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Yes, NBA Players Should Make More Money: How the NLRB can Change the Future of Collective Bargaining Agreements in Professional Sports

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Yes, NBA Players Should Make More Money: How the NLRB can Change the Future of Collective Bargaining Agreements in Professional Sports

Keywords

National Basketball Association, National Labor Relations Board, Strikes & lockouts -- Basketball, Collective bargaining -- Sports, Antitrust law -- United States, Labor laws & legislation -- United States

YES, NBA PLAYERS SHOULD MAKE MORE MONEY: HOW THE NLRB CAN CHANGE THE FUTURE OF COLLECTIVE BARGAINING AGREEMENTS IN PROFESSIONAL SPORTS

SAM IVO BURUM*

As lockouts in professional sports have become increasingly common in recent years, the means to resolve these lockouts have also become more important. The 2011 National Basketball Association (NBA) lockout was one of the most significant in the league's history, lasting 161 days and resulting in the cancellation of twenty-six regular season games. In addition to its length, the 2011 NBA lockout was significant because the NBA players and the National Basketball Players' Association contested the legality of the NBA owners' lockout through an approach grounded in labor law; not through antitrust law as the National Football League players did earlier in 2011.

The NBA players and the players' association filed a complaint with the National Labor Relations Board (NLRB), but the players and the league came to terms on a new collective bargaining agreement before the NLRB had a chance to make a decision. What that NLRB decision would have been and the impact it would have had has not been analyzed until this Comment. This Comment argues that if the NBA players and the players' association had been able to hold out for an NLRB decision, the NLRB would have ruled in favor of the players, given the players more bargaining

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power during negotiations, and encouraged future players' associations to challenge collective bargaining agreements through a labor law route to the NLRB instead of an antitrust law route through federal court.

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INTRODUCTION

On January 20, 1998, the National Basketball Players Association (NBPA) and the National Basketball Association (NBA or “the league”) finalized a collective bargaining agreement (CBA) that would be enforced until 2011.¹ The parties were only able to reach this agreement after the NBA instituted a lockout, cancelled thirty-

1. See Kendall D. Isaac, *Employment ADR and the Professional Athlete*, 12 APPALACHIAN J.L. 167, 179 (2013) (discussing the severity of past work stoppages in the NBA and the four lockouts that have occurred in NBA history: 1995, 1996, 1998–1999, and 2011).

two games of the 1998–1999 season, and NBA commissioner, David Stern, threatened to cancel the entire season and hire replacement players.² In the spring of 2010, the NBPA and the NBA started negotiations in an attempt to ensure that the 2011–2012 season would not be cancelled due to the end of the 1999 CBA.³ Negotiations broke down several times and, with fundamental differences on key issues unresolved, the NBA owners officially locked out the players on July 1, 2011.⁴ The 2011 NBA lockout lasted 161 days and forced the cancellation of twenty-six regular season games.⁵ Eventually, on December 8, the NBA and NBPA ratified a new CBA that forced the players to give up \$270 million—an average of \$610,000 per player—to team owners.⁶

Prior to the start of the 2011 NBA lockout, the NBPA filed a complaint with the National Labor Relations Board (NLRB).⁷ The NBPA accused the league of negotiating in bad faith by failing to provide critical financial data, engaging in surface bargaining,⁸ and repeatedly threatening to lockout the players.⁹ Because the NBPA and the NBA came to a tentative agreement on terms for a new CBA and ended their labor dispute, the NLRB never had a chance to

2. See *id.* at 179–80 (noting that Commissioner Stern’s threats worked to end the 1998–1999 lockout and forced the NBPA to agree to a CBA that limited player salaries for the first time in major U.S. professional sports).

3. See *id.* at 180 (noting that the threat of a lockout was looming from the time negotiations started).

4. See Kevin Carpenter, *NFL and NBA Lockouts: A U.K. Lawyer’s Legal Retrospective*, 20 SPORTS LAW. J. 1, 12 (2013) (detailing the key differences that remained on issues such as salary cap and division of basketball-related income).

5. See *id.* at 14.

6. See Alexander C. Krueger-Wyman, Note, *Collective Bargaining and the Best Interests of Basketball*, 12 VA. SPORTS & ENT. L.J. 171, 185 (2012) (noting that this drop in salary was mainly a result of the new basketball-related income revenue-division scheme agreed to in the 2011 CBA); *NBA Lockout Timeline*, NBA.COM (Sept. 9, 2011, 9:25 AM), <http://www.nba.com/2011/news/09/09/labor-timeline/index.html> (adding that the new NBA CBA could last for up to ten years); see also Isaac, *supra* note 1, at 180 (stating that the NBA and NBPA only came to a deal after fifteen hours of negotiations and help from a federal mediator).

7. Carpenter, *supra* note 4, at 11–12 (recognizing that with negotiations continuing to go nowhere, the NBPA decided that filing a complaint with the NLRB was a better option than decertifying as a union and bringing an antitrust action in federal court); see also National Basketball Players Ass’n Charge Against Employer, Nat’l Basketball Ass’n, Case No. 02-CA-040518 (N.L.R.B. May 24, 2011) [hereinafter NBPA Compl.], available at http://assets.sbnation.com/assets/620666/NLRB_Charge_5.24.11.pdf.

8. See Marc Mandelman & Kevin Manara, *Staying Above the Surface—Surface Bargaining Claims Under the National Labor Relations Act*, 24 HOFSTRA LAB. & EMP. L.J. 261, 261 (2007) (defining surface bargaining to be when a party is engaging in negotiations to make bargaining useless or to avoid reaching an agreement).

9. See NBPA Compl., *supra* note 7 (stating that the NBA had violated sections 8(a)(1), 8(a)(5), and 8(d) of the National Labor Relations Act).

make a ruling on the NBPA's claims against the NBA.¹⁰ Accordingly, the question remains: how would the NLRB have ruled on the issue of whether the league was refusing to bargain in good faith?¹¹ This is an important question to examine because a favorable result for the NBPA would provide concrete proof that the labor law route through the NLRB is more beneficial for players' associations than the antitrust law route through federal court, which the National Football League (NFL) players took in a previous suit against the NFL.

In contrast to the NLRB intervention in the NBA lockout in 2011, the NFL lockout in 2011 led to litigation in federal court. In *Brady v. NFL*,¹² the U.S. Court of Appeals for the Eighth Circuit held that the NFL lockout was allowed to continue despite the players' challenge to the lockout's legality.¹³ In that case, the National Football League Players Association (NFLPA) decertified as a union and took a litigation approach grounded in antitrust law.¹⁴ The Eighth Circuit ruling prevented players from entering team facilities; receiving any compensation or benefits; and from performing any employment duties, including playing, practicing, or working out.¹⁵ By decertifying as a union, the NFLPA ended its collective bargaining relationship with the NFL, and the NFL was no longer immune from antitrust liability.¹⁶

10. See Isaac, *supra* note 1, at 180 (stating that the NBA and the NBPA came to an agreement on a new CBA that could last for up to ten years with a mutual opt-out for both sides in 2017).

11. See *id.* (noting that the lockout did eventually come to an end, but only after the season was cut short and owners, players, and communities lost millions of dollars).

12. 644 F.3d 661 (8th Cir. 2011).

13. See *id.* at 680–81 (holding that the Norris LaGuardia Act precluded federal courts from prohibiting lockouts of employees in a labor dispute). Judge Bye, however, argued in dissent that the majority misinterpreted Congress's intent behind passing the Norris LaGuardia Act. See *id.* at 690, 692–93 (Bye, J., dissenting) (suggesting that the legislative history showed that the Act was only meant to protect employees, not employers).

14. See Carpenter, *supra* note 4, at 7–8 (detailing the NFL players' strategy to bring an antitrust lawsuit against the NFL in federal court and challenge the NFL's player restrictions as anticompetitive).

15. See *Brady v. NFL*, 640 F.3d 785, 788 (8th Cir. 2011) (per curiam) (tracing the history of the breakdown in labor negotiations); see also Carpenter, *supra* note 4, at 13 (adding that one of the main reasons the NBPA choose not to decertify was because of the imminence of an NLRB decision that could have been in their favor).

16. See Carpenter, *supra* note 4, at 7 (stating that the players were attempting to avoid the non-statutory labor exemption, which established that terms of a CBA were immune from antitrust liability); see also Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales After Brady v. NFL and Anthony v. NBA*, 45 U.C. DAVIS L. REV. 1221, 1238 (2012) (explaining that the non-statutory labor exemption developed from the Eighth Circuit's decision in *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), in which the court determined that when terms of a CBA primarily affect only the parties involved in the collective bargaining relationship, the agreement relates to the subject of bargaining, and the agreement is the product of good faith negotiations, terms in that CBA do not violate antitrust law).

Due to this decertification, the NFL players were able to sue the NFL in federal court and challenge the NFL rules that limited a player's compensation and impacted a player's working conditions.¹⁷ In stark contrast, the NBPA did not decertify as a union in its CBA dispute.¹⁸ Therefore, the National Labor Relations Act (NLRA) governed the terms of the CBA with the NBA, and allowed the NBA to maintain immunity from antitrust liability.¹⁹ Thus, the NBPA grounded its dispute in labor law and was required to take its complaint to the NLRB instead of federal court.²⁰ Considering the NBPA's allegations that the NBA failed to provide relevant financial information and engaged in surface bargaining, along with the recent pro-union rulings of the NLRB, it is likely that the NLRB would have held that the NBA violated the NLRA, ruled in the NBPA's favor, and given the NBA players more bargaining power during the CBA negotiations.²¹ An NLRB decision in favor of the NBPA would also have meant that the NLRB and the Eighth Circuit had come to different conclusions regarding the ability of professional sports leagues to lockout players. The likelihood of an NLRB decision favoring the NBPA indicates that the labor—rather than antitrust—approach will become more prevalent and will impact negotiations surrounding future CBAs in professional sports.

The NBPA example serves as a case study for why the labor law route is more beneficial to a players' association than the antitrust law route. It also forecasts the future impact the NLRB could have on professional sports in the United States; by ruling for a players' association, the NLRB could change the landscape of professional sports and alter the way players' unions and professional sports leagues approach the collective bargaining process. With the increasing frequency of lockouts in professional sports resulting from the inability of players' unions and professional leagues to

17. See Carpenter, *supra* note 4, at 7 (highlighting that the players claimed the salary cap and free agent restrictions were the main violations of antitrust law in the CBA).

18. See *id.* at 13 (identifying that the NBA players' chose not to decertify because they believed there were significant advantages in maintaining the union).

19. See *id.* (providing that one of the reasons the NBPA decided not to decertify was because of the possibility of an imminent decision from the NLRB, and the NBPA knew an NLRB ruling in its favor would lead to increased bargaining power).

20. *Id.*

21. See *infra* notes 119–23 and accompanying text (noting that the NBPA requested documents concerning franchise valuation information, sale prospects, and financial information on related-party entities, which the NBA inadequately responded to); *infra* notes 144–45 and accompanying text (stating that the NBPA claimed all of the meetings in the lead up to the expiration of the past CBA were a sham and their only purpose was to stall negotiations until the NBA was able to lockout the players); *infra* notes 163–67 and accompanying text (highlighting the recent string of NLRB decisions in favor of unions).

agree on terms for various CBAs, it is likely that the NLRB will have an opportunity to make this type of ruling in the near future.²² The NBPA's experience during the 2011 NBA lockout will then serve as a guide for other players' unions that take the labor law route to the NLRB.

This Comment argues that if the NLRB had made a ruling, it would have been in the NBPA's favor, and accordingly, changed the outcome of the league's current CBA. It is likely that the NLRB would have found the NBA's use of unfair bargaining practices violated the NLRA, which would have ended the lockout and given the players more bargaining power throughout the rest of the CBA negotiations. A decision for the NBPA also leads to the conclusion that it is more likely for a players' union to receive a favorable result by taking the labor law route through the NLRB rather than the antitrust law route through federal court.

Part I of this Comment provides background information on the lead up to the NBPA complaint and includes a brief history of how CBAs have impacted professional sports. This Part also examines the laws applicable to the 2011 NBA CBA. Additionally, Part I outlines the NFL players' unsuccessful antitrust path through federal court, the development of the NBA lockout, and the NBPA's path to the NLRB.

Part II considers how the NLRB would have decided the NBPA's case and how the NLRB decision would have impacted the 2011 NBA CBA, as well as future CBAs in professional sports. This consideration first involves analyzing two of the major NBPA claims: (1) the NBA refused to provide relevant financial information and (2) the NBA engaged in surface bargaining through the use of dilatory tactics. Next, Part II examines how an NLRB decision for the NBPA would have drastically reduced the NBA's bargaining power and resulted in a new CBA without many of the terms that favored the NBA owners. Finally, Part II highlights the lessons learned from the 2011 NBA lockout and how they can be applied to future lockouts in professional sports.

This Comment concludes by determining that an NLRB decision in favor of the NBPA would have taken away the NBA's bargaining power. This shift in power would have put millions of dollars into the

22. See Isaac, *supra* note 1, at 167 (highlighting the prevalence of lockouts in professional sports: Major League Soccer and Major League Baseball (MLB) both narrowly avoided lockouts in 2010 and 2011, respectively, while the NBA and NFL both instituted lockouts in 2011). Additionally, the National Hockey League (NHL) had a lockout in 2004–2005, which resulted in cancellation of the entire season, and then had another lockout at the beginning of the 2012–2013 season. *Id.* at 183–84.

players' hands instead of the hands of the league and owners, and also resulted in a more balanced and player-centric CBA.

I. BACKGROUND

A. *Collective Bargaining Agreements in Professional Sports*

Professional sports CBAs allow sports leagues and owners to avoid antitrust liability and simultaneously give players more bargaining power.²³ Many of the standard practices used by professional sports leagues in America today would be considered illegal because, without the presence of CBAs, these standard practices would violate antitrust laws.²⁴ The development of CBAs concerns three parts of the U.S. Code: the Sherman Act, the National Labor Relations Act, and the Norris LaGuardia Act.

Section 1 of the Sherman Act states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”²⁵ However, this provision conflicts with federal labor laws because section 7 of the NLRA grants employees the power to “bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining.”²⁶ To resolve this conflict, the Norris LaGuardia Act (NLGA) created the “non-statutory labor exemption” and limited the ability of federal courts to enjoin certain labor-related activities.²⁷ This exemption allows employees to organize as a collective bargaining unit and negotiate with employers over a contract that covers all employees within that unit.²⁸ Professional athletes have used the exemption to form

23. See Krueger-Wyman, *supra* note 6, at 179 (noting that “[w]ithout a CBA, disputes from both antitrust and labor laws would likely impose overly burdensome costs upon all parties involved, thus derailing the system and preventing the league’s successful operation”).

24. See *id.* at 174 (identifying a number of agreements that are essential to a sports league’s success, including restrictions on player movement, income levels, and entry into the league, which would be illegal without CBAs because they are anti-competitive in nature and restrain trade or commerce).

25. 15 U.S.C. § 1 (2012).

26. 29 U.S.C. § 157.

27. See Krueger-Wyman, *supra* note 6, at 175 (adding that the non-statutory labor exemption “exempts from antitrust liability conduct relating to the collective-bargaining process over employment terms between union representatives and employers”).

28. 29 U.S.C. § 101 (“No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter . . .”).

players' unions and negotiate CBAs with their specific sport's league and owners.²⁹

The ability to collectively bargain benefits NBA players in a variety of ways. First, it gives the players leverage when negotiating with the owners.³⁰ Second, collective bargaining allows the majority of players in the league to receive significantly higher guaranteed salaries than they would otherwise.³¹ Finally—and arguably most importantly—collective bargaining allows the players to demand a share of the owner's profits.³²

On the other hand, collective bargaining also benefits team owners in two primary ways. First, collective bargaining allows the owners to exercise more control over player salary, movement, and entry into the league.³³ Second, owners of less-popular, small-market teams are guaranteed a certain degree of parity, which increases the NBA's overall popularity and makes these small-market teams more attractive destinations for players.³⁴ CBAs and the non-statutory labor exemption provide the NBA, and other American professional sports leagues, with the necessary leeway to institute the terms and conditions that allow the league to operate successfully.³⁵

B. Laws Applicable to Collective Bargaining Agreements and the 2011 NBA CBA

Labor laws govern professional sports league CBAs; therefore, any dispute between a players' union and a league falls within the

29. See Krueger-Wyman, *supra* note 6, at 174–75 (describing how players' unions, and not individual players, negotiate with the league to finalize terms included in a new CBA).

30. See *id.* at 179–80 (stating that most individual players would have no leverage in negotiations with the owners without the presence of CBAs because the owners would be able to drive down the price of compensation and threaten to replace existing players with new ones willing to accept worse contract terms).

31. See *id.* at 180–81 (asserting that only “superstars” have enough leverage to demand and negotiate for higher salaries on an individual bargaining basis).

32. See *id.* at 181 (explaining that under the 2011 CBA, profits from a wide variety of areas, including luxury suites, arena naming rights, and premium seat licenses, are shared between the owners and the players).

33. See *id.* at 181–82 (detailing that NBA players cannot demand a longer contract or higher salary than the CBA allows and that the NBA draft includes a designated rookie pay scale with pre-determined contract lengths and amounts).

34. See *id.* (comparing the NBA to MLB and noting that the degree of parity in the NBA develops from the salary cap, which is enforced through the CBA, not allowing teams with bigger budgets to outspend small-market teams and acquire all the top talent).

35. See *id.* at 183 (“The benefits of having a CBA thus significantly outweigh the costs to the league as a whole, to the players, and to the owners.”).

jurisdiction of the NLRB.³⁶ The NLRB is an independent federal agency that consists of five members appointed by the president, with Senate approval, to protect the rights of private-sector employees.³⁷ The NLRB enforces the NLRA—an act created to protect the rights of employees and employers, encourage collective bargaining, promote the free flow of commerce, and restore bargaining equality between employees and employers.³⁸ Section 8 of the NLRA prohibits unfair labor practices and the refusal to bargain in good faith; a lack of good faith bargaining is the most common allegation surrounding CBAs and was included in the NBPA's 2011 challenge.³⁹ The NLGA created the non-statutory labor exemption that enables professional sports leagues to avoid antitrust liability by negotiating CBAs with players' unions.⁴⁰ The non-statutory labor exemption "declare[s] that labor unions are not combinations or conspiracies in restraint of trade, and exempt[s] specific union activities . . . from the operation of the antitrust laws."⁴¹

Collective bargaining under the NLRA has two essential elements: (1) negotiating with respect to the mandatory rules of bargaining and (2) ensuring that such deliberations are carried out in good faith.⁴² Determining good faith requires the NLRB and the courts to draw inferences from many facts concerning a party's state of mind.⁴³ As part of this determination, the NLRB uses a totality of the circumstances test to review an employer's conduct as a whole, both at and away from the bargaining table.⁴⁴ It is necessary to analyze the totality of the circumstances because examining a negotiating strategy

36. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 242 (1996) (asserting that under labor law, the primary responsibility for regulating the collective bargaining process lies with the NLRB, not federal courts).

37. *Who We Are*, NAT'L LAB. REL. BOARD, <http://www.nlrb.gov/who-we-are> (last visited Jan. 22, 2014).

38. 29 U.S.C. § 151 (2012) (outlining the purposes of the NLRA).

39. *Id.* § 158; *see also* NBPA Compl., *supra* note 7 (stating that the NBA refused to bargain in good faith and engaged in surface bargaining, which is a violation of sections 8(a)(1), 8(a)(5), and 8(d) of the NLRA).

40. *See* 29 U.S.C. § 101 (providing that federal courts cannot issue an injunction in any case arising out of a labor dispute).

41. *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621–22 (1975).

42. *See* Mandelman & Manara, *supra* note 9, at 262–63 (adding that the concept of good faith was a later development, which was supposed to equalize the bargaining power of unions and employers).

43. *See id.* at 263 (noting that individually, those facts may not seem significant, but together they could prove to be substantial).

44. *See id.* at 263–64 (providing that through the totality of the circumstances test, a number of smaller acts that appear to be harmless, both at the bargaining table and away from it, can lead to the NLRB finding a refusal to bargain in good faith).

individually might only indicate “hard bargaining,”⁴⁵ whereas examining a party’s actions cumulatively might reveal that the party was bargaining in bad faith.⁴⁶

The three sections of the NLRA relevant to the NBPA’s complaint are sections 8(a)(1), 8(a)(5), and 8(d).⁴⁷ Section 8(a)(1) deals with an employer’s interference with an employee’s section 7 rights: the right to self-organize; to form, join, or assist labor organizations; to bargain collectively; and to engage in other activities for the purpose of collective bargaining.⁴⁸ Section 8(a)(1) states that “[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.”⁴⁹ Therefore, section 8(a)(1) prohibits employers from interfering with the employee’s right to self-organize; form, join, or assist a labor organization; or bargain collectively.⁵⁰

Section 8(a)(5) makes it illegal for an employer to refuse to bargain in good faith with regard to wages, hours, and other conditions of employment with the representative selected by a majority of employees.⁵¹ Additionally, section 8(d) requires an employer and the representative of its employees to meet at reasonable times, to confer in good faith about certain matters,

45. See STEVEN C. KAHN & BARBARA BERISH BROWN, LEGAL GUIDE TO HUMAN RESOURCES § 15:39 (2002) (stating that “hard bargaining” is when a party will disagree but does not intend to avoid reaching an agreement, whereas “surface bargaining” is when a party goes through the motions of bargaining with no intention of reaching an agreement).

46. See Mandelman & Manara, *supra* note 9, at 264 (explaining that when the NLRB finds one single occurrence of bargaining that possibly violates the NLRA, it is unlikely that the NLRB would find that party was bargaining in bad faith); see also NLRB v. Pac. Grinding Wheel Co., 572 F.2d 1343, 1349 (9th Cir. 1978) (applying the totality of the circumstances test and finding the employer guilty of refusing to bargain in good faith because a violation of a settlement agreement showed an unwillingness to deal with the union, the continuous communication with employees was an attempt to bypass the union, immediately after the union went on strike wage offers were lowered, and a refusal to provide data was frustrating negotiations). The court stated that alone, these factors would only indicate hard bargaining, but when viewed cumulatively, these factors provided evidence of a failure to bargain in good faith. *Id.*

47. See NBPA Compl., *supra* note 7 (outlining the NBPA’s claims against the NBA).

48. 29 U.S.C. § 157 (2012) (identifying the rights granted to employees in section 7 of the NLRA).

49. *Id.* § 158(a)(1).

50. *Id.* §§ 157, 158(a)(1).

51. *Id.*; see also NAT’L LABOR RELATIONS Bd., BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT 24 (1997), available at <http://www.nlr.gov/sites/default/files/documents/224/basicguide.pdf> (providing examples of section 8(a)(5) violations such as: “refusing to supply the employees’ representative with cost and other data,” “refusing to meet with the employees’ representative because the employees are on strike,” and “announcing a wage increase without consulting the employee’s representative”).

and to put any agreement reached into writing if requested by either party.⁵²

At least two rulings—one from the U.S. Supreme Court and one from the U.S. Court of Appeals for the Ninth Circuit—in addition to previous NLRB holdings, would have had a major impact on the outcome of an NLRB decision regarding the NBPA's complaint against the NBA. In *NLRB v. Truitt Manufacturing Co.*,⁵³ employees of a company asked for a wage increase, and the company answered that it could not afford to pay for such an increase.⁵⁴ The employees' union then asked the company to produce evidence substantiating its response, but the company refused all requests.⁵⁵ The Supreme Court stated that "[g]ood-faith bargaining necessarily requires that claims made by either bargainer should be honest claims" and that "[i]f such 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."⁵⁶ The Court affirmed the findings of the NLRB and found that the employer was guilty of an unfair labor practice for failing to bargain in good faith by refusing to provide the requested documents.⁵⁷ The Court held that the NLRB could find that an employer had refused to bargain in good faith where the employer claimed it could not afford to pay higher wages and then refused to produce information substantiating its claim.⁵⁸

In *NLRB v. Western Wirebound Box Co.*,⁵⁹ the Ninth Circuit extended the Supreme Court's holding from *Truitt*.⁶⁰ In *Western Wirebound Box*, the company failed to produce records substantiating its position during negotiations for a new contract.⁶¹ *Western Wirebound Box* argued that this case was different from *Truitt* because in *Truitt* the

52. 29 U.S.C. § 158(d).

53. 351 U.S. 149 (1956).

54. *See id.* at 150 (stating that the employees requested a wage increase of ten cents per hour, and the company answered that any increase over two-and-a-half cents would put it out of business).

55. *See id.* (noting that the union claimed the information would enable it to determine whether it should continue to negotiate for the wage increase).

56. *Id.* at 152–53.

57. *Id.* at 153.

58. *See id.* (reasoning that it does not make sense for an employer to be able to repeatedly claim that it is unable to accommodate a union's demands for increased wages, but then never provide any evidence supporting that claim).

59. 356 F.2d 88 (9th Cir. 1966).

60. *See id.* at 90 (noting that the holding in *Truitt*—that an employer must provide financial information to support a bargaining position—is not limited to situations where the employer claims he is unable to afford the wage increase).

61. *See id.* at 89 (explaining how the employer claimed that a pay cut of eight cents an hour was necessary because of price cutting conducted by the competition; however, when the union representative asked to examine the financial information, the employer said that the information was unavailable).

employer claimed it could not afford to pay the wage increase because it would put the company out of business, whereas Western Wirebound Box claimed that granting the union's wage increase would put the company at a competitive disadvantage.⁶² Despite this difference, the court found that Western Wirebound Box's refusal to provide financial information violated sections 8(a)(1) and (5) of the NLRA and held that "the principle announced in *Truitt* is not confined to cases where the employer's claim is that he is unable to pay the wages demanded by the union."⁶³

Since *Truitt* and *Western Wirebound Box*, the NLRB has continued to find that refusing to furnish requested financial information is a violation of NLRA section 8(a)(5) and a refusal to bargain in good faith. In *Paccar, Inc.*,⁶⁴ during a collective bargaining negotiation, Paccar locked out union employees after the previous CBA ended and refused to provide requested financial information regarding the new contract negotiations.⁶⁵ Paccar withheld the requested information because it believed that the information was irrelevant.⁶⁶ However, the NLRB stated that Paccar had assumed a standard of relevance that was too high, and the applicable test only asked whether the information was "probably or potentially relevant" to the union's duties as a bargaining representative.⁶⁷ The NLRB found that the requested information would have been informative and useful to the union in responding to Paccar's demands for concessions and carrying out its duties as bargaining representatives; therefore, the NLRB held that the information was relevant and that by failing to provide it, Paccar had refused to bargain in good faith.⁶⁸

The administrative law judge (ALJ), who initially ruled on the case before it reached the NLRB, also found that by withholding the requested information Paccar converted what had been a lawful

62. See *id.* at 90 (emphasizing that *Western Wirebound Box* claimed competitive disadvantage, which was not discussed in *Truitt*).

63. *Id.* at 90–91 (reinforcing the notion that the broad principles of good-faith bargaining require that if an argument is important enough to present during bargaining sessions, it is important enough to require verification).

64. 357 N.L.R.B. No. 13, 2011 WL 2784214 (July 15, 2011).

65. See *id.* at *2 (explaining that the employer claimed the plant had the highest operating cost of any facility, but when the union representative asked for information to evaluate the accuracy of the claim, the employer refused to provide the information).

66. *Id.* The information was irrelevant because it was based on information gained from workers at other plants and not from workers at the employer's plants. *Id.*

67. See *id.* at *3–4 (defining the standard that determines whether requested financial information is relevant).

68. See *id.* at *4 (providing that the information would have given the union some insight on whether Paccar's claims about comparative labor costs at other factories were valid).

lockout into an unlawful one.⁶⁹ Even though the NLRB found that Paccar violated section 8(a)(5) of the NLRA, the NLRB overturned the ALJ's decision and held that Paccar's lockout remained lawful.⁷⁰ The NLRB stated that an unremedied, unfair labor practice can taint an employer's bargaining position and render a lockout in support of that position unlawful,⁷¹ "[b]ut the mere fact of an unremedied Section 8(a)(5) failure to furnish information does not necessarily *compel* a finding that a subsequent lockout was unlawful."⁷² The standard consistently applied by the NLRB is that:

[W]here the unlawful withholding of the information did not materially affect the progress of negotiations, the ensuing lockout is lawful notwithstanding the unremedied violation Thus, if the withholding of that information did not materially affect the progress of negotiations, a lawful lockout will not be converted into an unlawful lockout by that unfair labor practice.⁷³

In *Paccar*, the NLRB found that withholding information did not cause the ongoing lawful lockout to become unlawful because there was no evidence that withholding requested information materially affected the bargaining process.⁷⁴ Nevertheless, the NLRB explicitly stated that this case did not "foreclose the possibility that an employer's unlawful failure to provide information *may* cause an ongoing, lawful lockout to become unlawful."⁷⁵

The NLRB has also outlined factors that provide evidence of "surface bargaining," which occurs when an employer engages in negotiations simply to foil the bargaining process and avoid reaching an agreement.⁷⁶ In surface bargaining cases, the relevant inquiry is whether the party is lawfully engaged in hard bargaining or unlawfully frustrating the bargaining process to halt negotiations and keep both sides from reaching a decision.⁷⁷ In *Atlanta Hilton &*

69. *Id.* at *5.

70. *See id.* at *5–6 (reasoning that the union and Paccar were so far apart on fundamental issues that the failure to provide the financial information did not have a substantial adverse impact on negotiations). Because there was no standard for whether an unlawful failure to furnish requested information converted an ongoing lawful lockout into an unlawful one, the NLRB used the same standard as when an unlawful failure to furnish information renders a lockout unlawful from its inception. *Id.* at *5.

71. *Id.* (citing *Allen Storage & Moving Co.*, 342 N.L.R.B. 501, 501 (2004)).

72. *Id.*

73. *Id.*

74. *See id.* (determining that Paccar's failure to provide the requested financial information did not have an adverse impact on the negotiation process).

75. *Id.* (emphasis added).

76. Mandelman & Manara, *supra* note 9, at 261 (defining surface bargaining).

77. *See id.* at 272 (explaining that it is uncommon to find specific conduct that classifies as a per se violation of good faith bargaining).

Tower,⁷⁸ the NLRB outlined seven factors that signal a refusal to bargain in good faith: (1) dilatory tactics, (2) unreasonable bargaining demands, (3) unilateral changes in mandatory subjects of bargaining, (4) efforts to bypass the union, (5) failure to designate an agent with sufficient bargaining authority, (6) withdrawal of already agreed-upon provisions, and (7) arbitrary scheduling of meetings.⁷⁹ An employer does not have to engage in all of these activities to be found guilty of surface bargaining; instead, if a party's overall conduct reflects an intention to avoid reaching an agreement, the NLRB can find the party guilty of refusing to bargain in good faith.⁸⁰

Similar to surface bargaining, the NLRB has also outlined a standard for determining when a party has engaged in making unlawful take-it-or-leave-it demands. In *Hartz Mountain Corp.*,⁸¹ the NLRB considered whether the employer had "defined, explained and advocated its position," or instead, simply "attempt[ed] to thrust provisions on the union in a take-it-or-leave-it manner."⁸² To ensure that an employer is not found guilty of making take-it-or-leave-it demands, the NLRB requires the employer to explain the reasoning behind its bargaining strategy.⁸³ These NLRB rulings, along with the Supreme Court and Ninth Circuit holdings, would have had a major impact on the NLRB's decision regarding the NBPA's Complaint.

C. Brady v. NFL: *The 2011 NFL Lockout and Antitrust Law Route Through Federal Court*

In 2011, the NFL dealt with a lockout involving the NLGA, which allows employees to organize as a collective bargaining unit and the employer to negotiate a contract that covers all employees within that unit.⁸⁴ The NLGA also curtails the authority of a district court to

78. 271 N.L.R.B. 1600 (1984).

79. *Id.* at 1603.

80. See Mandelman & Manara, *supra* note 9, at 274 (noting that two of these factors, unilateral changes in mandatory subjects of bargaining and negotiating directly with employees in an effort to bypass the union, can violate the NLRA on their own).

81. 295 N.L.R.B. 418 (1989).

82. Mandelman & Manara, *supra* note 9, at 279 (contrasting *Hartz Mountain Corp.* with *Hamilton Standard Div. of United Tech. Corp.*, 296 N.L.R.B. 571 (1989), where the employer was found guilty of refusing to bargain in good faith after he forced the union to either negotiate each proposal individually, or the whole contract all at once).

83. See *id.* at 280 (explaining that an employer cannot force its position on the union; the employer must offer some type of explanation and reasoning for why it has decided to take the stance it has).

84. See Carpenter, *supra* note 4, at 4 (revealing that Congress prefers the collective bargaining process to forcing court intervention because court intervention involves complex examinations of labor practices).

issue injunctions in labor disputes.⁸⁵ Prior to the beginning of the NFL lockout, the NFLPA decertified as a union before the CBA expired which allowed the players to sue the NFL under antitrust law.⁸⁶ The players were attempting to prevent the owners from instituting a lockout by asking for a preliminary injunction.⁸⁷ The players claimed that a lockout would constitute an illegal group boycott and price fixing—both of which would be violations of the Sherman Act under antitrust law.⁸⁸ The NFL's main argument in response to the players was that the NLGA precludes federal courts from enjoining lockouts.⁸⁹ Because the NLGA allows unions and employers to form CBAs and then restricts the ability of federal courts to enjoin labor disputes arising out of those CBAs,⁹⁰ the NFL claimed its lockout—which resulted from the latest CBA labor dispute—was lawful.⁹¹

The U.S. District Court for the District of Minnesota granted the NFL players' motion to prohibit the NFL owners from instituting a lockout.⁹² The court held that the NLGA was not applicable because the issue between the NFL and the players did not arise out of a labor dispute, and that therefore, the NLGA did not limit the power of the district court to issue an injunction.⁹³ Additionally, the court's

85. See *Brady v. NFL*, 644 F.3d 661, 669 (8th Cir. 2011) (explaining that it was Congress's intention to take federal courts out of labor disputes except in a small subset of situations allowed by the NLGA); see also *Carpenter*, *supra* note 4, at 4 (noting that Congress has always favored the process of collective bargaining over involving the federal courts in labor disputes because of the disputes' complexities).

86. See *Feldman*, *supra* note 17, at 1249–50 (discussing how a majority of NFL players voted to end the collective bargaining status of the NFLPA, and the NFLPA informed the NFL that it disclaimed any interest in representing the players).

87. See *Brady*, 644 F.3d at 663.

88. *Feldman*, *supra* note 17, at 1250. Group boycotts and price fixing both classify as illegal restraints of trade under the Sherman Act. See 15 U.S.C. § 1 (2012) ("Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal.").

89. See *Feldman*, *supra* note 17, at 1250–51 (identifying the owners' other two arguments: that the non-statutory labor exemption grants the lockout immunity since the dissolution of the NFLPA was a sham, and that because of the doctrine of primary jurisdiction, the federal court should have to defer to the NLRB before continuing with the case).

90. See 29 U.S.C. § 101 (providing that a federal court does not have the jurisdiction to issue an injunction in a case arising out of a labor dispute).

91. *Brady v. NFL*, 779 F. Supp. 2d 1043, 1005 (D. Minn.), *rev'd*, 644 F.3d 661.

92. *Id.* at 1053–54 (concluding that the NFL did not show it was likely to succeed on the merits of the case and the players faced real and immediate harm from losing an entire season to the NFL lockout). See generally *Carpenter*, *supra* note 4, at 9 (highlighting that it was a surprise to many commentators when the district court ruled in the players' favor and claimed that federal courts did have the power to enjoin the NFL from instituting a lockout).

93. *Brady*, 779 F. Supp. 2d at 1042 (rejecting the NFL's argument that labor law should continue to govern disputes even after the termination of a collective bargaining relationship); see also *Brady*, 644 F.3d at 668 (restating the district court's

opinion determined that the NLGA does not apply when there are no unions involved because then the case does not involve or arise out of a labor dispute.⁹⁴ This non-union involvement occurred during the NFL lockout because the NFLPA union dissolved immediately before the CBA expired.⁹⁵ However, the Eighth Circuit reversed the district court's decision and held that it was not necessary to have a union involved for the NLGA to apply.⁹⁶ The Eighth Circuit stated that a labor dispute includes any controversy concerning terms or conditions of employment or involving persons who are engaged in the same industry, trade, craft, or occupation.⁹⁷

The controversy between the NFLPA and the NFL concerned terms or conditions of employment because the NFLPA was asking the court to declare several restraints on player movement—the rookie-salary scale, the salary cap, the franchise player tag, and the transition player designation—illegal as a violation of the Sherman Act.⁹⁸ The case also involved or grew out of a labor dispute because the NFL and the NFLPA were engaged in the same industry—professional football.⁹⁹ Therefore, the Eighth Circuit held that,

decision to reject the NFL's arguments that the court lacked jurisdiction, that the court should defer to the NLRB, and that the non-statutory labor exemption still granted the NFL immunity from antitrust liability).

94. *Brady*, 779 F. Supp. 2d at 1042 (warning that when employees renounce their union they must accept the consequences of choosing to negotiate contracts individually).

95. *See Brady*, 644 F.3d at 668 (explaining the district court's additional reasoning behind its decision to end the lockout, including that a stay would be inappropriate because the delay would cause significant hardship to the NFL players and that the non-statutory labor exemption did not protect the NFL from antitrust liability); *see also Carpenter*, *supra* note 4, at 6 (stating that the NFLPA dissolved as a union, thereby losing any ability to bring an action against the NFL for a violation of labor law through an unfair labor practice, and forcing the players to sue the league under antitrust law in federal court).

96. *See Brady*, 644 F.3d at 680–81 (holding that the NLGA precluded the ability of federal courts to issue an injunction ending the lockout).

97. *See id.* at 670–71 (referencing section 13(c) of the NLGA, which specifically states that “[t]he term ‘labor dispute’ includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment,” and section 13(a) which states “[a] case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation”).

98. *See id.* at 670 (noting that the district court overlooked the controversy between the NFL and the NFLPA that surrounded the terms and conditions of employment).

99. *See id.* at 671 (stating that a third reason this case involved or grew out of a labor dispute was because the dispute was between one or more employers or associations of employers and one or more employees, meaning it was not necessary to have a union involved for the NLGA to apply).

despite NFLPA decertification, the NLGA still precluded a federal court from issuing an injunction and preventing a lockout.¹⁰⁰

D. The 2011 NBA Lockout and Labor Law Route to the NLRB

On January 20, 1998, the NBPA and the NBA finalized a CBA that remained enforceable until 2011.¹⁰¹ This agreement was only reached after NBA Commissioner, David Stern, made severe threats to the players and the NBA owners instituted a lockout.¹⁰² Before the 2011–2012 season, the NBPA and the NBA started negotiations to prevent a majority of the next season from being cancelled due to the end of the 1998–1999 CBA.¹⁰³ However, negotiations broke down several times and ultimately fundamental differences could not be resolved.¹⁰⁴ These impasses led the NBA owners to officially begin the lockout in July 2011.¹⁰⁵

When the 2011 NBA CBA expired, instead of decertifying as a union and instituting an antitrust action like the NFL, the NBPA decided to stay together and pursue a remedy through labor law.¹⁰⁶ After months of negotiations, but still prior to the lockout, the NBPA filed a complaint with the NLRB in May 2011.¹⁰⁷ The NBPA accused the league of negotiating in bad faith by withholding critical financial data, engaging in surface bargaining, and repeatedly threatening to lockout the players.¹⁰⁸ The complaint alleged violations of several NLRA sections: 8(a)(1), interfering with rights of employees; 8(a)(5), refusing to bargain in good faith; and 8(d), obliging parties to bargain in good faith in regards to wages, hours, and other terms and conditions of employment.¹⁰⁹ Complicating matters further, the

100. See *id.* at 673 (explaining that the labor dispute did not disappear just because the NFLPA decertified as a union hours before the CBA expired).

101. Isaac, *supra* note 1, at 179–80 (stating that the 1998–1999 lockout led to the NBA season being shortened by thirty-two games and cancellation of the All-Star Game).

102. See *id.* (noting that David Stern recommended cancelling the season and hiring replacement players).

103. See *id.* at 180 (providing that the NBPA and the NBA began negotiating as early as the spring of 2010).

104. See Carpenter, *supra* note 4, at 12 (asserting that the NBPA and the NBA could not come to an agreement on the salary cap or the appropriate split of basketball-related income).

105. *Id.*

106. See *id.* at 13 (noting that the imminence of an NLRB decision was one of the main reasons why the NBPA chose not to decertify).

107. *Id.* at 11.

108. *Id.*; NBPA Compl., *supra* note 7 (detailing the NBPA's complaints against the NBA).

109. See NBPA Compl., *supra* note 7 (alleging that the NBA was (1) making harsh, and inflexible demands that the NBA knew were not acceptable to the union, (2) engaging in surface bargaining and “take it or leave it” demands, (3) engaging in direct dealing with unit employees, (4) refusing to provide relevant financial

NBA filed a counter complaint with the NLRB against the NBPA.¹¹⁰ The NBA alleged that the NBPA had failed to bargain in good faith with the NBA in regards to wages, hours, and other terms and conditions; therefore violating section 8(d) of the NLRA.¹¹¹

As the NBPA waited for a decision from the NLRB, negotiations continued unsuccessfully, and Commissioner Stern cancelled the NBA's November 2011 schedule.¹¹² As the Commissioner continued to cancel games, a split emerged between the NBA players.¹¹³ Many players who earned average salaries started to feel the financial effects of not getting paid.¹¹⁴ Eventually the lockout ended when, on November 26, 2011, the NBPA and the NBA came to a tentative agreement on the terms of a new CBA before the NLRB had a chance to make a ruling on the NBA's bargaining practices.¹¹⁵

II. IF THE NBA PLAYERS HAD HELD OUT FOR AN NLRB DECISION, THE NLRB WOULD HAVE RULED IN THE PLAYERS' FAVOR AND ALTERED THE WAY PLAYERS' UNIONS AND PROFESSIONAL SPORTS LEAGUES APPROACH THE COLLECTIVE BARGAINING PROCESS

In May 2011, the NBPA filed its complaint with the NLRB accusing the NBA of refusing to bargain in good faith; however, before the NLRB had an opportunity to make a ruling in the case, both sides came to an agreement on terms for a new CBA.¹¹⁶ However, if the

information properly requested by the union, and (5) repeatedly threatening to lockout union-represented employees upon contract expiration regardless of negotiation status).

110. *Id.*; see Carpenter, *supra* note 4, at 12 (stating that the NBA filed its NLRB complaint on August 2, 2011, and it resembled the earlier complaint filed by the NBPA, as they both accused the NBPA of refusing to bargain in good faith).

111. See NBPA Compl., *supra* note 7; (noting that the NBPA threatened to decertify or disclaim interest in further representing NBA players unless its demands were met, which is an impermissible negotiating tactic designed by the NBPA to create leverage to achieve favorable terms in the new CBA). See generally Lester Munson, *NLRB Now Holds Key to NBA Lockout*, ESPN.COM (Oct. 21, 2011), <http://espn.go.com/espn/print?id=7130777&type=story> (emphasizing the importance of the NLRB's role in deciding the outcome of the NBA lockout).

112. Carpenter, *supra* note 4, at 14 (stating that, initially, only the pre-season was cancelled, but after negotiation talks continued to fail, the first two weeks of the regular season and then the whole November schedule were also cancelled).

113. See generally *id.* at 14–15 (noting that this was one of the main differences between the NFL and the NBA lockouts because the NFL players had unity throughout team rosters regardless of salary).

114. See *id.* (explaining that the NBA superstars were the ones taking the hard line stance for more favorable terms in the new CBA, while the players on average salaries who were much more affected by the lockout began to get frustrated with not getting paid).

115. See *NBA Lockout Timeline*, *supra* note 6 (stating that this tentative agreement only came about after a 149 day lockout, twenty-six regular season game cancellations, and a fifteen-hour meeting between the NBPA and the NBA).

116. See *supra* notes 108–16 and accompanying text.

NBA players had been able to hold out long enough for an NLRB decision, it is likely that the NLRB would have ruled in the players' favor. This ruling would have altered the outcome of the current CBA between the NBPA and the NBA, and would have resulted in a better outcome for the NBPA and the players it represents. An NLRB ruling for the NBPA would also have had an effect on future professional sports CBAs. If the NBA players had received a favorable decision from the NLRB after taking the labor law route, it is likely that more players' unions would follow in the NBPA's footsteps and avoid antitrust litigation in federal court. Even though the NLRB did not make a ruling in the NBPA's case against the NBA in 2011, the NLRB will almost assuredly have another opportunity to do so in the near future given the growing frequency of lockouts in professional sports.¹¹⁷ The NBPA's experience during the 2011 NBA lockout will serve as a guide for future players' unions that take the labor law route to the NLRB.

A. The NLRB Would Have Decided in Favor of the NBPA Because the NBA Bargained in Bad Faith, Utilized Unfair Bargaining Strategies, and Violated the NLRA

One of the major NBPA complaints against the NBA was that the league refused to provide relevant financial information that was properly requested and necessary for understanding, testing, and analyzing the NBA's demands.¹¹⁸ The NBPA argued that this conduct violated section 8(a)(5) of the NLRA and constituted a refusal to bargain in good faith.¹¹⁹ The NBPA's lead attorney, Lawrence Katz, stated that the players placed three requests for documents that the owners either ignored or responded to with less information than was requested.¹²⁰ These three document requests concerned franchise valuation information, sale prospects, and financial information on related-party entities.¹²¹ In addition to these three larger document requests, Katz claimed that the NBPA

117. See Isaac, *supra* note 1, at 167 (highlighting the prevalence of lockouts in professional sports).

118. See NBPA Compl., *supra* note 7 (noting that the NBPA needed this financial information because the NBA was making grossly regressive contract demands based on its financial weakness).

119. *Id.*

120. Scott Schroeder, *NBA Lockout: Players Claim Owners Withholding Information*, SBNATION.COM (July 15, 2011), <http://www.sbnation.com/2011/7/15/2277274/nba-lockout-news-update-information-withheld>.

121. See *id.* (noting what was in the financial documents that the NBPA requested from the NBA, but that the NBA failed to turn over).

had also made about twenty smaller requests for financial information to which the NBA failed to respond.¹²²

The employers' negotiation strategies in both *Truitt* and *Western Wirebound Box* involved similar circumstances to the bargaining surrounding the 2011 NBA CBA.¹²³ In *Truitt* and *Western Wirebound Box*, the employers violated NLRA section 8(a)(5) by refusing to provide properly requested financial information to the unions after the employers had made certain statements involving that information.¹²⁴ The NBA claimed that it would be financially unable to accommodate the NBPA's demands and then denied the NBPA request for access to financial information that would have substantiated that claim.¹²⁵ Therefore, it is likely that the NBA would have been guilty of a section 8(a)(5) violation and a refusal to bargain in good faith.

The NBA denied the NBPA access to franchise information, sale prospects, and financial information on related-party entities.¹²⁶ This information would have allowed the NBPA to determine whether the NBA was actually suffering from the substantial financial losses it had previously claimed.¹²⁷ Therefore, similar to *Paccar*,¹²⁸ where the

122. *Id.*

123. *Compare* NLRB v. *Truitt Mfg. Co.*, 351 U.S. 149, 150 (1956) (detailing how the employees asked for a wage increase, and the company stated it could not afford to pay for a wage increase, but then did not provide any information supporting its claim), *and* NLRB v. *W. Wirebound Box Co.*, 356 F.2d 88, 89 (9th Cir. 1966) (identifying how the employer failed to produce any records supporting its position during negotiations for a new contract), *with* *Schroeder*, *supra* note 121 (analyzing how the NBPA made certain demands that the NBA claimed it was unable to include in the new CBA, but the NBA refused to provide properly requested financial information to support its claim).

124. *See* *Truitt Mfg. Co.*, 351 U.S. at 153; *W. Wirebound Box Co.*, 356 F.2d at 92. *See generally* BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT, *supra* note 52, at 24 (stating that it is the employer's duty to supply requested information that is "relevant and necessary," so the union may be able to bargain "intelligently and effectively").

125. *See* *Schroeder*, *supra* note 121 (providing that even though the NBA claimed it was being open regarding its financial documents, the NBA still withheld important financial information from the union); Larry Coon, *Lockout Looms Over 2010–2011 Season*, ESPN.COM (Sep. 22, 2010), http://sports.espn.go.com/nba/columns/story?columnist=coon_larry&page=lockout-100922 (stating that the main reason the NBA and the owners wanted a new CBA was because the NBA had lost at least \$200 million during each of the first four years of the old CBA and \$370 million in 2009–2010).

126. *Schroeder*, *supra* note 121 (describing the information that the NBA declined to turn over to the NBPA).

127. *See* Coon, *supra* note 126 (stating that the NBA's primary motivation to enter negotiations over a new CBA was the significant financial losses it had suffered during the final years of the previous CBA).

128. *See* *supra* notes 65–69 and accompanying text (providing that the information the union requested would have been relevant because it was informative and useful; therefore, *Paccar* violated NLRA section 8(a)(5) when it did not turn the information over).

NLRB found the employer guilty of violating section 8(a)(5) and refusing to bargain in good faith for not providing relevant information,¹²⁹ it is likely that the NBA would be found guilty of violating section 8(a)(5) and refusing to bargain in good faith because it also failed to provide relevant, informative, and useful information to the NBPA.¹³⁰

Although the NLRB would likely have held that the NBA refused to bargain in good faith, it probably would not have held that the NBA's lockout was unlawful. In another relevant portion of *Paccar*, the ALJ that ruled on the case before it reached the NLRB found that Paccar's failure and refusal to provide the requested information to the union converted what had been a lawful lockout into an unlawful one.¹³¹ However, the NLRB overturned the ALJ's decision and found that the lockout remained lawful because withholding the information did not materially affect the bargaining process.¹³² The NLRB analyzed evidence of how far apart the parties were on issues both sides deemed to be fundamentally important to determine whether the withholding of information materially affected the progress of negotiations.¹³³ The NLRB also analyzed evidence concerning whether the parties continued to meet and bargain after Paccar refused to provide the relevant information.¹³⁴ Even though Paccar did not provide the union with the relevant information, the NLRB found that the parties were still far apart on important issues and that—even after the information was withheld—the union and the company continued to meet and bargain.¹³⁵ Because there was

129. *Paccar, Inc.*, 357 N.L.R.B. No. 13, 2011 WL 2784214, at *3–5 (July 15, 2011).

130. *Compare* Schroeder, *supra* note 121 (noting that the information that the NBA refused to hand over to the NBPA included franchise information, sale prospects, and financial information on related-party entities), and Jeff Zillgitt, *Players Union Accuses NBA of Unfair Labor Practices*, USA TODAY (May 24, 2011), http://usatoday30.usatoday.com/sports/basketball/nba/2011-05-24-nbapa-labor-charges_N.htm (adding that this information was requested in response to the NBA's claims that it lost nearly \$340 million and was projected to lose \$300 million the next season if there were not drastic changes made in the next CBA), *with Paccar*, 2011 WL 2784214, at *3–5 (holding that the requested information on wages and benefits was relevant because it would have been informative and useful; therefore, not turning it over to the union constituted a refusal to bargain in good faith and a violation of NLRA section 8(a)(5)).

131. *Paccar*, 2011 WL 2784214, at *5.

132. *See supra* notes 70–74 and accompanying text (referencing the NLRB's decision to overturn the ALJ's ruling because if withholding the information did not materially affect the bargaining process, then that alone could not convert a lawful lockout into an unlawful one).

133. *Paccar*, 2011 WL 2784214, at *5.

134. *See id.* (stating that considering one violation of section 8(a)(5), as the ALJ did, is not necessarily enough to determine whether a lockout is unlawful).

135. *See id.* at *6 (noting that the NLRB stated the refusal to hand over the requested information was not a “stumbling block to bargaining,” and the union

no evidence that the bargaining process had been materially affected, the NLRB overturned the ALJ's decision and found that the lockout did not become unlawful once the requested information was not handed over to the union.¹³⁶

The NBA failed to provide relevant financial information to the NBPA within the first two weeks of the NBA lockout,¹³⁷ but similar to *Paccar*, the NBA and the NBPA continued to meet and bargain even though the players' union did not have all the information it requested.¹³⁸ Also similar to *Paccar*, the NBA and the NBPA remained split on fundamental issues such as the salary cap and how basketball-related income should be divided between the players and the owners.¹³⁹ These issues were not resolved until late in the bargaining process.¹⁴⁰ Following the NLRB's reasoning in *Paccar*, it is unlikely that the NBA lockout would have turned from lawful to unlawful solely because the NBA failed to provide relevant financial information.¹⁴¹ However, the NLRB stated that it did not "foreclose the possibility that an employer's unlawful failure to provide information may cause an ongoing, lawful lockout to become unlawful."¹⁴² Therefore, if the NLRB found other unfair labor practices, such as surface bargaining, present in addition to the NBA's refusal to provide relevant financial information, it follows that

never claimed it was unable to formulate its own proposal or evaluate the company's proposal because of this lack of requested relevant information).

136. See *id.* (adding that the union sent a memo to its members stating that over 150 issues still needed to be resolved, but the memo made no mention of *Paccar* failing to provide the requested financial information).

137. See Schroeder, *supra* note 121.

138. See *NBA Lockout Timeline*, *supra* note 6 (outlining many more meetings that occurred between the NBA and the NBPA after the first two weeks of the NBA lockout when the NBA did not provide the NBPA all of the financial information it had requested).

139. Carpenter, *supra* note 4, at 12 (adding that these fundamental differences were the main reasons the NBA locked out the players in July 2011); see also Krueger-Wyman, *supra* note 6, at 172 (noting that the main dispute during the 2011 CBA negotiations was how the basketball-related income would be divided).

140. *NBA Lockout Timeline*, *supra* note 6 (noting that as late as November 8, 2011, it was clear that the NBA and the NBPA had not come to an agreement on how to split the basketball-related income between the players and the owners).

141. Compare *Paccar*, 2011 WL 2784214, at *4 (stating that the failure to provide relevant financial information did not materially affect the bargaining process because both parties were still divided over fundamental issues and the parties continued to meet and bargain after *Paccar* refused to provide the information), with Carpenter, *supra* note 4, at 12 (providing that the NBA and the NBPA were still far apart on issues concerning salary cap and basketball-related income), and *NBA Lockout Timeline*, *supra* note 6 (outlining that the NBA and the NBPA continued to meet and bargain after the NBA refused to provide the relevant financial information).

142. *Paccar*, 2011 WL 2784214, at *6.

the NBA's refusal to provide information could have turned the NBA lockout into an unlawful one.

The second major complaint that the NBPA alleged against the NBA was that the NBA engaged in surface bargaining to delay negotiations for a new CBA until the NBA locked out the players and thereby coerced those players into accepting the NBA's unrealistic demands, as well as "classic 'take it or leave it' . . . bargaining."¹⁴³ The NBPA claimed that all meetings between August 2009 and June 30, 2011, when the 2011 CBA expired, were a sham, and that their only purpose was to stall the negotiation process until the NBA was able to lockout the players.¹⁴⁴ Surface bargaining occurs when an employer engages in negotiations to make bargaining useless and avoid reaching an agreement.¹⁴⁵ When analyzing a surface bargaining claim it is necessary to look at whether the party has engaged in tough bargaining to try and reach its desired terms and conditions, or whether the party is purposefully frustrating the negotiation process to keep both sides from reaching any kind of agreement.¹⁴⁶

Two types of dilatory tactics may provide proof of surface bargaining:¹⁴⁷ when an employer lacks a desire to reach an agreement,¹⁴⁸ and when an employer presents counterproposals that are unresponsive to union proposals.¹⁴⁹ Before the lockout, the NBA submitted its first proposal in early 2010, which was rejected by the NBPA.¹⁵⁰ The NBPA submitted a counterproposal to the NBA in July 2010, but the NBA never responded.¹⁵¹ A second proposal from the NBA to the NBPA did not follow until late April 2011, and this

143. NBPA Compl., *supra* note 7.

144. See Munson, *supra* note 112 (adding that the owners were also trying to take back major benefits that the players had already gained in past CBAs without offering appropriate concessions).

145. Mandelman & Manara, *supra* note 9, at 261 (defining surface bargaining).

146. See *id.* at 272 (explaining that most of the time, a party's state of mind during negotiations must be ascertained from circumstantial evidence because a party will never admit to bargaining in bad faith).

147. See *supra* notes 79–81 and accompanying text (outlining the seven *Atlanta Hilton & Tower* factors that signal a refusal to bargain in good faith and the standard used to judge an employer when engaging in those activities).

148. See *NLRB v. Milgo Indus., Inc.*, 567 F.2d 540, 545 (2nd Cir. 1977) (holding that lack of a sincere desire to reach an agreement was sufficient evidence to prove surface bargaining).

149. See Mandelman & Manara, *supra* note 9, at 281 (detailing the types of bargaining conduct that can increase the likelihood of being found guilty of surface bargaining and violating section 8(a)(5) of the NLRA).

150. See Zillgitt, *supra* note 131 (stating that the NBPA rejected the NBA's first proposal that sought drastic changes to the CBA, including a hard salary cap, a reduction in salaries, less guaranteed money, and shorter contracts).

151. See *id.* (noting that the NBA never responded to the NBPA's counterproposal and that the NBPA had to wait eight months for a revised proposal).

proposal was largely the same as the already-rejected first proposal.¹⁵² The NBA's actions were evidence of standard dilatory tactics; the NBA lacked any desire to reach an agreement and offered proposals that were unresponsive to union terms.¹⁵³ Therefore, the NLRB would have likely found the NBA guilty of surface bargaining because of the tactics it used during negotiations in the lead-up to the expiration of the 2011 CBA and during the beginning of the lockout.¹⁵⁴

The NBPA also alleged that the NBA issued take-it-or-leave-it demands as another type of dilatory tactic.¹⁵⁵ This tactic left the union with two potential choices: either accept the demand or file an unfair labor practice charge.¹⁵⁶ When analyzing a surface bargaining complaint that involves take-it-or-leave-it demands used for dilatory bargaining, the NLRB will look at whether an "employer has defined, explained and advocated its position rather than attempting to thrust provisions on the union in a 'take-it-or-leave-it' manner."¹⁵⁷ Even though the NBA was unresponsive to union proposals,¹⁵⁸ there is no evidence that the NBA was not defining, explaining, or advocating its position and improperly forcing new terms and conditions on the union.¹⁵⁹ Although it would have been unlikely for the NLRB to find the NBA guilty of issuing take-it-or-leave-it demands, the NLRB could

152. See *id.* (explaining that the NBPA was unimpressed by the NBA's latest proposal, and the only difference between the NBA's April 2011 proposal and the early 2010 proposal was that some of the NBA's original terms would be gradually implemented over a few seasons).

153. See Mandelman & Manara, *supra* note 9, at 277 (stating that lacking a sincere desire to reach an agreement is evidence of surface bargaining). In addition, a party that avoids presenting counterproposals that are unresponsive to union proposals decreases its chances of being found guilty of surface bargaining. *Id.* at 280–81.

154. Compare *id.* at 277 (asserting that a sincere lack of desire to reach an agreement can be used as evidence of surface bargaining), and *id.* at 280–81 (noting that presenting counterproposals that are unresponsive to union proposals can be used as evidence of surface bargaining), with Zillgitt, *supra* note 131 (stating that the NBA did not respond to one NBPA proposal, and that when the NBA did send a revised proposal it was not materially different from the original).

155. See NBPA Comp., *supra* note 7 (asserting that the NBA "engag[ed] in classic 'take it or leave it' . . . bargaining intended to . . . coerce [the players] into accepting the NBA's harsh and regressive demands").

156. See Mandelman & Manara, *supra* note 9, at 281 (providing a list of factors that qualify as dilatory tactics that delay bargaining efforts and can increase the likelihood of being found guilty of violating NLRA section 8(a)(5)).

157. *Id.* at 279 (citing *Hartz Mountain Corp.*, 295 N.L.R.B. 418, 426 (1989)).

158. See Munson, *supra* note 112 (stating that the NBPA claimed all of the meetings and exchanges between August 2009 and June 2011 were a sham and only designed to slow the process of negotiations); see also Zillgitt, *supra* note 131 (asserting that the NBA was unresponsive to the NBPA's counterproposals).

159. See Mandelman & Manara, *supra* note 9, at 279 (explaining that when an employer defines, explains, and advocates for its position, it is more likely that the employer is bargaining in good faith and not engaged in take-it-or-leave-it demands).

still have found that the league was guilty of surface bargaining for being unresponsive to the union.¹⁶⁰

Another factor in determining how the NLRB would have decided the NBPA's complaint against the NBA is the NLRB's recent trend of reaching pro-union decisions.¹⁶¹ In the weeks leading up to the NBPA and NBA's agreement on terms for a new CBA, the NLRB issued a series of pro-union rulings.¹⁶² In *Lamons Gasket Co.*,¹⁶³ *UGL-UNICCO Service Co.*,¹⁶⁴ and *Specialty Healthcare & Rehabilitation Center of Mobile*,¹⁶⁵ the NLRB repeatedly sided with unions and overruled past decisions that favored employers. This trend of the NLRB continuously ruling in favor of labor unions continued up to the end of 2012.¹⁶⁶ The NLRB's recent trend of pro-union rulings made immediately before the NBPA and the NBA agreed to a new CBA increases the likelihood that the NLRB would have ruled in the NBPA's favor.

160. See *supra* note 159 and accompanying text.

161. Since the beginning of the Obama Administration and the President's appointment of pro-union NLRB members, the NLRB has been consistently ruling in favor of unions on a broad range of issues. See Evan Rosen, *NLRB Continues Pro-Union Agenda*, LEXOLOGY.COM (Jan. 15, 2013), <http://www.lexology.com/library/detail.aspx?g=dbf6a128-6377-4252-9d72-ecf774b08c4c> (noting that the NLRB's pro-union bias that was present during Obama's first term is likely going to continue into his second term).

162. See Steven Greenhouse, *At N.L.R.B., Flurry of Acts for Unions as Chief Exits*, N.Y. TIMES (Aug. 30, 2011), <http://www.nytimes.com/2011/08/31/business/economy/nlr-b-eases-unionizing-at-nursing-homes.html> (noting that the NLRB had been making a number of pro-union decisions right around the time the NBPA case was being examined).

163. 357 N.L.R.B. No. 72, 2011 WL 3916075, at *2 (Aug. 26, 2011) (reestablishing the rule "barring an election petition for a reasonable period of time after voluntary recognition of a representative designated by a majority of employees").

164. 357 N.L.R.B. No. 76, 2011 WL 3916076, at *1–2 (Aug. 26, 2011) (reinstating a modified successor bar doctrine that, when a new successor employer takes control of a company, entitles a union representative to bargain collectively with the new employer for a reasonable period of time without having his status challenged).

165. 357 N.L.R.B. No. 83, 2011 WL 3916077, at *1 (Aug. 26, 2011) (placing the burden on employers to demonstrate that a group containing employees with a readily identifiable community interest is inappropriate because it does not include additional employees).

166. See *Am. Baptist Homes of the W.*, 359 N.L.R.B. No. 46, 2012 WL 6673080, at *1 (Dec. 15, 2012) (holding that the employer violated NLRA section 8(a)(1) and 8(a)(5) by not providing the union with the names and job titles of witnesses it had requested); *Alan Ritchey, Inc.*, 359 N.L.R.B. No. 40, 2012 WL 6800789, at *1 (Dec. 14, 2012) (ruling that discretionary discipline is a mandatory subject of bargaining that employers cannot impose unilaterally); *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, 2012 WL 6800769, at *1 (Dec. 14, 2012) (holding that an employer violated section 8(a)(1) of the NLRA by firing five employees for Facebook comments they wrote responding to criticism of their job performance); *WKYC-TV, Inc.*, 359 N.L.R.B. No. 30, 2012 WL 6800777, at *1 (Dec. 12, 2012) (overruling *Bethlehem Steel* and holding that an employer's obligation to deduct union dues continues after a CBA has expired).

The totality of the circumstances surrounding the 2011 NBA CBA bargaining process indicates that the NLRB would have ruled in favor of the NBPA.¹⁶⁷ Examining the NBA's actions both at and away from the bargaining table, there were several instances from which the NLRB could find that the NBA had been bargaining in bad faith.¹⁶⁸ First, the NLRB would likely have found that the NBA violated section 8(a)(5) when the league refused to provide relevant financial information to the NBPA.¹⁶⁹ Second, even though it is unlikely that the NBA participated in take-it-or-leave-it bargaining, it is likely the NLRB would have found the NBA guilty of surface bargaining because of the dilatory tactics the league used.¹⁷⁰ Finally, the NLRB's recent trend of pro-union decisions during the time the NBPA complaint was raised also weighed heavily in the players' favor.¹⁷¹ The NBPA would have gained a significant advantage in the bargaining process had it been able to hold out long enough for an NLRB decision.

B. An NLRB Decision in the Players' Favor Would Have Taken Away the NBA's Bargaining Power, Given the NBPA More Influence During Negotiations, and Allowed the NBA Players To Retain Large Sums of Money Given Up to the Owners

If the NLRB had ruled in favor of the NBPA, the NLRB would have required the league to end the lockout.¹⁷² The NBA would have been able to argue before the NLRB and in federal court, but the lockout would have been forced to end and negotiations would have taken a turn heavily in favor of the players.¹⁷³ Losing the NLRB case to the

167. See Mandelman & Manara, *supra* note 9, at 263–64 (explaining the NLRB's use of the totality of the circumstances test and that viewing a party's actions cumulatively makes it easier to determine that a party has been bargaining in bad faith).

168. See *infra* notes 170–72 and accompanying text.

169. See Schroeder, *supra* note 121 (noting that the NBPA requested three documents that referenced franchise violation information, sale prospects, and financial information of related party entities, along with twenty smaller financial documents, but the NBA refused to provide the NBPA with the requested information).

170. See Munson, *supra* note 112 (stating that the NBA was conducting sham meetings that were only designed to slow the progress of negotiations); Zillgitt, *supra* note 131 (stating that the NBA was unresponsive to union counterproposals).

171. See *supra* notes 163–68 and accompanying text (highlighting the recent string of pro-union NLRB decisions around the time the NBPA and the NBA ratified the new CBA).

172. See Munson, *supra* note 112 (stating that the NLRB would file a 10(j) legal action against the NBA, which would require the league to stop bargaining in bad faith and end the lockout).

173. See *id.* (explaining that the NBA could dispute the NBPA's Complaint in front of the NLRB and contest the NLRB's 10(j) legal action in federal court, but it would not be surprising if the NLRB ruled in favor of the NBPA and the federal court granted the 10(j) legal action ending the lockout).

NBPA would have been a huge defeat for Commissioner Stern, the NBA, and the owners.¹⁷⁴

Once the lockout ended, the NLRB would have likely forced the NBA to continue negotiations with the NBPA after the season was allowed to begin.¹⁷⁵ This would have been an enormous setback for the owners.¹⁷⁶ They would have lost their main leverage over the players: the ability to withhold compensation.¹⁷⁷ Even though the players' bargaining position would have improved significantly with an end to the lockout, the NBPA would still have been interested in coming to terms on a new CBA as quickly as possible. The futures of players without current contracts—such as free agents and rookies—would still have been uncertain, and the NBPA would have wanted to make the most out of their new leverage during negotiations.¹⁷⁸ Without the lockout, it would have been difficult for the NBA and the owners to maintain their same bargaining strategy, a new CBA would have been agreed on more quickly, and the players would not have sacrificed as much financially.¹⁷⁹

Because the NBPA and the NBA players were not able to hold out long enough for an NLRB decision, the NBA owners had an advantage during the 2011 CBA negotiations.¹⁸⁰ The

174. See *id.* (noting that if the NLRB had ruled in favor of the NBPA, the NBA would lose all the leverage it had worked to gain over the last two years of negotiations).

175. See David Aldridge, *Ten Lockout Questions to Chew On . . . Probably for Awhile*, NBA.COM (Oct. 6, 2011, 10:45 AM), http://www.nba.com/2011/news/features/david_aldrige/10/06/lockout-questions/index.html (stating that the reason the NBPA did not decertify as a union was because the NLRB could have decided to end the lockout and forced the NBA to continue negotiations while the season began; whereas, if the NBPA decertified, the NLRB complaint would no longer be valid).

176. See Steve Aschburner, *Lockout FAQs: What, How and What's Next in Labor Standoff*, NBA.COM (July 5, 2011, 1:53 PM), <http://www.nba.com/news/lockout-faqs/index.html> (observing that during a lockout, there is no use of team facilities, no contracts signed, no free agent period, and no trades); *For NBA Players, Check's Not in the Mail*, ESPN.COM (Nov. 16, 2011), http://espn.go.com/nba/story/_/id/7238632/nba-lockout-average-player-loses-220000-paychecks-arrive (asserting that NBA players do not receive paychecks during the lockout).

177. See Gabriel A. Feldman, *The Legal Issues Behind the Looming NBA Lockout*, HUFFINGTON POST (June 21, 2011, 3:52 PM), http://www.huffingtonpost.com/gabriel-a-feldman/the-legal-issues-behind-t_1_b_881409.html (explaining that the reason employees are not paid during a lockout is because employers are refusing to let the employees work).

178. See Aschburner, *supra* note 177 (discussing how contracts cannot be signed during a lockout, which means that players who were not under contract when the lockout began, like free agents and rookies, cannot sign a new contract until the lockout is over and there is a new CBA).

179. See Munson, *supra* note 112 (emphasizing that an NLRB decision for the NBPA would have been a huge setback for the owners and they would have lost all the leverage they worked to gain over the previous two years).

180. See Krueger-Wyman, *supra* note 6, at 184 ("Despite Commissioner Stern and NBPA Executive Director Billy Hunter's comments to the contrary, the owners

employer-friendly terms of the current CBA only exist because the NBA utilized negotiating tactics that the NLRB would have likely held impermissible.¹⁸¹ If the NLRB had ruled for the NBPA, the 2011 CBA would look very different. The 2011 CBA reduced the players' share of basketball-related income from 57% to between 49% and 51%.¹⁸² A consequence of this drastic cut in the players' share of basketball-related income is that the players were required to sacrifice approximately \$270 million—around \$610,000 per player—to the owners.¹⁸³ Additionally, the players agreed to receive prorated salaries to compensate the owners for financial losses due to the shortened season, but the players were already receiving about 20% less in salary because of the cancelled games during the lockout.¹⁸⁴

As a result of the NBA's unfair bargaining practices, the new 2011 CBA also restricts the length of player contracts, thereby reducing the total amount of money NBA team owners can pay players.¹⁸⁵ Under the previous CBA, players were eligible to sign six-year extensions with their current team or sign a new five-year contract with a different team.¹⁸⁶ Under the 2011 CBA, the maximum contract length for a player re-signing with his team is five years and for a player signing with a new team the maximum is now four years.¹⁸⁷ This new rule significantly decreases the total amount of money players can earn when signing new contracts—especially superstar players who can earn upwards of \$20 million a year—and represents another sacrifice NBA players accepted under the terms of the new CBA.¹⁸⁸

profited enormously from the terms in the new agreement, and they achieved these gains at the comparative loss of the players.”).

181. See *supra* notes 168–71 and accompanying text (concluding that the NLRB would have likely found the NBA guilty of refusing to provide relevant financial information and surface bargaining that consisted of using delay tactics).

182. See Krueger-Wyman, *supra* note 6, at 184–85 (indicating that the owners demanded a larger portion of the basketball-related income because of lost money due to the financial crisis).

183. *Id.* at 185.

184. *Id.*

185. See Carpenter, *supra* note 4, at 16 (outlining the changes in the 2011 CBA, including a player's maximum contract length); see also Krueger-Wyman, *supra* note 6, at 187 (describing how shortening the number of years a player can sign a contract helps small-market teams keep high-value free agents from signing elsewhere).

186. See Carpenter, *supra* note 4, at 16 (comparing the differences in maximum contract length from the old CBA to the new CBA).

187. *Id.*

188. See Krueger-Wyman, *supra* note 6, at 187–88 (explaining that if the 2011 CBA had been in place when LeBron James left the Cleveland Cavaliers and signed with the Miami Heat in 2010, James would have had to pass on a five-year contract from Cleveland worth \$95 million to sign a four-year contract with Miami worth \$62 million).

Another product of the NBA's likely impermissible negotiating strategies was the stricter luxury-tax threshold, which will discourage owners from spending beyond the salary cap and further restrict player salaries.¹⁸⁹ The NBA created the luxury tax as a system to discourage big-market teams from drastically outspending small-market teams in an effort to level the playing field.¹⁹⁰ The teams over the salary cap pay into the luxury-tax pool, which is then divided and distributed to the teams under the salary cap.¹⁹¹ Under past CBAs, for every dollar a team spent over the salary cap, the owners would then have to pay a dollar in luxury tax.¹⁹² Under the new CBA, the luxury tax increases incrementally for every \$5 million a team spends over the salary cap.¹⁹³ The luxury tax starts at \$1.50, instead of \$1.00, and then increases to \$1.75, \$2.50, \$3.25, and upwards in seventy-five cent increments.¹⁹⁴ This increase in luxury tax will limit how much money owners invest into players' salaries because exceeding the salary cap has a more significant financial impact.¹⁹⁵

Even though the players were able to secure some small victories, such as retaining the soft salary cap and forcing owners to spend 85–90% of the salary cap on player contracts, the owners ended negotiations in a superior position.¹⁹⁶ In light of all the concessions made by the NBPA and the NBA players,¹⁹⁷ an NLRB decision for the

189. See *id.* at 186–87 (noting that the increase in luxury tax will force big-market teams that consistently spend over the salary cap to think about decreasing their spending); Moke Hamilton, *How NBA's Luxury Tax Penalties Will Impact Elite Teams*, BLEACHER REP. (Dec. 26, 2012), <http://bleacherreport.com/articles/1457745-how-nbas-luxury-tax-penalties-will-impact-elite-teams> (illustrating how teams are less likely to offer enormous salaries to young players or try to acquire as much talent as possible because it will be too expensive).

190. See Hamilton, *supra* note 190 (explaining that the NBA felt the ability of big-market teams to buy up all available talent and leave small-market teams with nothing threatened the competitive balance of the league).

191. See Krueger-Wyman, *supra* note 6, at 186–87 (providing that under the new CBA the luxury tax would be distributed among non-tax paying teams like in the past; additionally, new provisions in the 2011 CBA allow the NBA to retain some of the money).

192. Carpenter, *supra* note 4, at 16.

193. See Krueger-Wyman, *supra* note 6, at 186–88 (noting that teams that are repeat offenders will also have a higher tax, which is \$1 more than each standard increment).

194. *Id.* (detailing the new 2011 CBA's luxury tax system).

195. See Hamilton, *supra* note 190 (revealing that it will be much less likely to see a team with three or four superstar players because it will be too expensive for the owner, and some teams have only been able to stay together because players have accepted lower salaries).

196. See Krueger-Wyman, *supra* note 6, at 188–90 (asserting that the owners secured a larger percentage of league profits for themselves in addition to gaining more control over the players).

197. See *supra* notes 181–96 and accompanying text (discussing how the new CBA reduces the NBA players' share of basketball-related income, restricts the length of player contracts, and imposes a stricter luxury tax threshold).

NBPA would have leveled the playing field and increased the players' bargaining power for the 2011 CBA.

C. An NLRB Decision for the NBPA Would Have Impacted Future Professional Sports CBAs, Encouraged More Players' Unions To Explore Labor Law Remedies, and Altered the Way Players' Unions and Professional Sports Leagues Approach the Collective Bargaining Process

Recently, as old CBAs have begun to expire, there have been many lockouts in professional sports.¹⁹⁸ If the NLRB had decided in favor of the NBPA, it is likely that other players' unions would take future challenges directly to the NLRB. Learning from the NFL's experience, if decertifying as a union and taking the antitrust law route through federal court does not provide the leverage and support players' unions require in the collective bargaining process,¹⁹⁹ players' unions would have a clear incentive to take the labor law route. With a better chance of success—or at least a better chance of avoiding the same fate as the NFLPA—it appears more likely that a challenge under labor law would lead to a positive result; especially in light of the NLRB's recent trend of pro-union decisions.²⁰⁰

There are several important lessons to be learned from the NBA lockout and the potential NLRB decision for future professional-sports CBAs. First, players should not rush to decertify as a union because the labor law route is more promising than the antitrust law route.²⁰¹ Significant disadvantages can develop from quickly decertifying as a union and forcing players into taking the antitrust law route.²⁰² Using labor laws also offers several advantages unavailable in antitrust.²⁰³ Even though the NLRB never had a

198. See Isaac, *supra* note 1, at 167 (stating that in 2011, the NFL had a lockout and antitrust lawsuit and MLB narrowly avoided a lockout by signing a new five-year CBA). In addition, the NHL completely cancelled its 2004–2005 season and then had another lockout in 2012. See *id.* at 181, 183–85.

199. See Carpenter, *supra* note 4, at 10 (explaining that the Eighth Circuit's decision was a key victory for the NFL and the owners, giving "them greater bargaining power as negotiations continued, because it realistically meant that the lockout could, if needed, be maintained into the next year").

200. See *supra* notes 163–68 and accompanying text (outlining the NLRB's recent string of pro-union rulings).

201. See Feldman, *supra* note 17, at 1249–51 (stating that on the day the CBA was set to expire, the NFLPA informed the NFL it no longer represented the players and a majority of players voted to end the collective bargaining status of the NFLPA, after which the players sued the NFL in federal court, and the Eighth Circuit ultimately held that the owners' lockout could not be enjoined).

202. See Carpenter, *supra* note 4, at 9–10 (noting that after the NFLPA decertified, the players took the antitrust law route and found initial success in district court, but were ultimately stopped in the Eighth Circuit).

203. Compare Brady v. NFL, 644 F.3d 661, 680–81 (8th Cir. 2011) (denying the NFL players' antitrust claim and holding that the Norris LaGuardia Act prohibited

chance to rule in the NBPA case, it is likely the NLRB would have come to a different conclusion than the Eighth Circuit and found that the NBA was negotiating in bad faith, which would have led to an end of the NBA lockout.²⁰⁴ Second, a sports league's failure to provide relevant financial information could be considered a refusal to bargain in good faith.²⁰⁵ During future negotiations, unions should require sports leagues to provide all requested relevant financial information to ensure that the league is not found guilty of refusing to bargain in good faith.²⁰⁶ Third, a violation of NLRA section 8(a)(5), which covers a refusal to bargain in good faith, could render a lawful lockout unlawful.²⁰⁷ If the NLRB was able to find that an unfair labor practice and a refusal to bargain in good faith materially affected the bargaining process, a sports league's lockout would be cancelled, the players would regain full access to the facilities, and the players would once again be entitled to their salaries.²⁰⁸

The fourth lesson that can be learned from the 2011 NBA CBA negotiations is that if a players' union is going to take the labor law route, it should ensure that there is unity throughout the union and that each player is committed to waiting as long as necessary for an NLRB decision.²⁰⁹ If the players are not unified and committed, their bargaining power fades. The owners will eventually sense this weakness and see that some of the players are willing to fold.²¹⁰ In

the district court from ending the NFL's lockout of the players), *with* Carpenter, *supra* note 4, at 13 (asserting that the NBA players decided to maintain the NBPA because they saw a favorable NLRB decision as a way to strengthen their bargaining position and potentially add leverage).

204. See *supra* note 168–72 and accompanying text (articulating the likelihood that the NLRB would have ruled in the NBPA's favor).

205. See *supra* note 127–31 and accompanying text (explaining that the NBA would have been found guilty of refusing to bargain in good faith because of its refusal to provide relevant financial information to the NBPA).

206. See *Paccar, Inc.*, 357 N.L.R.B. No. 13, 2011 WL 2784214, at *3 (July 15, 2011) (stating that the standard the NLRB uses for relevance is whether the information probably or potentially would have been informative or useful to the union carrying out its duties as a bargaining representative).

207. See *id.* at *6 (noting that even though the NLRB did not find that the refusal to provide relevant financial information rendered the lockout unlawful, the NLRB specifically stated it did not “foreclose the possibility that an employer’s unlawful failure to provide information may cause an ongoing, lawful lockout to become unlawful”).

208. See *id.* at *5 (illustrating that the standard consistently applied by the NLRB is that if there was evidence that the unfair labor practice materially affected negotiations, a lockout could be deemed unlawful).

209. See Carpenter, *supra* note 4, at 14–15 (revealing that a rift grew among the NBA players because the players who were taking the “hard-line stance” during the lockout were the highly paid superstars and not the majority of players who were on average salaries and had significantly more to lose financially); see also *id.* at 15 (conveying that the NFL players were unified in their case against the NFL).

210. See *supra* notes 114–15 and accompanying text (detailing the split that occurred between the NBA players during the lockout and CBA negotiations); *supra*

the case of the NBA and NBPA, the complaint with the NLRB was filed in May 2011 and the players were still waiting for a result when the two sides eventually reached an agreement on a new CBA in November 2011.²¹¹ The NBA players will now endure the consequences of the NBPA's unwillingness to fully commit to the labor law process as the current CBA heavily favors the owners.²¹²

Fifth, a players' union should always account for recent NLRB precedent. Even though the NLRB never had a chance to make a ruling, the NLRB had issued a number of significant pro-union holdings immediately before the NBPA and the NBA came to terms on a new CBA.²¹³ This trend continued throughout 2012.²¹⁴

The last, and most important, lesson learned from the 2011 NBA lockout and potential NLRB decision is for parties to avoid surface bargaining and take-it-or-leave-it demands, and to always bargain in good faith.²¹⁵ Surface bargaining can be tempting, especially for a professional sports league with a lockout looming, because of the added bargaining power the league gains while the players are locked out.²¹⁶ However, surface bargaining and delay tactics are a violation of NLRA section 8(a)(5) and constitute a refusal to bargain in good faith.²¹⁷ As mentioned in *Paccar*, a section 8(a)(5) violation can turn a lawful lockout in an unlawful lockout.²¹⁸ One of the two essential elements of collective bargaining under the NLRA is to ensure that negotiations are performed in good faith.²¹⁹ Both parties must remember that there is a line between hard bargaining and

note 197 and accompanying text (noting the unfavorable terms the NBA players agreed to in the new CBA).

211. *NBA Lockout Timeline*, *supra* note 6.

212. See Krueger-Wyman, *supra* note 6, at 184–86 (identifying ways that the new CBA heavily favors the owners and the significant amount of money the players will lose because of the terms in the new CBA); see also Carpenter, *supra* note 4, at 16 (illustrating the changes from the old CBA to the new CBA).

213. See *supra* notes 163–66 and accompanying text (recounting the NLRB's pro-union rulings in the weeks leading up to the NBPA and NBA's agreement on terms for a new CBA).

214. See *supra* notes 167 and accompanying text (demonstrating that the NLRB's pro-union trend continued after the NBPA and NBA came to terms on a new CBA).

215. See *supra* note 144–61 and accompanying text (evaluating the NBPA's complaint alleging that the NBA was engaged in take-it-or-leave-it bargaining and surface bargaining, which was delaying the negotiations until the league was able to institute a lockout).

216. See Aschburner, *supra* note 177 (recognizing the bargaining power gained during a lockout because players do not get paid, do not receive health insurance, and have finite careers, so any time they miss on the court is irretrievable).

217. *Supra* notes 77–81 and accompanying text.

218. *Paccar, Inc.*, 357 N.L.R.B. No. 13, 2011 WL 2784214, at *5 (July 15, 2011).

219. Mandelman & Manara, *supra* note 9, at 262 (noting that the other essential element of collective bargaining is “to confer with respect to wages, hours and other terms and conditions of employment”).

unreasonable bargaining. Neither party should cross that line by refusing to bargain in good faith.

CONCLUSION

An NLRB decision in favor of the NBPA would have changed the face of the 2011 NBA CBA and impacted the NBA for at least the next decade. An analysis of the NBPA's complaint and surrounding circumstances demonstrates that it is likely the NLRB would have ruled for the players, and that the labor law route offers players' unions certain advantages over the antitrust law route.²²⁰ The NBA's refusal to provide the NBPA with requested relevant financial information was likely a violation of NLRA section 8(a)(5) and a refusal to bargain in good faith.²²¹ It is also probable that the NBA engaged in surface bargaining, which was used as a dilatory tactic to halt negotiations until the old CBA expired.²²² These bargaining strategies allowed the NBA to institute a lockout and put more pressure on the NBPA to give in to the NBA's terms. It is likely that these two factors, along with the NLRB's recent trend of pro-union decisions,²²³ would have caused the NLRB to rule in the NBPA's favor when analyzing the NBA's refusal to bargain in good faith under the totality of the circumstances test.

The NBPA example serves as a case study for future players' unions and demonstrates why the labor law route to the NLRB may be more beneficial than the antitrust law route through federal court. Even though the NLRB did not make a ruling in the NBPA's case against the NBA, this issue will certainly arise again with the increasing frequency of lockouts in professional sports.²²⁴ The NLRB will have another opportunity to alter the way players' unions and professional sports leagues approach the collective bargaining process.

Players' unions and professional sports leagues can learn much from the 2011 NBA lockout and potential NLRB decision. A decision for

220. See *supra* notes 168–72 and accompanying text (concluding that the NLRB would have ruled in the NBPA's favor because the NBA refused to provide relevant financial information, engaged in surface bargaining, and the NLRB had recently made a number of pro-union decisions).

221. *Supra* notes 124–26 and accompanying text; see also *supra* notes 127–31 and accompanying text (analyzing the NBPA's complaint that the NBA failed to provide properly requested relevant financial information).

222. See *supra* notes 149–61 and accompanying text (referencing the NBPA's complaint that the NBA was engaged in take-it-or-leave-it bargaining and surface bargaining purposefully used as a tactic to prolong negotiations).

223. See *supra* notes 163–68 and accompanying text (outlining the recent string of NLRB rulings that established a precedent in favor of unions).

224. *Supra* note 23 and accompanying text.

the players would have swayed negotiations in the NBPA's favor and reduced the NBA's bargaining power. This change in bargaining position would have drastically altered the outcome of the CBA negotiations and the owners would not have received such a favorable result. If the NBPA had been able to hold out long enough for an NLRB decision, millions of dollars could have ended up in the players' hands; however, "[a]s a result of the new revenue-division scheme, players will likely be sacrificing roughly \$270 million dollars . . . to the owners."²²⁵ Even though an average NBA salary in December of 2012 was \$5.15 million, each NBA player lost an average of \$610,000 under the terms of the 2011 NBA CBA.²²⁶ Future players' unions should be aware of, and do everything in their power to avoid, this \$270 million dollar mistake.

225. Krueger-Wyman, *supra* note 6, at 185.

226. *See id.* (emphasizing the significant benefits the NBA owners gained because of the terms in the new NBA CBA).