as well as illustrate the disadvantaged position that a union inhabits in today's economy after decertification.¹¹

II. BACKGROUND

To safeguard both employers and employees, and to "promote[] the flow of commerce," the NLRA regulates collective bargaining relationships between employers and designated employee unions.¹² The history of labor

6. See generally Eric R. McDonough, *Escaping Antitrust Immunity—Decertification of the National Basketball Players Association*, 37 SANTA CLARA L. REV. 821 (1997) (proposing, in the context of the late 1990s dispute between the NBA and NBPA, that decertification of the NBPA, following the expiration of the then-current CBA, would allow players to compete in a more free market and receive fair market value wages).

7. Cf. *Nat'l Basketball Ass'n v. Williams*, 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994) (explaining that decertification allows players to pursue new strategies, such as challenging league practices through a strikes or through antitrust claims).

8. See *Decertification: The NFLPA and NBPA's Nuclear Option*, LAW360 (January 18, 2011), www.constantinecannon.com/pdf_etc/complaw360art011811.pdf (explaining that decertification would eliminate guaranteed salaries and pensions for the players and the ability to negotiate and control their marketing and licensing rights).

9. See *infra* Part II (discussing the application of the NLRA to professional sports labor disputes).

10. See *infra* Part III (analyzing the effects of the most recent NFL decertification and the future of the NBA lockout).

11. See *infra* Part IV (providing an accounting of the labor history and current labor relations disputes present in the NBA and the NFL).

12. See generally National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006) (attempting to rectify the unequal bargaining power between employers and employees through provision for collective bargaining).

law, stemming from the Wagner Act,¹³ is based around the policy of bringing employers and employees together to encourage negotiation and agreement.¹⁴

A. *Collective Bargaining and the NLRA*

In 1935, Congress passed the NLRA to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain labor and management practices deemed harmful to the workforce and economy of the United States.¹⁵ In order to carry-out this process, Congress charged the NLRB with administering the provisions of the Act.¹⁶ The Board has two main functions: (1) to determine, through elections, whether a group of employees wish to be represented by a union in dealing with their employers and if so, by which union; and (2) to prevent “unfair labor practices by private sector employers and unions.”¹⁷

The Board’s authority includes oversight of union representative elections by employees,¹⁸ as well as the governing of elections when employees seek to dissolve their labor organization as their exclusive bargaining representative.¹⁹ The Board is also empowered to regulate unfair labor practices by conducting investigations, issuing complaints, and petitioning courts for relief.²⁰ One of the key aspects of labor practices between labor organizations and employers is the mandatory obligation to bargain collectively when a labor unit has elected an exclusive bargaining agent.²¹ This obligation exists “with respect to wages, hours, and other terms and conditions of employment,” and requires that both sides negotiate in “good faith.”²²

The process of collective bargaining begins with the selection of an

13. National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended 29 U.S.C. §§ 151–169 (2006)).

14. See 1 PATRICK HARDIN ET AL., *THE DEVELOPING LABOR LAW* 26–27 (4th ed. 2001) (providing Senator Wagner’s belief that, in an industrial era dominated by large corporations, employees needed the ability to bargain together in order to assure their rights, with regard to the need for the passage of the Wagner Act).

15. See *id.* (explaining that the “cornerstone” of the Wagner Act was Section 7, which gave employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for . . . mutual aid and protection”).

16. See § 153 (creating the NLRB to adjudicate, investigate, and enforce the NLRA to remedy historically lax enforcement that plagued previous labor laws).

17. *What We Do*, NAT’L LAB. RELATIONS BD., <http://www.nlr.gov/what-we-do> (last visited Apr. 23, 2011).

18. § 159(c).

19. See § 159(e) (requiring that thirty percent of eligible employees must petition the Board, no sooner than one year after a union had previously been certified, for an election to decertify a previously-certified bargaining representative).

20. See § 160(e) (permitting the NLRB to seek relief in federal district court to enjoin ongoing unfair labor practices).

21. See § 158(d) (specifying that the duty to bargain in good faith is aimed at the consummation of a written collective bargaining agreement between the employer and the bargaining representative).

22. See *id.* (explaining, however, that such an “obligation does not compel either party to agree to a proposal or require the making of a concession”).

appropriate unit for the purpose of bargaining with the employer.²³ The unit representative is selected by a majority of all employees within an appropriate unit at the employer's facility or plant; after the representative collectively bargains with an employer over several mandated conditions of employment.²⁴ The Board's statutorily-mandated determination of an "appropriate unit for collective bargaining" is adjudicated before, and decided by the Board, and cannot be overruled or interfered with by a court, unless the Board's decision is arbitrary or capricious.²⁵ Additionally, the Board has the authority to decline to exercise jurisdiction over an employment organization if the labor dispute does not have a sufficiently substantial impact on interstate commerce.²⁶

Once the selection of an exclusive bargaining unit is complete, the collective bargaining process ensues. There is a duty for both the employer and the unit representative to bargain in good faith, failure to do so is an unfair labor practice.²⁷ The language in the Act creates two subject matter categories for collective bargaining—mandatory and permissive subjects.²⁸ To be a mandatory subject of collective bargaining, a term must "settle an aspect of the relationship between the employer and employees."²⁹

23. For instance, when an employer has two plants that manufacture different product lines, the employer may ask the Board to segregate the two into two different bargaining units. If the employer is successful, each plant would then have to separately select a certified exclusive bargaining representative (union) and each representative would have to bargain with the employer separately. *See* § 159(a)–(b); Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 382 (1989) ("When a majority of employees designate a union to represent them, an employer must . . . bargain in good faith with the employees' representatives . . .").

24. *See* § 159(a) ("Representatives designated or selected for the purposes of collective bargaining . . . shall be the exclusive representatives of all the employees in such a unit" regarding mandatory subjects of bargaining, including "rates of pay, wages, hours of employment, or other conditions of employment.").

25. *See* *NLRB v. Lettie Lee, Inc.*, 140 F.2d 243, 247–50 (9th Cir. 1944) (upholding the Board's determination that sloper and trimmer employees were also qualified cutters and that all three could join in an appropriate bargaining unit together). A federal court usually defers to an "administrative agency [like the NLRB] because of its own lack of experience with issues or the need to protect the authority of the agency." *HARDIN ET AL.*, *supra* note 14, at 2282.

26. *See* § 164(c)(1); *see also* *Sec. Guards & Watchmen Local No. 803 (Yonkers Raceway, Inc.)*, 196 N.L.R.B. 373, 373 (1972) (declining jurisdiction over the horse racing industry, even though racing had "some effect" on interstate commerce).

27. *See* § 158(a)(5) (prohibiting an employer from refusing to bargain collectively with his employees' chosen representative); § 158(d) ("[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith . . .").

28. *See* *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348–49 (1958) (holding that an employer cannot insist on acceptance of non-mandatory terms as a precondition to reaching an agreement, even when the employer otherwise agrees to bargain over mandatory terms).

29. *See* *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971) (explaining that there is no penalty or repercussion if parties refuse to negotiate with regard to permissive subjects).

An unfair labor charge can be brought when one party refuses to bargain in good faith over a mandatory subject.³⁰ The good faith requirement to bargain collectively, however, does not indicate a necessity for parties to reach an agreement.³¹ The “good faith” requirement in collective bargaining is focused on the standards of behavior in the bargaining process, not on results.³²

A theory of judicial non-intervention supports the purpose of the NLRB refereeing the collective bargaining process.³³ While the Act establishes the right of employees to join labor organizations and engage in collective action, it also guarantees the right of employees to abstain from forming or joining a labor union.³⁴ Additionally, the Act provides a strict procedure for decertifying a labor organization by a vote of the union’s members.³⁵ Following a petition to the NLRB for decertification signed by at least thirty percent of the employees, the Board takes a secret ballot poll of the entire bargaining unit to determine whether or not to decertify the unit.³⁶ If the majority of employees vote against the continuation of the union as the exclusive representative of the bargaining unit, the Board then decertifies the union.³⁷

B. The Labor Exemption

Because the union-employer relationship can often lead to accusations of antitrust violations, courts have recognized a “non-statutory labor exemption” from antitrust law in certain agreements reached in the course of collective

30. See § 158(a)(5) (“It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees [over mandatory subjects of bargaining].”).

31. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956) (“While Congress did not compel agreement between employers and bargaining representatives, it did require collective bargaining in the hope that agreements would result.”); *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 525 (1941) (“It is true that the National Labor Relations Act, while requiring the employer to bargain collectively, does not compel him to enter into an agreement.”).

32. Cf. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435–36 (1967) (stressing that the employer has an obligation to supply all relevant information necessary for the employees’ bargaining representative to perform its duties); *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (holding that the duty “may be violated without a general failure of subjective good faith”).

33. See generally *Lock*, *supra* note 23, at 381–83 (explaining the theory behind restraint in judicial intervention during the bargaining process as being consistent with congressional intent manifested in the text of the Act).

34. See § 157 (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment . . .”).

35. See § 159(c)(1) (requiring an initial petition by employees); see also 29 C.F.R. §§ 102.83–102.84 (2010) (regulating the form, content, and procedure for presentation to the NLRB of decertification petitions).

36. § 159(e)(1).

37. *Id.*

bargaining under the NLRA.³⁸ The primary purpose of the labor exemption is to protect labor organizations and their bargaining activities.³⁹ Typically, antitrust actions are brought under the Sherman Act, which condemns “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.”⁴⁰ The Supreme Court has held, however, that parties engaged in labor agreements can be immune from antitrust laws.⁴¹ The Court cited a “strong labor policy” favoring labor agreements, even in the face of antitrust restraints.⁴² The labor exemption and antitrust immunity apply when agreements at issue relate to mandatory subjects of bargaining such as wages, hours, and terms and conditions of employment.⁴³

C. The NLRA and Collective Bargaining as Applied to the Sports Industry

In 1969 the Board established its jurisdiction over professional sports leagues, holding in *American League of Professional Baseball Clubs*⁴⁴ that Congress

38. See *Connell Const. Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 622 (1975) (recognizing “the nonstatutory exemption” to federal antitrust law protects the unions ability to “eliminate competition over wages and working competitions” and to inevitably “affect price competition among employers”); *Local No. 189, Amalgamated Meat Cutters, Butcher Workmen of N. Am. v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965) (“[T]he national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work.”); see also 15 U.S.C. § 17 (2006) (“The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”); cf. 29 U.S.C. § 105 (2006) (preventing federal courts from enjoining activity that would otherwise be considered “an unlawful combination or conspiracy because of the doing in concert of [certain] acts” in the context of a labor dispute).

39. See, e.g., *United States v. Hutcheson*, 312 U.S. 219, 229–33 (1941) (holding that labor actions directed at an employer but due to “internecine” conflict between two competing labor organizations did not violate the antitrust law); but cf. *Allen Bradley Co. v. Local Union No. 3, Int’l Bhd. of Elec. Workers*, 325 U.S. 797, 807–11 (1945) (noting, however, that the exemption does not permit unions to combine with non-labor groups in order “to create business monopolies and to control the marketing of goods and services”).

40. 15 U.S.C. § 1.

41. See 312 U.S. at 229–33 (explaining that “whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and [Section] 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct”).

42. See 421 U.S. at 622 (“[T]he goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws.”).

43. See *id.* (“The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions.”).

44. *Am. League of Prof’l Baseball Clubs & Ass’n of Nat’l Baseball League Umpires*, 180 N.L.R.B. 190 (1969).

intended for the Act to apply to Major League Baseball.⁴⁵ And reasoned that, based on its policy of encouraging collective bargaining, it should assert its jurisdiction and subject any professional team sports labor dispute to the Act.⁴⁶ For the first time, the Board accepted the idea that professional baseball affects interstate commerce, and thus ruled that professional baseball is subject to the Act.⁴⁷ The Supreme Court applied the Board's holding in *Radovich v. Nat'l Football League* to determine that both football⁴⁸ and basketball⁴⁹ affect interstate commerce under the Commerce Clause and are, by extension, subject to the NLRA.

Then, in 1980 the Fifth Circuit established that when facing a joint employer relationship, such as a professional sports league, a league-wide, multi-employer bargaining unit was appropriate because the unit had "common labor problems and a high degree of centralized control over labor relations."⁵⁰ And rationalized that only a bargaining unit comprised of every league player can wield enough bargaining power to challenge professional sports leagues.⁵¹

For multi-employer certification, the NLRB requires either such a joint agreement between the parties or a controlling history of bargaining on a

45. See *id.* at 192 ("We can find, neither in the statute nor in its legislative history, any expression of a Congressional intent that disputes between employers and employees in [the] industry [of professional sports] should be removed from the scheme of the National Labor Relations Act.").

46. See JOHN C. WEISTART & CYM H. LOWELL, *THE LAW OF SPORT* § 6.03, at 788 (1979) (explaining that the Act is broad enough to permit the Board to exercise jurisdiction over "all the employees" in professional team sports, "from bat boys to maintenance men").

47. See *id.* at 190–91 ("Congressional deliberations regarding the relationship of baseball and other professional team sports to the antitrust laws likewise reflect a Congressional assumption that such sports are subject to regulation under the commerce clause . . . [and] legal scholars have agreed . . . that professional sports are in or affect interstate commerce, and as such are subject to the Board's jurisdiction." (footnotes omitted)). See generally *NLRB v. Fainblatt*, 306 U.S. 601 (1939) (establishing that that the Board had authority under the NLRA to exert jurisdiction over an employer even when a manufacturer was not directly involved in interstate commerce but instead, received and shipped a small volume of manufactured goods through interstate commerce).

48. Cf. *Radovich v. Nat'l Football League*, 352 U.S. 445, 452 (1957) ("[T]he volume of interstate business involved in organized professional football places it within the provisions of the [Sherman] Act.").

49. Cf. *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1055 (C.D. Cal. 1971) ("The business of professional basketball as conducted by NBA and the NBA teams on a multi-state basis, coupled with the sale of rights to televise and broadcast the games for interstate transmission, is trade or commerce among the several States within the meaning of the Sherman Act."), *stay granted*, 1971 WL3015 (9th Cir. Feb. 16, 1971), *reinstated sub nom.* *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204.

50. 613 F.2d 1379, 1383 (5th Cir. 1980) (explaining that once a player is hired by a team, his working conditions are controlled not only by that team, but by the league as well).

51. Cf. PAUL C. WEILER & GARY ROBERTS, *SPORTS AND THE LAW* 302–03 (3d ed. 2004) (explaining that multi-employer bargaining is now a common feature, because "[b]oth employers and unions in these industries find they have a complimentary long-term interest in putting their relationship on that broader footing"); WEISTART & LOWELL, *supra* note 46, at 794 ("Multi-employer bargaining is presently used in professional sports"); see also WONG, *supra* note 5, at 530 (describing that today "players associations have become a powerful tool" in collective bargaining).

multi-employer basis.⁵² In the sports industry, the inclusion of all teams within a league, along with the league commissioner's office, constitutes a multi-employer unit for collective bargaining.⁵³

In the context of a multi-employer unit, challenges often arise over the issues of individual bargaining and the union's right to fair representation.⁵⁴ Professional sports contracts have historically been made between a player and a single team or organization. Meanwhile, the relevant collective bargaining agreement does not set salaries for contracts, but rather contains constraints concerning wages and conditions of employment within which players and teams are free to negotiate.⁵⁵ Each league sets forth in its CBA the limitations or parameters in which a player and team can negotiate a salary, but no matter the system, any employer that individually bargains with a player outside of those parameters is committing an unfair labor practice.⁵⁶

The Supreme Court's standard for such action comes from *J.I. Case Co. v. NLRB*,⁵⁷ when the Court conceded that in some situations, allowing for individual employees to bargain may be beneficial for the purpose of collective bargaining.⁵⁸ The Southern District of New York's decision in *Morio v. North American Soccer League*⁵⁹ best illustrates the issue of individual bargaining in sports.⁶⁰ The *Morio* court granted a temporary injunction on all individual contracts due to a violation of the employers' duty to bargain exclusively with the bargaining representatives of the players.⁶¹ Thus, in sports there is more individual freedom of contract for employees under typical league collective bargaining agreements, so long as the employees and the individual teams act

52. *Id.*

53. *See, e.g.,* N. Am. Soccer League v. NLRB, 613 F.2d 1379, 1383 (5th Cir. 1980) (explaining that there is a joint employer relationship between the North American Soccer League and the various clubs that have a "proportionate role in League management").

54. *See generally* NLRB v. Truck Drivers Local 499, 353 U.S. 87, 94–97 (1957) (establishing the constitutionality of multi-employer bargaining).

55. *See* WONG, *supra* note 5 at 529–30 (explaining the difference between typical sports contracts and those of other unions such as butchers, teachers, or grocery workers who will negotiate specific salaries in collective bargaining).

56. *Compare* WEILER & ROBERTS, *supra* note 51, at 305 (quoting *Morio v. N. Am. Soccer League*, 501 F. Supp. 633, 638–39 (S.D.N.Y. 1980), *aff'd*, 632 F.2d 217 (2d Cir. 1980) (explaining that any individual bargaining outside of a CBA can be a violation under the Act, because a union is entitled to conduct all bargaining with an employer), *with* WEISTART & LOWELL, *supra* note 46, at 808 (describing how it has "been common for collective bargaining agreements in professional sports to cover only the minimum terms . . . and to *specifically provide* that individual athletes may negotiate individually for better terms" (emphasis added)).

57. 321 U.S. 332 (1944).

58. *See id.* at 338 (noting that it may be wise for a CBA to set basic terms but to allow further individualized bargaining, particularly when individual employees face different work or personal circumstances).

59. 501 F. Supp. 633 (S.D.N.Y. 1980), *aff'd*, 632 F.2d 217 (2d Cir. 1980).

60. *See id.* at 635, 637 (finding that the soccer league's clubs continued to negotiate with individual players after the NLRB named the league as a multi-employer unit).

61. *See id.* at 638–39, 640 ("The duty to bargain carries with it the obligation on the part of the employer not to undercut the Union by entering into individual contracts with the employees.").

in good faith and within the parameters of the CBA.⁶²

The duty to bargain in good faith is best seen through the behaviors and actions of parties involved in collective bargaining.⁶³ In sports, bad faith bargaining accusations are usually the result of one party refusing to start or continue negotiations with the other party.⁶⁴ Both players associations and leagues have been found guilty of unfair labor practices for a bad faith refusal to negotiate over mandatory subjects of bargaining.⁶⁵

While the Act vaguely mandates that all negotiations must be in good faith “with respect to wages, hours, and other terms and conditions of employment,”⁶⁶ several cases have explicitly held certain types of restraints and parameters within collective bargaining to be mandatory subjects of bargaining in good faith.⁶⁷ Some of the most important bargaining issues are included in mandatory subjects of collective bargaining, such as free agency,⁶⁸

62. See WEILER & ROBERTS, *supra* note 51, at 307 (discussing the free market orientation of CBAs in sports and how such an orientation is different “than what one finds in most unionized sectors.”).

63. See *supra* notes 17-37 and accompanying text.

64. See WEISTART & LOWELL, *supra* note 46, at 805 (explaining that bad faith has been found when there was a refusal to negotiate or an attempt to bypass the other party with a unilateral change in a mandatory subject matter of collective bargaining).

65. Compare Nat’l Football League Players Ass’n v. NLRB, 503 F.2d 12, 17 (8th Cir. 1974) (“[B]y unilaterally promulgating and implementing a rule providing for an automatic fine to be levied against any player who leaves the bench area while a fight or an altercation is in progress on the football field, [employers] have engaged in unfair labor practices.”), with WEISTART & LOWELL, *supra* note 46, at 805 & n.217.1 (explaining that in 1976 the NBPA was found to have bargained in bad faith when it refused to bargain over player restraint mechanisms that were mandatory subjects of bargaining, but which the NBPA contended were violations of antitrust law).

66. 29 U.S.C. § 158(d) (2006).

67. *Accord Mackey v. Nat’l Football League*, 543 F.2d 606 (8th Cir. 1976); *Powell v. Nat’l Football League (“Powell II”)*, 930 F.2d 1293 (8th Cir. 1989); *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954 (2d Cir. 1987); *Silverman v. Major League Baseball Player Relations Comm., Inc. (“Silverman II”)*, 880 F. Supp. 246 (S.D.N.Y. 1995), *aff’d*, 67 F.3d 1054 (2d Cir. 1995).

68. See *Mackey*, 543 F.2d at 615 (holding that the “Rozelle Rule,” which provides guidelines on free agency for NFL players, constitutes a mandatory subject of collective bargaining).

player mobility restraints⁶⁹ (including compensation systems),⁷⁰ salary caps, player drafts,⁷¹ and salary arbitration.⁷²

Challenges to mandatory subjects of bargaining in sports have often been presented as antitrust claims under Sherman Act.⁷³ These challenges are typically defended by the non-statutory labor exemption that allows for a league to engage in behavior that would otherwise be an antitrust violation, so long as the action or restriction relates to mandatory subjects of collective bargaining.⁷⁴ *Mackey v. National Football League* provides the accepted requirements with which a subject of collective bargaining in sports may be exempt from trade restraints claims.⁷⁵ The Eighth Circuit designated a three-part test to determine whether the restraint receives the labor exemption.⁷⁶ For the labor exemption to apply, (1) the restraint on trade must primarily affect only the parties to the collective bargaining agreement; (2) the agreement must concern a mandatory subject of collective bargaining; and (3) the agreement must be the product of bona fide arm's-length bargaining.⁷⁷

69. See *id.* (noting that the Rozelle Rule “operates to restrict a player’s ability to move from one team to another and depresses player salaries”).

70. See *Powell II*, 930 F.2d at 1303 (“The First Refusal/Compensation system, a mandatory subject of collective bargaining, was twice set forth in collective bargaining agreements negotiated in good faith . . .”).

71. See, e.g., *Wood*, 809 F.2d at 961–62 (holding that the salary cap, entry draft, minimum individual salaries, fringe benefits, minimum aggregate team salaries, guaranteed revenue sharing, and first refusal provisions, “are mandatory subjects of bargaining . . . [because] [e]ach of them clearly is intimately related to ‘wages, hours, and other terms and conditions of employment’”).

72. See, e.g., *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 257 (S.D.N.Y. 1995), *aff’d*, 67 F.3d 1054 (2d Cir. 1995) (finding that the “salary arbitration for reserve players is also a mandatory part of the collective bargaining process between the Players and the Owners.”).

73. See *Mackey*, 543 F.2d 606, 609, 610 (challenging an NFL rule that allowed the league commissioner to force a club receiving a free agent to compensate the player’s former club); *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954 (2d Cir. 1987) (reciting contentions by a national basketball player that “[a] ‘salary cap,’ college draft, and prohibition of player corporations violated Sherman Act”).

74. See *supra* Part II.B; see also *Local Union No. 189 v. Amalgamated Meat Cutters, Butcher Workmen of N. Am. v. Jewel Tea Co.*, 381 U.S. 676, 689–90 (1965) (holding that a marketing-hours restriction was related to wages and hours, and obtained through collective bargaining, and thus fell within the “protection of the national labor policy and [was] therefore exempt from the Sherman Act”).

75. *Mackey*, 543 F.2d at 614.

76. *Id.*

77. *Id.*

III. HISTORY OF LABOR RELATIONS IN THE NFL AND THE NBA

Both the NBA and the NFL have exclusive bargaining agents that were first recognized in the 1960's—the NFLPA and the NBPA.⁷⁸ During their tenure, both labor organizations have negotiated numerous collective bargaining agreements with their respective leagues, yet both the NFL and the NBA have had their share of strikes, work stoppages and even cancelled seasons.⁷⁹ Currently after a four-and-half month lockout, the 2011 NFL season is back on track, after a new ten-year CBA was executed on July 21, 2011.⁸⁰ But, the NBA's 2011 season appears to be in jeopardy after the league and the NBPA's negotiations failed on July 1, 2011 the NBA filed an unfair labor practice complaint with the NLRB and a suit against the NBPA in Federal District Court of New York.⁸¹

A. Labor History of the National Football League

The NFLPA was formed in 1956 and became the exclusive bargaining unit to NFL players in 1968.⁸² While there were small work stoppages in 1968, 1970, and 1974⁸³ the NFLPA encountered its first serious issue in the case of *Mackey v. National Football League*.⁸⁴

In *Mackey*, a group of present and former players sued the NFL, arguing that the “Rozelle Rule,” was an unfair restraint on trade under the Sherman Act.⁸⁵ This rule provided that, upon the expiration of a player's original team contract, if a player switched teams and the two teams could not reach a satisfactory

78. *Compare About the NBPA*, NAT'L BASKETBALL PLAYERS ASS'N, <http://www.nbpa.org/about-us> (last visited Oct. 8, 2010) (explaining that the National Basketball Players Association was founded in 1954), and WONG, *supra* note 5, at 531 (stating that the National Football League Players Association was founded in 1956), with *Mackey v. Nat'l Football League*, 543 F.2d 606, 610 (8th Cir. 1976) (pointing out that the NLRB recognized the NFLPA in 1968 as the exclusive bargaining representative of all NFL players), and *Nat'l Basketball Ass'n v. Williams* (“*Williams II*”), 45 F.3d 684, 686 (2d Cir. 1995) (referencing how the NBA and NBPA entered into their first collective bargaining agreement in 1967).

79. See April Weiner, *NFL and the CBA: Ranking the Worst Work Stoppages in Pro Sports' History*, BLEACHER REPORT (March 10, 2011), <http://bleacherreport.com/articles/631338-nfl-and-the-cba-ranking-the-worst-work-stoppages-in-pro-sports-history> (noting that the NFL has had five work stoppages since its inception—four strikes and one lockout—and the NBA has had three work stoppages, all of which were lockouts).

80. See DeMaurice Smith, Interview with Michel Martin host of NPR's Tell Me More (July 27, 2011) (transcript available at <http://www.npr.org/2011/07/27/138738431/nfls-longest-work-stoppage-ends>).

81. See Nathan Koppel, *NBA Takes Players Association to Court*, WALL STREET JOURNAL LAW BLOG (August 2, 2011, 12:35 PM), <http://blogs.wsj.com/law/2011/08/02/nba-takes-players-association-to-court/?mod=WSJBlog>; Nat'l Basketball League, *NBA Files Unfair Labor Practice Charge, Lawsuit Against NBPA* (August 2, 2011 10:38 AM), <http://www.nba.com/2011/news/08/02/nba-labor-lawsuit/>.

82. *Kapp v. Nat'l Football League*, 390 F. Supp. 73, 83 (N.D. Cal. 1974), *vacated in part*, No. 72-537, 1975 WL 959 (N.D. Cal. Apr. 11, 1975), *aff'd*, 586 F.2d 644 (9th Cir. 1978).

83. WONG, *supra* note 5, at 544 tbl.11.3.

84. 543 F.2d 606 (8th Cir. 1976).

85. *Id.* at 609.

arrangement on compensation, the league commissioner could transfer substitute players from the player's new team to the old team.⁸⁶ League players complained that the rule limited their free agency and argued that they could not freely contract out their services.⁸⁷ The NFL argued that it was shielded from antitrust liability under the nonstatutory labor exemption within the Sherman Act, due to its participation in a CBA.⁸⁸ The District Court of Minnesota held that "[the NFL's] enforcement of the Rozelle Rule constituted a concerted refusal to deal . . . and therefore was a per se violation of the Sherman Act."⁸⁹

The Eighth Circuit upheld the District Court's ruling that because the Rozelle Rule was not the product of "bona-fide arms length bargaining," the labor exemption did not apply and the Rozelle Rule was subject to antitrust scrutiny under the Sherman Act.⁹⁰ In a victory for the players, the court held that the Rozelle Rule was a violation of antitrust law because it was an unreasonable restraint on trade, but the court also encouraged the two sides to resolve the issue of player mobility restraints through a collective bargaining agreement.⁹¹ The two sides came to an agreement in March of 1977 that contained league concessions on "union security" and the league's pension plans, in return for new and different restrictions on free agency.⁹²

Then, in 1982 following the expiration of the CBA, the NFL players went on strike; this strike lasted fifty-seven days and ended with a new agreement.⁹³ Later, in 1987, the NFL experienced its most significant labor dispute after the expiration of the 1982 CBA when the NFL owners found replacements for the striking players and the NBPA was forced to call off the strike after many players were close to crossing the picket line to receive a paycheck.⁹⁴ After twenty-four days the strike ended, and the players returned to work under similar pre-strike conditions.⁹⁵

86. *Id.* at 610–11.

87. *Id.* at 609.

88. *Id.* at 620–21.

89. *Id.* at 609 (citing *Mackey v. Nat'l Football League*, 407 F. Supp. 1000 (D. Minn. 1975)).

90. *See id.* at 616 (observing that the clubs had unilaterally imposed the rule since 1963). *See generally* John Croke, *An Examination of the Antitrust Issues Surrounding the NBA Decertification Crisis*, 5 SPORTS LAW. J. 163, 177-79 (1998) (discussing the "per se" and "rule of reason" antitrust analyses in the decertification context).

91. *See Mackey*, 543 F.2d at 623 ("The parties are far better situated to agreeably resolve what rules governing player transfers are best suited for their mutual interests than are the courts.").

92. *See* WEILER & ROBERTS, *supra* note 51, at 231 (observing that the new rules "proved even more restrictive than the old Rozelle Rule" and that only one player "actually changed teams for compensation" from 1977 to 1987).

93. *See* WONG, *supra* note 5, at 531 (noting that the union conceded on the issue of player mobility in return for better player salaries and benefits).

94. *See generally* Paul D. Staudohar, *The Football Strike of 1987: The Question of Free Agency*, 111 MONTHLY LAB. REV. 26 (1988) (explaining the disputes over free agency and player mobility in the 1987 strike). *See id.* at 29 (describing how two-thirds of the league teams found replacement players, while the striking players, on the other hand, had limited financial reserves and the union had no "strike fund" prepared).

95. *See id.* at 30 (stating that the strike ended October 15th).

The fight was not over, and a group of players brought suit against the NFL in the District Court of Minnesota for several restrictions contained in the CBA and in the standard player contract—claiming that they were violations of the Sherman Act.⁹⁶ The court refused to order a preliminary injunction on the issues and held that the labor exemption protected the NFL—as the parties had not come yet to an impasse.⁹⁷

The players appealed the district court's decision that there was not yet an impasse, but the Eighth Circuit reversed the District Court's decision and held that the labor exemption applies for "as long as there is a possibility that proceedings may be commenced before the Board, or until final resolution of Board proceedings and appeals."⁹⁸ Noting, in the decision, that antitrust claims were not appropriate because labor policy favors "negotiated settlements rather than intervention by courts."⁹⁹

Following this ruling, and having played two seasons without a CBA in place, the NFLPA elected to decertify itself as the exclusive bargaining unit through a league-wide player vote.¹⁰⁰ Following decertification, another lawsuit was filed against the NFL in *Powell v. National Football League & McNeil v. National Football League (Powell III)*.¹⁰¹ The District Court of Minnesota held that because of the decertification of the NFLPA, the labor exemption no longer protected the NFL and the player restraints challenged in the suit were

96. See *Powell v. Nat'l Football League ("Powell I")*, 678 F. Supp. 777, 778–79 (D. Minn. 1988) (stating that plaintiffs "[sought] to enjoin defendants from implementing or continuing a system of alleged player restraints [set up to restrict player mobility]"), *rev'd*, 930 F.2d 1293 (8th Cir. 1989).

97. See *id.* at 788 ("[P]roper accommodation of labor and antitrust interests requires that a labor exemption relating to a mandatory bargaining subject survive expiration of the collective bargaining agreement until the parties reach impasse *as to that issue*; thereafter, the term or condition is no longer immune from scrutiny") The NLRB has ruled an "impasse" to be a "matter of judgment" in which the Board considers: [the] bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to [sic] which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations See *Taft Broad. Co. & Am. Fed'n of Television & Radio Artists*, 163 N.L.R.B. 475, 478 (1967); see also *Wong*, *supra* note 5, at 544 (listing seven factors to consider).

98. See *Powell v. Nat'l Football League (Powell II)*, 930 F.2d 1293, 1303–04 (8th Cir. 1989) ("[T]he nonstatutory labor exemption protects agreements conceived in an ongoing collective bargaining relationship . . . beyond impasse. . . .")

99. *Id.* at 1303.

100. See *WONG*, *supra* note 6, at 531. Without a CBA, the league was able to institute unilateral changes so long as the bargaining relationship existed, and these changes could not be challenged as unfair labor practices through NLRB jurisdiction.

101. 764 F. Supp. 1351 (D. Minn. 1991).

now vulnerable to antitrust violation claims.¹⁰² This time, a jury found that the NFL's compensation rule was a violation of the Sherman Act.¹⁰³

Another suit was filed less than two weeks after *Powell: White v. National Football League*.¹⁰⁴ In *White* a group of players brought a class action suit seeking total or modified free agency.¹⁰⁵ *White* eventually settled out of court, and the NFL paid \$195 million to the class of players and granted greater free agency to the NFL players.¹⁰⁶ Not long after the *Powell* verdict, the players once again elected the NFLPA as their exclusive bargaining representative and the NFLPA successfully executed a new CBA in 1993.¹⁰⁷

The most recent CBA, signed in 2006, included a provision allowing owners to opt out of the agreement in March, 2011—instead of its expiration in 2012.¹⁰⁸ Months before the CBA actually expired, NFLPA executive director DeMaurice Smith expressed concerns about the NFL making plans for a lockout,¹⁰⁹ and stated that every team had taken individual votes to determine whether the NFLPA should once again decertify as the exclusive bargaining unit.¹¹⁰

On March 11, 2011, the owners opted out of the agreement and the league locked out its players.¹¹¹ The same day, the NFLPA officially decertified and a group of individual players filed a lawsuit in

102. See *id.* at 1358–59 (reasoning that, without a certified collective bargaining representative, no further remedy or action before the Board remained, and thus there was no longer the “ongoing collective bargaining relationship”).

103. See McDonough, *supra* note 6, at 840 (describing how the jury found that Plan B had “a substantially harmful effect on competition” and caused economic injury to the players (quoting *Jackson v. Nat'l Football League*, 802 F. Supp. 226, 229 n.2 (D. Minn. 1992))).

104. *White v. Nat'l Football League*, 822 F. Supp. 1389, 1394 (D. Minn. 1993), *motion for final approval of settlement granted*, 836 F. Supp. 1458 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994).

105. *Id.* at 1394–95.

106. McDonough, *supra* note 6, at 842 (“But of greater importance is that the *White* settlement, gained only after decertification of the players own union and subsequent court victories, provided the most significant amount of free agency in the history of the NFL.”).

107. WONG, *supra* note 5, at 531.

108. See NFL Collective Bargaining Agreement 2006–2012 (Mar. 8, 2006) (unpublished contract) (on file with author); see also WONG, *supra* note 5, at 546 (explaining that the “[o]wners unanimously vote[d] to opt out of [the] collective bargaining agreement” on May 20, 2008, an act that resulted in the expiration date of the collective bargaining agreement moving to May 1, 2011).

109. See Associated Press, *Union Head Says Owners Set for Lockout*, ESPN (Oct. 5, 2010), <http://sports.espn.go.com/nfl/news/story?id=5652700> (explaining that Smith has pointed to the NFL's recently asking banks to extend loan periods for league teams in the event of a lockout).

110. See Doug Farrar, *Players, NFL Dig In For Pending Labor Fight*, YAHOO! SPORTS (Nov. 18, 2010) <http://sports.yahoo.com/nfl/news?slug=ys-nfllabor111810/> (describing the actions of the league and the NFLPA in preparing for a possible lockout at the end of the current season).

111. See Nate Davis, *NFLPA Decertifies, Pursues Lockout Injunction Against NFL*, USA TODAY, <http://content.usatoday.com/communities/thehuddle/post/2011/03/report-nfl-players-association-applies-for-decertification/1> (Mar. 12, 2011).

U.S. District Court, alleging antitrust violations and seeking an injunction regarding the lockout.¹¹² In the months since then, the NFLPA has engaged in a series of court hearings, court-mandated mediation and numerous negotiation meetings.¹¹³ Then, on July 25, 2011 NFL Commissioners Roger Goodell and DeMaurice Smith announced that the league and the NFLPA had reached a new ten-year CBA which would end the lockout and that “[f]ootball [was] back.”¹¹⁴

B. Labor History of the National Basketball Association

The exclusive bargaining unit of the NBA is the NBPA, which was founded in 1954.¹¹⁵ The NBA entered into its first CBA in 1967.¹¹⁶ Following the 1971 decision in *Denver Rockets v. All-Pro Management, Inc.*,¹¹⁷ which provided that the NBA participated in interstate commerce,¹¹⁸ and thus, by extension, would fall within the jurisdiction of the NLRB.¹¹⁹

*Wood v. Nat’l Basketball Ass’n*¹²⁰ provided a major victory for the league in the labor relationship. Leon Wood, a college basketball player drafted in the first round of the NBA draft, brought suit against the league and argued that the draft and salary cap were illegal restraints of trade.¹²¹ Despite finding that the draft and salary cap actually injured Wood and others in the position of drafted players, the *Wood* court held that all trade restraints were the product of collective bargaining and thus could not be challenged on antitrust grounds.¹²²

112. *See id.*

113. *See generally* Sal Paolantonio, *Players, Owners Facing Tight Squeeze*, ESPN.COM (July 11, 2011), http://sports.espn.go.com/nfl/columns/story?columnist=paolantonio_sal&id=6756795 (describing the federal judge-mandated negotiations between the league and NFL player representatives).

114. *See Players Vote to Approve New Labor Deal, Put End to Extended Lockout*, SPORTS ILLUSTRATED (July 25, 2011 9:40 PM), <http://sportsillustrated.cnn.com/2011/football/nfl/07/25/nfl-labor-deal.ap/index.html>.

115. *See About the NBPA*, *supra* note 78 (discussing how the NBA recognized the NBPA as the exclusive union representative of all NBA players when the players threatened not to play in the first televised All-Stars game).

116. *Id.*

117. 325 F. Supp. 1049 (C.D. Cal. 1971), *stay granted*, 1971 WL 3015 (9th Cir. Feb. 16, 1971), *reinstated sub nom.* *Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204 (1971).

118. *See id.* at 1062 (noting that the NBA operates in seventeen metropolitan areas, schedules games in numerous states, and receives revenue from nationwide broadcasts).

119. *See supra* notes 47–49 and accompanying text.

120. 809 F.2d 954 (2d Cir. 1987).

121. *Id.* at 956–57.

122. *Id.* at 959, 960 (rebuffing a basketball player’s argument that his superior skills vis-à-vis other players should permit him to insist on individual bargaining, because “collective agreements routinely set standard wages for employees with differing responsibilities, skills, and levels of efficiency”); *see McDonough supra* note 6, at 833–34 (highlighting the fact that Wood still lost the suit even though at the time he was not yet a part of the bargaining unit but an in-coming college athlete, and explaining that the court relied on the definition of “employee” in the NLRA in holding against Wood).

Besides the *Wood* decision, the first major labor issue in the NBA arose in 1995.¹²³ Facing the imminent expiration of the CBA in 1994, the league and players managed to reach a no-strike, no-lockout agreement to protect the 1994–95 season; the players played under the regulations of the previous agreement in hopes of striking a new deal during the season.¹²⁴ However, following the expiration of the CBA on June 23, 1994 the NBA and its teams brought suit against the class of present and future NBA players seeking a judgment stipulating:

(i) that the continued imposition of the disputed provisions of the CBA [the college draft, the salary cap, and the right of first refusal for free agents] would not violate the antitrust laws because that imposition is “governed solely by the labor laws and is exempt from antitrust liability under the nonstatutory exemption to the antitrust laws”; and (ii) that the disputed provisions are lawful even if the antitrust laws apply.¹²⁵

The Second Circuit ruled for the league and cited the labor exemption as providing the league with immunity from possible antitrust challenges so long as there was a collective bargaining relationship between the parties.¹²⁶

After the 1995 season, the loss in *Nat’l Basketball Ass’n v. Williams* (“*Williams I*”), and the failure to negotiate a new CBA, a group of NBA players who were unhappy with the current league provisions signed a petition to decertify the players association as their exclusive bargaining agent.¹²⁷ The association’s biggest stars, led by Michael Jordan and Patrick Ewing, also brought an antitrust suit in District Court.¹²⁸ Eventually, the NLRB conducted

123. See WONG, *supra* note 5, at 549 tbl.11.3 (noting that in 1995, the NBPA threatened to decertify during an owners’ lockout).

124. Robert Bradley, *Labor Pains Nothing New to NBA*, ASS’N FOR PROF’L BASKETBALL RES., <http://www.apbr.org/labor.html> (last visited May 30, 2010).

125. See *Williams II*, 45 F.3d 684, 686 (2d Cir. 1995) (finding that the players had refused to negotiate with the NBA until the 1988 CBA had expired); see also McDonough, *supra* note 6, at 835 (indicating that the same restrictions had been challenged eight years prior in *Wood*).

126. See 45 F.3d at 691, 693 (holding that even after the expiration of a collective bargaining agreement, where there is a collective bargaining relationship employers can still bargain with a union, implement joint proposals, and use economic pressure to secure agreement on proposals).

127. See 1 AARON N. WISE & BRUCE S. MEYER, INTERNATIONAL SPORTS LAW AND BUSINESS 95 (1997) (describing the 1995 negotiations and the resulting attempt to get rid of the union leadership).

128. See *id.* (stating that the lawsuit alleged that any joint action by the NBA owners, whether a lockout, the return of the old salary cap system, or a new system, “would violate the antitrust laws in the absence of a union”).

an election that would determine whether the players association would be decertified.¹²⁹ By a vote of 226–134 the union remained the exclusive bargaining agent.¹³⁰ Still without a CBA, the NBPA and the league continued to negotiate and eventually created a new agreement in July 1996, all without any significant work stoppages—either by a player strike or an owner lockout.¹³¹

The new six-year CBA, however, contained a provision allowing owners to re-open negotiations after three years if player salaries rose too high relative to league income, and in 1998, the NBA faced a work stoppage.¹³² During the season, on March 23, 1998, the owners voted to reopen negotiations, and, after nine negotiation sessions that produced little progress, the league announced a lockout beginning July 1, 1998.¹³³ The lockout lasted six months, and right before the 1998–1999 season was set to be cancelled, the sides settled on a new CBA and agreed to play a shortened season beginning in February.¹³⁴ Both sides made concessions in the settlement, with the players suffering a new cap on individual salaries, while the owners lost in their efforts to institute a hard team salary cap.¹³⁵

The most recent CBA came into existence on July 1, 2005 and expired on June 30, 2011.¹³⁶ The owners made the decision to refuse an option to continue the CBA until 2012, and the struggles in negotiation over the past six months have resulted in both sides questioning whether there will be an NBA season in 2011.¹³⁷ Prior to the expiration of the CBA, the NBPA filed an unfair labor charge against the league with the Board for unfair bargaining practices,

129. *Id.*; see Murray Chass, *N.B.A. Taking a Timeout for Decertification Results*, N.Y. TIMES, Sept. 12, 1995, at B12 (“If the union wins, the players will continue to have a labor relationship with the N.B.A., short-circuiting an antitrust suit . . . [if] the NLRB certifies the results, Judge David Doty of United States District Court in Minneapolis will consider the players’ request to issue a preliminary injunction ending the league’s lockout of the players.”).

130. David Steele, *NBA Players Vote for Union Decertification Fails; Lockout Could End Friday*, SAN FRANCISCO CHRON., Sept. 13, 1995, at B1.

131. See WISE & MEYER, *supra* note 127, at 95–96 (describing the tumultuous relationship between the owners and union following the decertification election).

132. Paul D. Staudohar, *Labor Relations in Basketball: The Lockout of 1998-99*, 122 MONTHLY LAB. REV. 3, 4-5 (1999) [hereinafter, Staudohar, *Labor Relations in Basketball*].

133. *Id.* at 4–5 (explaining that the league claimed nearly half of its 29 teams were losing money, and that players were receiving 57 percent of total revenue in salaries, a number much greater than the threshold 51.8% that allowed owners to reopen negotiations).

134. *Id.* at 8.

135. *Id.*

136. 2005 [NBA] Collective Bargaining Agreement art. XXXIX (unpublished contract) (on file with author), available at <http://www.nbpa.org/cba/2005>.

137. See Coon, *supra* note 3 (“If the league and players’ union don’t come to terms on a new agreement by then, the league will impose a lockout, a work stoppage that will disrupt business and could possibly lead to the cancellation of the entire 2011-12 season.”); see also Chris Mannix, *As Two Sides Stand Firm, Lockout Seems Inevitable For NBA*, SPORTS ILLUSTRATED (July 12, 2010), http://sportsillustrated.cnn.com/2010/writers/chris_mannix/07/12/stern.las.vegas/ (noting that the league’s current proposal and the players’ current proposal are “miles apart”).

complaining the NBA's goal was to avoid meaningful negotiation until a lockout was in place.¹³⁸ Following the expiration of the CBA, the owners initiated a lockout,¹³⁹ and the biggest issue the two sides are in disagreement about is revenue sharing between owners and players.¹⁴⁰ NBA commissioner David Stern and NBPA executive director Billy Hunter have met for several negotiations, but since expiration, progress has stalled and both sides appear unafraid to discuss the possibility of a lengthy work stoppage.¹⁴¹

IV. ANALYSIS OF NLRB DECERTIFICATION AND ITS NEGATIVE EFFECTS

While the NFL players have decertified their union once before, both the NFLPA and NBPA considered the option of Board-regulated decertification in light of the threat of a lockout in 2011.¹⁴² However, decertification of a union provides instability and it is unlikely to result in any large benefits—in contrast to the advantages of continued negotiation through an exclusive bargaining agent certified by the Board.

A. Legal Options of a Decertified Players' Association to Challenge Trade Restraints

The Eighth Circuit established that any trade restraint is a mandatory subject of collective bargaining. Yet, today almost all salary caps, free agency restrictions, and rookie drafts fall under the labor exemption—so long as a collective bargaining relationship exists.¹⁴³ Thus, a players' association who desires to pursue an antitrust claim against a league is presented with a many number of options under the Sherman Act.

In *Powell II*, the court lists several choices for labor organizations faced with possible restraints on trade, including exerting economic pressure and presenting claims to the Board.¹⁴⁴ Additionally, in *Williams I*, Judge Duffy opined that the players union could decertify under Board regulations and subsequently bring antitrust claims against the NBA, but did not advise the players to pursue this course of action.¹⁴⁵ As the Eighth Circuit explained:

138. See ESPN.COM, *supra* note 4.

139. See *id.*

140. See Coon, *supra* note 3 (“The players are guaranteed fifty-seven percent of the league’s revenues . . . before expenses come out.”).

141. See Adrian Wojnarowski, *NBA Lockout Threatens Entire Season*, YAHOO SPORTS, http://sports.yahoo.com/nba/news?slug=aw-wojnarowski_nba_lockout_players_063011 (June 30, 2011) (“[T]here’s a real chance the NBA is gone for a full year now. This has the makings of the NHL’s labor war of 2004-05, where the cost of instituting a hard salary cap cost the sport a complete season.”).

142. See generally Coon, *supra* note 3 (noting that “fewer than ten percent of the players who experienced the lockout in 1998-99 are still in the league”).

143. See *Powell II*, 930 F.2d 1293, 1303 (8th Cir. 1989) (holding that the labor exemption protects “agreements conceived in an ongoing collective bargaining relationship . . .” from antitrust liability). See also *supra* notes 135–39 and accompanying text (discussing the “impassé” and “bargaining relationship” tests).

144. See *id.*

145. See Nat’l Basketball Ass’n v. Williams (*Williams I*), 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994) (*aff’d*, 45 F.3d 684 (2d Cir. 1995)).

[W]e are not compelled to look into the future and pick a termination point for the labor exemption. The parties are now faced with several choices. They may bargain further . . . [t]hey may resort to economic force. And finally, if appropriate issues arise, they may present claims to the [Board]. We are satisfied that as long as there is a possibility that proceedings may be commenced before the Board, or until final resolution of Board proceedings and appeals therefrom, the labor relationship continues and the labor exemption applies.¹⁴⁶

A decertified labor organization holds almost no actual power; instead, the power to bring legal action lies in the hands of individual employees.¹⁴⁷ Not only will the players have to provide their own legal representation— instead of relying on the union to bring suit or an unfair labor practices complaint against the league—but the chances of winning such lawsuits are not a certainty for the players.¹⁴⁸

This theory is exemplified by *Caldwell*—where a player in the American Basketball Association brought suit against the league and his team for a suspension.¹⁴⁹ The court ruled, however, that because the American Basketball Association Players Association had received Board certification as the exclusive bargaining unit, *Caldwell*'s proper pursuit of a claim was through the NLRB by alleging unfair labor practices, rather than an antitrust suit.¹⁵⁰

More recently a group of NBA players lost their antitrust counterclaims in *Nat'l Basketball Ass'n v. Williams*.¹⁵¹ In dicta, the court reasoned that there was no per se violation of section 1 of the Sherman Act, and therefore considered the reasonableness of the challenged restraints.¹⁵² Applying a “rule of reason” analysis, the *Williams* court reasoned that the salary cap, the restrictions on free agency, and the college draft were not anti-competitive.¹⁵³

146. *Powell II*, 930 F.2d at 1303.

147. *See Croke, supra* note 90 at 177 (warning that decertification would leave the individual players to “fend for themselves”).

148. *Compare Mackey v. Nat'l Football League*, 543 F.2d 606, 622 (8th Cir. 1976) (holding that the Rozelle Rule was a violation of antitrust law), *with Williams I*, 857 F. Supp. 1069, 1078–79 (S.D.N.Y. 1994) (deciding on exemption grounds but positing in dicta that the challenged trade restraints were not violations of antitrust law), *aff'd*, 45 F.3d 684 (2d Cir. 1995).

149. *See id.* at 526 (explaining that *Caldwell* alleged that the team and league conspired to “blacklist” him to ensure that he could never play in the league again).

150. *See id.* at 530 (“[I]f *Caldwell* is allowed to proceed with the present action, employees in similar circumstances will either never resort to the NLRB or will institute parallel administrative and antitrust proceedings with the risk of inconsistent adjudications.”).

151. *See Williams I*, 857 F. Supp. at 1071, 1078, 1079 (characterizing professional athletic associations as joint ventures, not as “competitors in any economic sense” (quoting *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1178–79 (D.C. Cir. 1978) (emphasis in original))).

152. *Id.* at 1078–79.

153. *See id.* at 1079 (“The pro-competitive effects of these practices, in particular the maintenance of competitive balance, may outweigh their restrictive consequences.”).

Most recently, the Eighth Circuit's decision in *Brady v. NFL*¹⁵⁴ may be interpreted by other circuits as holding that lockouts are legal, even in the face of decertified unions.¹⁵⁵ This decision could greatly impact the strongest weapon of decertified unions, the assurance that decertified unions can bring antitrust claims against a league instituting a lockout. Even if such reading of the June 8, 2011 decision is a stretch of the imagination, the Eighth Circuit's opinion solidifies the notion that lockouts cannot be enjoined, and as such, any lockout would remain in place until the merits of the case are heard.¹⁵⁶ For example, the *Brady* case would not have been heard by a U.S. District Court until 2012, thus ensuring that without a negotiated deal, the NFL could have cancelled the upcoming season, despite whether or not the NFLPA elected to decertify.

Thus, continuing the union as the certified exclusive bargaining unit under the oversight of the NLRB is a more stable option in furthering the players' efforts to affect change in league provisions, as union lawsuits and unfair labor practice claims are less expensive and will be possibly more successful than individual antitrust lawsuits brought by players outside of the union.

Finally, there exists the possibility of NBA or NFL owners bringing a bad faith bargaining charge against their respective players' association concerning the decision to decertify.¹⁵⁷ Looking at the current status of the NFL, with every team voting—most unanimously—for decertification more than four months before the current CBA expires,¹⁵⁸ the league could argue that the players had no desire to reach an agreement.¹⁵⁹ By decertifying immediately following the CBA expiration, the NFL and the NBA players would be placing themselves in a different situation from the 1989 NFLPA, which only decertified following a failed court challenge and two seasons of play without an agreement in place.¹⁶⁰

154. *Brady v. Nat'l Football League*, Docket No. 11-1898 (8th Cir. 2011).

155. See Michael McCann, *Burning Questions From Eighth Circuit Ruling To Extend NFL Lockout*, SPORTS ILLUSTRATED (May 16, 2011) http://sportsillustrated.cnn.com/2011/writers/michael_mccann/05/16/nfl.lockout/index.html.

156. See *Brady* (“[W]e conclude that § 4(a) of the Norris-LaGuardia Act deprives a federal court of power to issue an injunction prohibiting a party to a labor dispute from implementing a lockout of its employees.”).

157. Cf. *HARDIN ET AL.*, *supra* note 14, at 803 (explaining that the Board can find bad faith even if a party is willing to meet, so long as the Board finds that the party “is merely going through the motions of bargaining”).

158. See *supra* note 110.

159. See *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943) (holding that the duty of good faith is an obligation “to participate actively . . . as to indicate a present intention to find a basis for agreement . . . [with] an open mind and sincere desire to reach an agreement” (quoting *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 885 (1st Cir. 1941))).

160. See generally WONG, *supra* note 5 at 544–45 & tbl.11.3 (describing the history of the 1989 NFLPA decertification struggle).

B. NLRB-Provided Oversight for Players Associations as Certified Exclusive Bargaining Agents

Unlike the uncertainty of antitrust lawsuits, any certified bargaining agent has the ability to use NLRB regulations to challenge their employer.¹⁶¹ Congress adopted the NLRA and its amendments in order to provide “a[n] array of rules and remedies” for employee unions to challenge their employers outside the scope of antitrust law.¹⁶² The original Wagner Act, passed in 1935, sought to significantly change labor law through providing additional rights to employees and additional outlets for employee-management disputes.¹⁶³ Congress recognized that the only way to successfully implement the new labor rights was to establish “the type of administrative agency that had become a hallmark for much of the New Deal legislation.”¹⁶⁴ With strict procedures and clear jurisdiction, the NLRB-regulated claims of unfair labor practices and bad faith negotiations provide labor unions with the stability necessary to challenge groups as powerful as sports leagues and team owners.¹⁶⁵ Finally, the presence of a collective bargaining unit and subsequent bargaining relationship do not exclude a union from bringing a successful antitrust suit against its employer, while the decertification of such union does preclude any unfair labor practice challenge under the Act.¹⁶⁶

The presence of an exclusive bargaining agent and a collective bargaining relationship allow for parties to use economic sanctions. The players have the ability to strike, as set forth in the Act.¹⁶⁷ However, even during a strike, a union

161. See HARDIN ET AL., *supra* note 14, at 27 (observing that the NLRA Act conferred a triad of essential rights: “(1) the right to organize; (2) the right to bargain collectively; and (3) the right to engage in strikes [and other concerted activities]”).

162. *Caldwell v. Am. Basketball Ass’n*, 66 F.3d 523, 530 (2d Cir. 1995) (quoting *Williams II*, 45 F.3d 684, 693 (2d Cir. 1995)) (“Every employee who is locked out by a multiemployer group, every striker who is not reinstated, and every employee who is discharged could bring an antitrust action . . . Clearly, Congress had no such intention. As noted, the NLRA offers ‘a[n] array of rules and remedies . . . and . . . application of antitrust principles to a collective bargaining relationship would disrupt collective bargaining as we know it.’”).

163. See HARDIN ET AL., *supra* note 14, at 26-27 (“Caught in the labyrinth of modern industrialism . . . the employee can attain freedom and dignity only by cooperation with other employees.” (quoting 79 CONG. REC. 7565 (1935) (statement of Sen. Robert Wagner))).

164. See *id.* at 28 (creating the Board).

165. See generally WONG, *supra* note 5, at 520 (outlining the procedural process of filing an unfair labor charge with the Board).

166. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996) (“[A]n agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process.”). The *Brown* decision also noted that investigation into the requirements of insulation from antitrust law should come from the Board “to whose ‘specialized judgment’ Congress ‘intended to leave’ many of the ‘inevitable questions concerning multiemployer bargaining bound to arise in the future.’” See *id.* (quoting *NLRB v. Truck Drivers Local 499*, 353 U.S. 87, 96 (1957)).

167. See 29 U.S.C. § 157 (2006) (“Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”).

is still bound to bargain in good faith.¹⁶⁸ Employers, on the other hand, have the ability to “lockout” their employees as a negotiation tactic in collective bargaining.¹⁶⁹ A likely provision in any CBA is a “no strike, no lockout” clause during the term of the CBA, which ensures that these economic sanctions will only be used if the agreement expires before a new one is signed.¹⁷⁰ If there is no exclusive bargaining unit, and thus no bargaining relationship, players would not have the statutory authority to strike,¹⁷¹ yet it remains unclear whether owners could lock out their employees.¹⁷²

From 1987–1989, the NFL played for two seasons without a collective bargaining agreement, with only a minor three-week strike in 1987.¹⁷³ However, when the NFLPA decertified in 1989, the owners lost their ability to lock out the players, but the players were also unable to bargain for any sort of benefits and were forced to play under the league’s unilateral provisions concerning free agency and salary caps.¹⁷⁴ Thus, while a Board decertification may ensure that the NBA will play the 2011 season, if the season occurs, the league and owners could attempt to unilaterally decide upon the provisions surrounding every season played where the players do not have an exclusive bargaining unit.¹⁷⁵

168. See § 158(b)(3) (“It shall be an unfair labor practice . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) . . .”).

169. See *Am. Ship Bldg. Co. v. NLRB* 380 U.S. 300, 318 (1965) (holding “an employer violates neither § 8(a) (1) nor § 8(a)(3) [of the Act] when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position.”).

170. See generally WEISTART & LOWELL, *supra* note 46, at 823–29 (discussing the economic uses of strikes and lockouts by bargaining parties).

171. See 29 U.S.C. § 157 (2006) (granting employees the right to engage in concerted activities “for the purpose of collective bargaining or other mutual aid or protection”).

172. Compare WISE & MEYER, *supra* note 127, at 95 (“[M]ultiple employers cannot conduct a lockout if there is no union”), with WEISTART & LOWELL, *supra* note 46, at 827 (stating that economic sanctions can only be used “so long as bargaining is pursued in good faith and the lockout is utilized only after the bargaining process has reached stalemate or impasse.”).

173. See *id.* at 545–46 (charting the NFL collective bargaining history from 1968 to 2008, and including the 1987 player strike and the 1993 CBA signing).

174. See generally Thomas George, *N.F.L.’s 7-Year Plan Was Really 5 Years of Cheating History*, N.Y. TIMES, Jan. 7, 1993, at B15 (arguing that, prior to the 1993 NFL CBA, the league had instituted “a heavy-handed, one-sided free agency system” that produced only two free agent moves over five years).

175. See Coon, *supra* note 3 (noting that players not represented by a collective bargaining unit lose key protections and benefits).

Collective bargaining relationships in sports often produce benefits to the players in return for sacrificing much of their “free market” abilities through restraints like the draft or salary cap.¹⁷⁶ Both the NFL and NBA’s current agreements contain explicit sections concerning health care, as well as retirement and pension plans, which are all benefits the union has accrued in negotiations with their respective leagues.¹⁷⁷ There will be little, if any incentive for the NBA to continue providing these benefits to the players in the event of union decertification.¹⁷⁸ As professional basketball can lead to long-sustaining and career-ending injuries, the presence of a retirement and pension plan is something of great value to all current, past, and future players in either league. Without a CBA—indeed—without a bargaining agent in general, it is unclear whether a pension plan would be as strong as the current plans are or if they the plans would exist at all.

Concerning player retirement, the short nature of professional athletic careers plays a role in pursuing actions against a league, as well as negotiations with leagues and owners. Between the lack of job security and the short length of a players’ career (as well as his earnings peak), the possibility of playing under unilateral salary restraints for any amount of time can jeopardize the earning capacity of NBA athletes.¹⁷⁹ While the NFL players were ultimately successful in their lawsuits against the league in *Powell–McNeil* and *White*, the process from the 1987 strike to the 1993 court decisions lasted longer than an average NFL player’s career.¹⁸⁰ Clearly, the success of these lawsuits comes at a price, while the ability to consistently play under mutually agreed-upon CBAs provides a more stable economic scheme for professional athletes.

Therefore, the abilities of a decertified union and its members to exact any change or to succeed in obtaining any beneficial economic provisions pales in comparison to both the powers of a certified union, as well as the limited capabilities of leagues who are obligated to negotiate with such unions under the NLRA.

176. See Croke, *supra* note 90, at 176 (noting that collective bargaining negotiations produce benefits such as minimum team salaries, which would most likely be eliminated if a union decertified); *Union: NFL Will Cut Off Health Benefits in Event of a Lockout*, SPORTS BUS. DAILY (Oct. 20, 2010), <http://www.sportsbusinessdaily.com/article/142994> (explaining that the NFL league office stated that if the two sides do not agree on a new CBA, the NFL would stop providing health care to NFL players and their families).

177. See, e.g., NFL Collective Bargaining Agreement 2006-2012, *supra* note 178, at arts. XLVI, XLVII (explaining the responsibilities of the team owners to provide health coverage and retirement benefits); 2005 Collective Bargaining Agreement, *supra* note 108, at arts. III, IV (same).

178. See, e.g., *Union: NFL Will Cut Off Health Benefits in Event of a Lockout*, *supra* note 192 (illustrating that without a CBA, leagues will cut the costs of providing benefits for their players).

179. See Lock, *supra* note 23, at 385 (arguing that because of a lack of job security and a short average career length, NFL players are unlikely to reach their earning potential if they strike or play without a CBA).

180. See generally *How Long is the Average NFL Career?*, LIVESTRONG, <http://www.livestrong.com/article/15527-long-average-career-nfl-player/> (last visited Mar. 27, 2011) (explaining that an average career in the NFL is 3.3 years).

C. Economic Realities of Salary Negotiations and the Failure of the Free Market Argument in Today's Economy

One of the statutorily imposed mandatory subjects of collective bargaining is wages,¹⁸¹ and the collective bargaining unit makes a significant difference in players' wages today. In professional sports, there is a large disparity in the salaries of top players and the players who receive the minimum contract.¹⁸² While it is possible to argue that the decertification of a union and removal of a collective bargaining relationship would allow all players to receive their "free market worth,"¹⁸³ this thought process is severely shortsighted.¹⁸⁴ When the NBA attempted to decertify in 1995, it was led by superstars Michael Jordan and Patrick Ewing, who fought hard against the institution of a hard salary cap and received record-breaking salaries.¹⁸⁵ Thus, the benefit felt from the presence of a free market, or even the ability to circumvent certain salary restrictions, rises to the top.

This, in contrast to the anticompetitive nature of unions under the Board, seeks uniformity within the ranks of the union.¹⁸⁶ While the superstars of the NBA would probably see their contracts rise in a free market, there would be little, if any beneficial effect for the majority of the league.¹⁸⁷ Additionally, while players like Michael Jordan argued that there is a competitive disadvantage for "highly skilled" employees, much of the trade provisions in sports extend beyond specific salaries.¹⁸⁸ While opponents of certification may argue that the players associations would be committing unfair employee representation practices, such a claim is short sighted in light of *Steele v. Louisville &*

181. See 29 U.S.C. § 159(a) (2006) (specifying that collective bargaining units are the exclusive employee representatives allowed to collectively bargain for employees' wages).

182. See Staudohar, *Labor Relations in Basketball*, *supra* note 132, at 6 (explaining that, while the mean salary is \$2.6 million, half of players make less than \$1.4 million).

183. See McDonough *supra* note 6, at 859 (noting that the "non-statutory" labor exemption protects salary caps from antitrust claims).

184. *But cf.* WEISTART & LOWELL, *supra* note 46, at 813 (conceding how difficult it would be for "star" players to complain of a CBA that would benefit the majority of players to the star players' detriment).

185. See Staudohar, *Labor Relations in Basketball*, *supra* note 132, at 4, 5, 6 (explaining that when the 1996 CBA retained the salary cap, it also had a "Larry Bird" exception, under which Jordan was able to sign a one-year, \$30 million contract). In Major League Baseball, when there was no salary cap, but only a "luxury tax," the top salary was over \$20 million more than the league minimum. See WEILER & ROBERTS, *supra* note 51, at 307 (explaining that in 2003, Alex Rodriguez of the New York Yankees received \$22 million salary in comparison to the league minimum of \$300,00).

186. See Robert A. McCormick, *Interference on Both Sides: The Case Against the NFL-NFLPA Contract*, 53 WASH. & LEE L. REV. 397, 406-07 (1996) (explaining that the union's goal of reducing competition among employees regarding wages and conditions is accomplished when employers agree to establish uniform terms of employment).

187. See generally Staudohar, *Labor Relations in Basketball*, *supra* note 132, at 6-7 (discussing how, even with salary caps, bottom players tend to have little in the way of payouts compared to stars).

188. See, e.g., NFL Collective Bargaining Agreement 2006-2012, *supra* note 108, at arts. VII, X, XXVIII (regulating issues such discrimination, personal appearance, and injury grievances); 2005 [NBA] Collective Bargaining Agreement, *supra* note 136, at arts. VI, XXVIII (incorporating attendance rules and telecom rights).

Nashville Railroad, which allows a union to make provisions for differing treatment among its members based on “competence and skill.”¹⁸⁹

Uncertainty of decertification extends additionally to the protections that a collective bargaining relationship provides to the union group as a whole in terms of wages, and that protection is vital in the economic realities of 2011.¹⁹⁰ The NBA’s current salary situation illustrates the problematic possibilities of employees working without the protections of Board-regulated negotiations.¹⁹¹ With teams acting more conservative economically, either the disparity in salary will skyrocket between the best players and the rest of the league, or the lack of salary cap could result in a decrease in salaries in general.¹⁹²

Finally, the players may have a viable claim of bad faith bargaining against the owners due to the owners’ refusal to turn over financial documents.¹⁹³ The NBPA has questioned the league’s claims that teams are losing money in recent years, and the leagues and teams in general have not sufficiently opened their

189. 323 U.S. 192, 203 (1944); *see, e.g.*, NFL Collective Bargaining Agreement 2006-2012, *supra* note 108, at art. XXIV, § 1(c) (listing several instances in which compensation can differ amongst players with different competency levels); 2005 [NBA] Collective Bargaining Agreement, *supra* note 136, at art. VII, § 4 (same).

190. *But see* Liz Mullen, *Hunter: Talk of \$400M NBA Loss ‘Baloney’*, SPORTS BUS. J. (May 31, 2010), [http://www.sportsbusinessdaily.com/Journal/Issues/2010/05/20100531/This-Weeks-News/Hunter-Talk-Of-\\$400M-NBA-Loss-Baloney.aspx](http://www.sportsbusinessdaily.com/Journal/Issues/2010/05/20100531/This-Weeks-News/Hunter-Talk-Of-$400M-NBA-Loss-Baloney.aspx) (expressing the view that while NBPA Executive Director Billy Hunter does not believe that the NBA is losing \$400 million, the NBA has already provided the union with boxes of financial records in support of that claim).

191. *Compare 2010 NBA Free Agents and Signings*, BACKSEAT FAN, <http://backseatfan.com/2010/07/2010-nba-free-agents-and-signings/> (last visited Mar. 27, 2011) (charting how, in the summer of 2010, 9 NBA players signed a maximum or near-maximum allowable contract despite owners’ claims of financial hardship), *with* WONG, *supra* note 5, at 532 (noting that the removal of the salary *floor* would result in “tremendous cost savings at the players’ expense”). *See generally* Michael J. Redding, *Third and Long: The Issues Facing the NFL Collective Bargaining Agreement Negotiations and the Effect of an Uncapped Year*, 20 MARQ. SPORTS L. REV. 95, 102 (2009) (“Operating without a minimum salary requirement would allow the owners to set the market for free agents and rookies without any artificial salary floors.”).

192. *See* Redding, *supra* note 109, at 102 (noting how the NFL owners believe that “the current financial model is harming them by providing the players with too large of a revenue share”).

193. *Compare* NLRB v. Truitt Mfg. Co., 351 U.S. 149, 755–56 (1956) (“Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims . . . [if] . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.”), *with* WEISTART & LOWELL, *supra* note 46, at 805 (stating that furnishing information to a union has been found to be an element of the employer’s duty to bargain in good faith, but that first a union must make a “good faith request for the information to be furnished” and that such information has to be relevant).

books to the players' association.¹⁹⁴ While the law only requires an employer to disclose financial documents when there is a stated "inability to pay," the economic claims of the league may warrant an order to disclose financial information.¹⁹⁵ Even if a bad faith bargaining claim would be unsuccessful, forcing the NBA to claim that it could pay wages, but simply desires to lower them, would be a valuable bargaining chip in collective bargaining negotiations.

The NBPA should remain certified as the exclusive bargaining agent under the Board. Based on the stable options available to Board-certified unions in collective bargaining and the benefits of administrative oversight, as well as the recent legal challenges in the NFL labor dispute, decertifying either union and attempting to individually bargain for contracts without a CBA in place will ultimately hurt the players as a group.

194. See *Union Head Smith: NFL Owners Gearing Up for Lockout in 2011*, NAT'L FOOTBALL LEAGUE, <http://www.nfl.com/news/story/09000d5d81b1858f/article/union-head-smith-nfl-owners-gearing-up-for-lockout-in-2011> (last visited Oct. 5, 2010) (describing the union representative's complaints about the league's willingness to turn over financial documents). Billy Hunter has repeatedly questioned David Stern's claims of financial loss and has requested additional documents. See Mullen, *supra* note 190 (explaining that Hunter has requested "the sales prospectuses NBA teams have shown to buyers and would-be buyers of franchises in the last few years" to illustrate that teams are advertising themselves as profitable to potential buyers, while claiming losses to the union).

195. See *Nielsen Lithographing Co. & Graphic Comms. Int'l Union*, 305 N.L.R.B. 697, 701 (1991) (holding that an employer also need not disclose its "projection of its future ability to compete" but that such estimation of its ability to compete is not "equate[d]" with its ability to pay).