The Ramification of National Basketball Association Labor Relations

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I. INTRODUCTION

This Essay reflects on the ramifications and implications flowing from the recent labor relations controversy in the National Basketball Association ("NBA"). Until the fall of 1998, basketball was the only major professional team sport in the United States that had not lost any regular season games due to labor relations disputes. Alas, the NBA came perilously close to losing its entire 1998-99 season, as the entire fall 1998 and January 1999 portions of the regular season were canceled. With a new multi-year collective bargaining agreement ("CBA") successfully achieved in early January, on the brink of the ownership's deadline for cancellation of the remainder of the season, the NBA will witness its first abbreviated season attributable to contentious labor relations. After literally only a few exhibition games, teams will play a fifty game schedule, rather than the normal full season of eighty-two games, from February to June 1999.

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After presenting the salient chronological highlights of the origins of the dispute and the major features of the new CBA reached in January 1999, we will pose some open questions for the future of labor relations, both in the NBA and in related professional team sports, and, more broadly, for labor relations in other sectors of the economy.

The NBA, perhaps more than any other major professional team sport, has become a highly lucrative amalgam of athleticism, entertainment and popular culture. Most of the NBA’s stars are multi-media stars, cultural icons and, not coincidentally, millionaires. Through the successful marketing and exporting of the “Dream Team” mystique, NBA marquee players have become international celebrities. Michael Jordan has approached the international star status previously occupied perhaps only by Muhammad Ali.

Much of what the NBA had achieved, especially through its successful marketing and television-friendly packaging, was placed at serious risk during the contentious and acrimonious labor relations of 1998-99. Fan allegiance is an ephemeral, but very real, ingredient in the success of any major team sport. Baseball clearly reclaimed, and indeed significantly expanded, its fan base through its wonderful 1998 season. The homerun exploits of Messrs. McGwire and Sosa and the phenominal team record of the world champion New York Yankees coupled to reenergize professional baseball. The sport was redeemed from the lingering residue of fan bitterness engendered by baseball’s abbreviated, troubled 1994 season, when labor relations difficulties caused the cancellation of the late summer season, the playoffs, and the 1994 World Series. Baseball may have enjoyed its best year ever in 1998, with the game’s renaissance and reclamation of its historically preeminent position as America’s national sport.

As baseball prospered, basketball suffered several largely self-inflicted wounds in 1998. First came the 1999 retirement announcement from the incomparable Michael Jordan.1 Immediately in the wake of the Jordan retirement came the dismantling of the world champion Chicago Bulls by the retirement of Dennis Rodman2 and the free agency trades regarding Scottie Pippen et al.3 Hence, some of the cornerstones of the NBA’s institutional marketing mystique suddenly evaporated. With no

2. Although announcing retirement, Dennis Rodman would ultimately sign with the Los Angeles Lakers. See Frank Litsky, Lakers Shorten Harris’s Season Even More, N.Y. TIMES, Feb. 25, 1999, at D2.
especially compelling successors to Mr. Jordan and the Chicago Bulls in sight, these post-lockout events have further exacerbated the NBA’s problems in reclaiming and revitalizing its disillusioned fan base. An ill-conceived basketball “charity” game during the lockout, with the supermajority of the proceeds originally destined to go to “needy” basketball players, and with only the small remainder of funds designated for legitimate, bona fide charities, justifiably earned the National Basketball Association Players Association (“NBAPA”) union the “tin ear” award for the nineties. This dubious achievement was no mean feat. In the political arena, serious competitors for the “tin ear” award may be both Ken Starr and President Clinton’s endless batteries of lawyers. But, of course, this is material for another Essay and a future day.

II. THE SALIENT NBA LABOR RELATIONS CHRONOLOGY

The heart of the 1998-99 labor relations controversy in the NBA was rooted in the owners’ demand that the union endeavor to assist the owners in saving the owners from themselves. The owners’ plight had its genesis in the “Larry Bird” exception to the salary cap, which, for several years, has permitted a team to ignore the salary cap in order to re-sign its own superstar player. More recently, however, the owners were understandably alarmed by the wildly escalating, multi-year, nine figure individual contracts awarded to new and unproven players barely out of high school. Thus, the owners used these egregious paradigms—ironically of the owners’ own profligate creation—to insist upon bringing salaries under greater control through the controversial device of a much more stringent salary cap. The owners ultimately were largely successful in achieving their essential objective of more meaningful and longer term salary cost controls over the life of the new multi-year labor contract. Rather than the perpetuation and escalation of the “winner take all” ethos of the marquee players, yesterday’s likely beneficiaries such as free agent Scottie Pippen—who was anticipating an annual contract well in excess of twenty million dollars—were successfully capped, and became, through the 1999 labor contract, salary-capped “losers” (relatively) for much of their remaining careers.

4. This was an option the Boston Celtics conceived and invoked to retain the services of the legendary Larry Bird for the balance of his superb playing career.
A. Events Leading up to the 1998-99 Lockout

In June 1995, the owners and the players' union negotiated a six-year CBA.\(^5\) The 1995 CBA included a luxury tax of as much as one hundred percent on large contracts if the percentage of basketball-related income devoted to player salaries exceeded sixty-three percent. In July 1995, the players refused to ratify the deal.\(^6\) The owners subsequently locked the players out.\(^7\)

A new agreement was reached in August 1995.\(^8\) The owners deleted the luxury tax in exchange for the option to renegotiate the CBA after three years, should the percentage of basketball-related income devoted to player salaries exceed 51.8%.

In September 1995, a group of players, spearheaded by Michael Jordan and Patrick Ewing, who were both clients of agent David Falk, sought to decertify the union, with hopes of thereby rendering the owners' lockout illegal as an unreasonable restraint of trade in violation of the federal antitrust laws.\(^9\) However, the union was in internal disagreement regarding this unorthodox labor tactic, and the union's then-executive director, Simon Gourdine, was opposed to decertification. Therefore, on September 12, 1995, the players voted to accept the six-year CBA rather than to decertify the union.\(^10\) This consequently ended the 1995 lockout.

Because of the controversy surrounding the ratification of the CBA, Simon Gourdine stepped down in January 1996.\(^11\) Billy Hunter, the current executive director, assumed the union's leadership on July 1, 1996\(^12\) and commenced completion of the remaining details of the labor agreement. Immediate controversy arose, however, over the distribution of the television revenues between the two parties. While this disagree-
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The mini-lockout led to an hours-long lockout; the lockout was lifted once the union agreed to the CBA in its entirety. In addition to the mini-lockout, the summer of 1996 witnessed a number of free agents being signed to $100 million contracts that inexorably drove team salaries well above the cap.

B. The 1998-99 Lockout

On March 23, 1998, in response to the rash of free agent signings, the owners voted to reopen the CBA. The proverbial "last straw" was the signing of Kevin Garnett to a $126 million contract. Garnett was an unproven third-year pro, and his enormous salary led to predictably higher salary demands by proven veteran free agents.

After a month of fruitless negotiations between the union and owners, the owners imposed a lockout on July 1, 1998. On July 24, 1998, the union filed an unfair labor practice ("ULP") charge with the NLRB, claiming the lockout was illegal. Subsequently, in August 1998, the union withdrew the ULP charge in favor of arbitration.

The lockout extended into the beginning of the 1998 scheduled training camp. Eventually, all of the preseason was canceled. The NBA canceled the first two weeks of the season on October 13, 1998. In a major blow to the union and its members, Dean John Feerick of the Fordham University Law School decided as arbitrator that the players were not entitled to be paid during the lockout. This aggravated the financial pressure on the players, some of whom had not received a paycheck since May. The owners, on the other hand, were still being paid from the five-year, $2.6 billion television contract.

22. Certain key players, however, such as Michael Jordan, had provisions in their employment agreements which required them to be paid during the lockout.
On December 8, 1998, the All-Star game originally scheduled to be held in Philadelphia was canceled, prompting near-universal and major alarm that the entire NBA season was in genuine jeopardy. This fear was heightened on December 23, 1998, when Commissioner David Stern announced January 7, 1999 as the absolute deadline for canceling the balance of the season, if a new collective bargaining agreement was not reached. Finally, on January 6, 1999 the union and the league reached a tentative agreement, which was ratified later that day by the players and the owners.

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A. Percentage of revenues to be devoted to salaries:
   1. First three years — no fixed number.
   2. Years 4, 5 & 6 — 55%.
   3. Year 7 — 57% if the owners exercise their option for the seventh year.

B. Maximum salary:
   1. 0-5 years playing experience—$9 million.
   2. 6-9 years playing experience—$11 million.
   3. 10+ years playing experience—$14 million.

C. Rookies: three year rookie scale with the current team having an option for the fourth year, but current team has the right of first refusal. In the previous CBA, rookies were free agents after three seasons.

D. Salary cap exceptions: teams can go over the cap by certain amounts to sign two players a season.
   1. Year 1—can sign one player for $1.75 million over the cap, and another player for $1 million.
   2. Year 2—can sign one player for $2 million over the cap, and another player for $1.1 million.
   3. Year 3—can sign one player for $2.25 million over the cap, and another player for $1.2 million.
   4. Years 4-7—teams can sign one player for the average salary and another player at the median salary in years 4-6, starting at about $1.7 million.

E. Maximum annual raises:
   1. 12% for players who qualify for the “Larry Bird exception.”
   2. 10% for all other players.

F. Cost certainty: Years 4-7—10% escrow tax withheld from players’ paychecks if percentage of income devoted to salaries exceeds 55%. The players decide who among them must pay the 10% tax.

G. Minimum salaries in year 1 of the CBA:
   1. Rookies—$287,500.
   2. 1 year—$350,000.
   3. 2 years—$425,000.
   4. 3 years—$450,000.
   5. 4 years—$475,000.
   6. 5 years—$537,500.
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III. RAMIFICATIONS

A. For the Labor Movement Generally

It is difficult to estimate the full impact that the NBA players’ dispute will have on labor relations nationwide. There is a tremendous difference between NBA players and unionized labor generally, even when compared to professional athletes in most other sports. The lowest paid rookie in the NBA will have a minimum salary of almost three hundred thousand dollars. The average union worker in the United States earns about one-tenth of that amount. This vast financial gap between professional athletes and average American workers was one of the main reasons for the public’s negative reaction to the proposed “charity” game that was to take place in December 1998 in Atlantic City. The proceeds from the game were to be used to help financially support the “lesser” paid NBA players, none of whom had received a paycheck for more than six months. In response to this public fiasco, the union decided instead to donate all the proceeds to a genuine charity.26

Given these facts, one could surmise that what occurred in the NBA may not have immediate applicability to other unionized settings. Significantly, however, one critical fact was made crystal clear by the manner in which the NBA labor dispute ended—the muscle of management. Indeed, after a lockout of over 190 days, the players made concessions that many of them and their agents once considered “unthinkable.” Indeed, management had wielded its power like a club, and browbeat the players into accepting a package that was essentially

7. 6 years—$600,000.
8. 7 years—$662,500.
9. 8 years—$725,000.
10. 9 years—$850,000.
11. 10 years—$1 million.

H. Other issues:
1. Performance bonuses limited to 25% of the value of player’s contract.
2. The union’s group licensing revenue guarantee dropped to $20 million this current season, and will be restored to $25 million in subsequent years.
3. Longer suspensions and higher fines for player misconduct.
4. All players drug tested once per season, and marijuana and illegal steroids added to banned substance list.


no better than what was on the bargaining table in the summer of 1998. If highly paid basketball superstars who turned into warriors to battle with management at the bargaining table did not have the leverage to outlast management, what message does that send to average rank and file workers?

Over the years, the number of workers in the United States in the private sector represented by labor unions has been steadily declining. This has led to an unprecedented number of once powerful unions seeking to merge forces. The United Auto Workers, United Steelworkers and the International Association of Machinists, for example, are currently involved in merger talks, as are the United Mine Workers and the International Union of Electronic Workers. Perhaps the shrinking of the nation’s industrial sector, among other factors, can be blamed for this phenomenon, but one cannot help but think that highly publicized debacles involving unions, such as the termination of virtually all of the Air Traffic Controllers in the early 1980’s and the corruption in the Teamsters, have had a major negative impact on the labor movement. These events, coupled with the recent NBAPA fiasco, may lead many workers in this country to think long and hard about the benefits of organizing or taking on management in a protracted dispute. Such hesitation would be based in the fear of losing their jobs to replacement workers or concluding at the end of a strike or lockout, when a new collective bargaining agreement is ultimately signed, with a deal far below their expectations, and substantial losses in income. Collectively, the NBA players lost hundreds of millions of dollars.

When the Air Traffic Controllers were negotiating with the federal government, they believed they had a major bargaining chip—the power to cripple the nation’s air traffic system. They went out on strike, and were ordered by President Reagan to return to work or face termination, for what the President termed a violation of their oath of loyalty to the government, including their agreement not to strike.27 Following the recommendation of their union’s leadership, however, most of the workers disregarded the President’s edict, resulting in their termination.28 Not surprisingly, as a result of the tremendous inconveniences experienced by many Americans during the period when the terminated Air Traffic Controllers’ replacements were being trained, many Americans expressed support for the actions of President Reagan. Manage-

ment had wielded its heavy hand, and the union lost. For years, the Air Traffic Controllers’ debacle lingered in the minds of many workers and undoubtedly had a chilling effect on the strike initiative by the labor movement. It was not until well over a decade later, when the Teamsters took on and achieved a favorable settlement from United Parcel Service (“UPS”) involving its part-time workforce, that the labor movement appeared to show renewed signs of life. Because of the NBA lockout, however, the gains realized by the labor movement as a result of the UPS settlements may be short-lived.

During a union organizational drive, for example, management invariably warns workers that a union can promise them the proverbial moon, but guarantee them nothing. Additionally, management typically warns workers that if they join a union and ultimately strike, they can be permanently replaced. Furthermore, management often informs workers that under the law, while they are required to bargain with the employees’ representatives in good faith, they are not obligated to give in to any union demands. It is not difficult to envision management pointing directly to the Air Traffic Controllers and the NBA players as prime examples of unions, with seemingly significant leverage in bargaining, nevertheless being pummeled into submission by management. After all, if star NBA players like Michael Jordan and Patrick Ewing, among others, cannot defeat management—who can? A powerful weapon for management indeed! How long management in other settings may ride the NBA’s victory horse remains to be seen. However, if the Air Traffic Controllers’ fiasco can be used as an analogous benchmark, the NBA players’ disaster will set the tone in labor-management circles for years to come.

B. For Other Professional Sports

The maximum salary provisions in the NBA contract will not translate into other sports. Other sports’ unions are stronger and probably more unified internally, and have better resources than the NBAPA did at the time of the lockout. The National Football League Players Association (“NFLPA”) and Major League Baseball Players Association (“MLBPA”), for example, have huge war chests to support their members financially in case of a future strike or lockout. The NBAPA had no such strike fund. This forced the players to accept more readily some sort of deal on the owners’ terms. Otherwise, the players would not have seen a paycheck for more than a year. When David Stern imposed the absolute deadline for canceling the season, many players panicked, es-
especially those who were on the lower end of the salary range. Significant vocal criticism of the union leadership accelerated from within the union. There were real risks that the rank and file was going to vote to accept the owners’ offer and repudiate the position of the union’s leadership.

Gene Upshaw, the NFLPA’s director, encouraged the NBAPA to decertify the union, so that they could challenge the owners’ action in court. The NFLPA took this course of action earlier this decade, and ultimately won the right to free agency. Billy Hunter did not want to take such action, because he believed that the NBAPA would remain unified. When the prospect of not being paid for over a year was presented, the players took whatever they could get.

Major League Baseball will be the first sport whose CBA expires after the 1999 NBA labor contract. The NBA contract probably will not have any significant impact on the baseball labor negotiations because of the MLBPA’s foresight. In addition, the MLBPA will be prepared to deal with a cap proposal by the owners, and will almost definitely respond in the negative.

The NBAPA has backed itself into a corner with the 1999 labor contract. The league’s “cap” before this agreement had many loopholes, and many teams were well above the salary cap. The precedent has now been set, so that salaries will be subject to a “hard cap.” While there are some concessions for re-signing two players, they are pyrrhic victories at best. The owners have achieved a major financial victory with the salary limits, as well as with other concessions that the players made. The players’ major concession beyond direct economics is the inclusion of marijuana on the banned substance list. For years, the union resisted putting marijuana on the banned list, although the other major professional sports already banned marijuana. Now that it is banned in the NBA, the lifestyle of some players may radically change.

Thus, the owners have scored a significant victory over the players. The owners have capped salaries, giving free agents much less leverage to market themselves. This cap may bind a player to the same team for his career, since he may not find a deal more lucrative with another team. There may be a reversion in the NBA to a pre-Curt Flood economic environment, where free agency will exist in theory but not in practice. The union probably will not be able to have this hard salary cap removed in later negotiations. The 1999 NBA-NBAPA CBA proves

29. See Murray Chass, In Final Staredown, Players Take the Hit, N.Y. TIMES, Jan. 8, 1999, at D5.
again that most labor relations in the United States continue to revolve around control of labor costs as a major dimension of ownership (un)profitability.