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ESSAYS

SOME KEYS TO THE NBA LOCKOUT*

*Grant M. Hayden***

I. INTRODUCTION

When it came to labor relations in professional sports, basketball was always different. The National Basketball Association (“NBA”) and the players’ union were proud of the fact that they worked in the only major American sport that had never lost a game to a labor dispute.¹ That all changed last year when, failing to come to agreement on a new contract, the NBA owners locked out the players for over six months, resulting in the cancellation of 423 regular season games.² Basketball, it seemed, had descended into the greedy narcissism that plagued every other major sport.

The 1998-99 NBA lockout, like the 1994 Major League Baseball strike, may have serious consequences for the future of the game. Already, the abbreviated training camps and compressed schedules have produced a spate of injuries and scores of ugly, low-scoring games.³ And the effects of the dispute on the game

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1. See Mike Wise, *Jan. 7 Is Stern's Deadline to Cancel Season*, N.Y. TIMES, Dec. 24, 1998, at D1.

2. See *Lockout at a Glance*, THE SUN, Jan. 5, 1999, at 3D.

3. See Mike Wise, *Can Anybody Here Score? Swish Turns to a Clank*, N.Y. TIMES, Feb. 23, 1999, at D1.

over the long run may be more difficult, if not impossible, to predict. But those questions are best left to those who track television ratings and ticket office receipts. The more immediate question—the one put to me by the editors of this journal—is what the lockout contributed to labor law or, more generally, what the dispute tells us about the state of labor relations in the United States. So it is to those questions that I turn.

II. THE LOCKOUT AND LABOR LAW DOCTRINE

The most recent NBA labor dispute is unremarkable from a strictly doctrinal standpoint. The owners and the players' association were operating under a six-year collective bargaining agreement signed in 1996 after the owners engaged in a brief and essentially meaningless lockout.⁴ That agreement, however, contained a clause under which the owners could, after three years, reopen negotiations.⁵ Last spring, the owners exercised their rights under the reopening clause,⁶ and when the two sides could not reach an agreement, the owners locked the players out.⁷

The centerpiece of the dispute—the lockout—was certainly nothing unique in the annals of labor history. Lockouts occur when employers attempt to put economic pressure on a group of employees by refusing to allow them to work.⁸ Depending on the role they play in a labor dispute, lockouts are typically characterized as

4. See Clifton Brown, *Deal Is a Lock, Not a Lockout, For the N.B.A.*, N.Y. TIMES, July 10, 1996, at B11. That lockout was only meaningless in the sense that it lasted about ten minutes in the middle of the night in July; it was certainly meaningful as a show of the league's strength and as a harbinger of future league actions. The league had also locked out the players for about three months in 1995. That lockout ended in September 1995, upon owner ratification of a new collective bargaining agreement. See *Owners Approve Labor Deal*, N.Y. TIMES, Sept. 16, 1995, § 1, at 29; Murray Chass, *N.B.A. Locks Out Players in First Work Stoppage*, N.Y. TIMES, July 1, 1995, § 1, at 27. The 1995 agreement, however, was never signed by the players' union, giving rise to the short lockout and new agreement in 1996. See *N.B.A. Negotiations Continue*, N.Y. TIMES, June 28, 1996, at B14.

5. See Harvey Araton, *For N.B.A. Players Union, What Goes Around Comes Around*, N.Y. TIMES, Nov. 1, 1998, § 8, at 7. The clause provided that the owners could renegotiate the contract if players' salaries exceeded 51.8 percent of basketball-related income. The salary figure reached 57 percent, and the owners reopened the collective bargaining agreement. See Mike Wise, *It's Their Ball, and N.B.A. Owners Call for Lockout*, N.Y. TIMES, June 30, 1998, at C1.

6. See Mike Wise, *Deflected Pact: N.B.A. Owners Reopening Labor Agreement*, N.Y. TIMES, March 24, 1998, at C1.

7. See Wise, *supra* note 5, at C1.

8. For a concise discussion of the legal status of a lockout, see ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 355-62 (1976).

either offensive or defensive. Offensive lockouts occur when an employer locks out its employees in order to pressure them to reach an agreement on terms favorable to the employer. Such a strategy may be deployed when an employer and union have reached a bargaining impasse.⁹ Defensive lockouts, on the other hand, occur when an employer locks out its employees to avoid potential harm to the employer's business, property, or goodwill that may be caused by an opportunistic strike called at the time of the union's choosing. Such lockouts may be used by an employer facing a whipsaw strike¹⁰ or by an employer in a seasonal industry in which a well-timed strike at peak season could bring enormous economic pressure to bear on the employer.¹¹ Whether offensive or defensive, however, the lockout is a tried and true means for an employer to seize the initiative in a labor dispute.

The NBA lockout was a fairly straightforward use of this traditional economic weapon. The owners had exercised their contractual right to reopen negotiations, and those negotiations failed to produce a new agreement before the old one expired at the end of June 1998. The dispute proceeded in three stages. First, the owners engaged in an offensive lockout to put pressure on the players' union to reach an agreement.¹² That strategy was successful in that it ultimately resulted in a new contract with terms favorable to the owners on January 6, 1999.¹³ The lockout, however, established no new legal precedent, broke no new legal ground, and contributed little to our understanding of the nature of the economic weapon. Indeed, it was this very lack of uniqueness—and,

9. *See, e.g., American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965) (principal Supreme Court case on the use of offensive lockouts).

10. A whipsaw strike occurs when a union strikes against competing employers in sequence. Unlike a simultaneous strike against all employers, a strike against a single employer allows its competitors to continue operations, thus placing enormous economic pressure on the struck employer and, at the same time, reducing the expenditure of union resources. *See NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen Case)*, 353 U.S. 87 (1957).

11. *See, e.g., Duluth Bottling Ass'n*, 48 N.L.R.B. 1335, 1359-60 (1943) (describing how an employer locked out its employees before they could strike in hopes of preventing a "spoilage of materials").

12. While the seasonal nature of the basketball business may have made the lockout appear to be defensive, the owners were not faced with any real prospect of an impending strike by the players' union which, after initially balking at various provisions in their 1996 contract, had begun to view the terms of their current contract with increasing favor. *See Araton, supra* note 5, at 7.

13. *See Mike Wise, With Little Time on Clock, N.B.A. and Players Settle*, N.Y. TIMES, Jan. 7, 1999, at A1.

of course, the fact that it involved celebrities—that made the NBA lockout a good teaching tool for an introductory labor law class.

The second major event of the labor dispute occurred in late July when the players' union, unconvinced of the typicality or legality of the lockout, filed an unfair labor practice charge with the National Labor Relations Board.¹⁴ The charge alleged that the lockout was illegal both because the players were not working—and thus were not locked out of anything—and because the owners placed a freeze on the signing of free agents, thus “unilaterally changing working conditions when the two sides had not bargained to impasse.”¹⁵ The union requested that the Board seek an injunction that would mandate an end to the lockout.¹⁶ The Board apparently did not agree with the union, and, within a month of its filing, the union withdrew the unfair labor practice charge.¹⁷ Such a resolution was not atypical: of the roughly thirty-two thousand unfair labor practice charges filed every year, over ninety-five percent are either settled, dismissed, or, as in this case, withdrawn.¹⁸ In the end, then, the unfair labor practice charge went the way of the overwhelming number of charges filed every year, and thus also added little of substantive or procedural note to labor law.

The third event in the NBA labor dispute was strictly contractual. The union filed a grievance on behalf of over two hundred players with guaranteed contracts demanding that the owners be held accountable for the salaries under those contracts during the lockout.¹⁹ Although over eight hundred million dollars worth of salaries were at stake,²⁰ the arbitrator's decision was a simple case

14. See *Grievance Filed on Lockout*, N.Y. TIMES, July 24, 1998, at C3.

15. Murray Chass, *Players Drop Charge, Look to Arbitration*, N.Y. TIMES, Aug. 14, 1998, at C4.

16. See *id.*; *Grievance Filed on Lockout*, *supra* note 14, at C3.

17. See Chass, *supra* note 15, at C4.

18. Specifically, 31 percent are settled, 33.8 percent are dismissed and 31.8 percent are withdrawn. See 56 NLRB ANN. REP. 153, 174-75 (1994) (citing statistics for 1991 fiscal year).

19. See Mike Wise, *Players File Salary Grievance*, N.Y. TIMES, July 2, 1998, at C6. In response, the league sued the players' union in federal district court seeking a ruling that the league need not pay the players during the lockout and that the matter not go to arbitration. See Mike Wise, *N.B.A. Sues Players Union Over Pay During Lockout*, N.Y. TIMES, July 14, 1998, at C3. Their request for a stay of arbitration was denied. See Jeffrey A. Rosenthal, *The NBA Lockout: Is Union Decertification The Next Step?*, N.Y.L.J., Nov. 27, 1998, at 5.

20. See Mike Wise, *N.B.A. Owners Needn't Pay Locked-Out Players*, N.Y. TIMES, Oct. 20, 1998, at D1.

of contractual interpretation.²¹ The arbitrator ruled against the players, putting them in the same position as that of their locked-out counterparts in more mundane professions—out of a paycheck.²² The ruling came as no great surprise and broke no real ground in the interpretation of collective bargaining agreements.

Thus, from start to finish, the NBA lockout and related skirmishes made no noteworthy contributions to legal doctrine. Rather, they were merely high-profile examples of rather pedestrian labor disputes. The reason the dispute achieved such notoriety and led to, among other things, an invitation to comment on its impact, is because it involved employees with extraordinary skills and celebrity status working in a prominent industry. But, these extralegal qualities of the dispute should not be underestimated. Instead, it is to these unique attributes of the NBA labor dispute that we must look in assessing the lockout's contribution to our understanding of labor law. In other words, one needs to look less at what the NBA lockout means to the development of labor law doctrine (very little) and more to what the high profile lockout tells us about the state of the labor movement and public perceptions of unions.

III. THE LOCKOUT AND THE LABOR MOVEMENT

While the ability of a group of employees to collectively face and withstand an extended lockout would normally signal union vitality, the NBA labor dispute instead presents a study in contrast between the economic power of professional athletes and that of more ordinary workers. More specifically, the dispute highlights the dramatic differences between highly-skilled and less highly-skilled workers in terms of their relative abilities to flex their economic muscle in collective bargaining relationships. And these differences, in turn, point to a failure of our labor laws to protect workers who truly need their protections against increasingly aggressive employer tactics.

It is no great secret that, in the United States, labor is on the run. Union membership in the private nonagricultural workforce declined to 9.6 percent in 1998,²³ continuing a downward spiral

21. See Rosenthal, *supra* note 19, at 5.

22. See *id.*

23. See United States Department of Labor, Bureau of Labor Statistics, *Union Members in*

that dates back to the 1950s. Even with the addition of an increasingly unionized public sector, union membership in all sectors still stands at less than 14 percent.²⁴ An American worker is less likely to belong to a union today than at any time in the past several decades.

Nearly fifty years of data on work stoppages from the Bureau of Labor Statistics tell a similar story. In the period from 1950 to 1957, for example, there were 2,940 work stoppages involving a thousand or more workers.²⁵ Those work stoppages involved almost 13 million workers and resulted in over 187 million days idle.²⁶ By contrast, the period from 1990 to 1997, despite a much larger workforce, only saw 267 such work stoppages involving 2.2 million workers and about 39 million days idle.²⁷ Indeed, there were only 29 work stoppages in 1997 involving more than a thousand workers, a far cry from the early 1950s, which regularly saw over 400 such stoppages per year.²⁸

Thus, union membership is down, and American workers are increasingly unwilling to engage in the work stoppages—either by calling strikes or risking lockouts—that are traditionally their most powerful economic weapons. But as labor's numbers and power decline, there is no shortage of explanations for the loss.²⁹ Many of the explanations point to extralegal causes of the decline of unionism, such as cyclical variations in the economy,³⁰ changes in the nature of the workforce from heavy industry to white collar and service sectors³¹ and the transfer of capital from the Northeast to

1998 (last modified Jan. 25, 1999) <<http://146.142.4.23/pub/news.release/union2.txt>>.

24. *See id.*

25. *See* United States Department of Labor, Bureau of Labor Statistics, *Work Stoppage Data* (visited Mar. 6, 1999) <<http://stats.bls.gov/top20.html>>.

26. *See id.*

27. *See id.*

28. *See id.*

29. For a brief survey of various explanations for the decline of unions, see MICHAEL GOLDFIELD, *THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES* 94-112 (1987). For a good list of studies on union growth and decline, see Gary Chaison & Joseph Rose, *The Macrodeterminants of Union Growth and Decline*, in *THE STATE OF THE UNIONS* 12-36 (George Strauss et al. eds., 1991).

30. *See, e.g.*, Jack Fiorito & Charles R. Greer, *Determinants of U.S. Unionism: Past Research and Future Needs*, 21 *INDUS. REL.* 1, 12 (1982) (noting that “business downturns . . . create fundamental unrest as a result of layoffs” and that this discord could have a “positive effect on unionization”).

31. For a brief recounting of this argument, see Chaison & Rose, *supra* note 30, at 12-16.

the less union-friendly environs of the South and Southwest.³² Such explanations are in accord with the more traditional historical view that social and economic forces drive the development of the law rather than the converse. But while I think that view of history is fundamentally correct, there needs to be some account of the role of the law in providing greater or lesser opportunities for parties to act out their socially-determined ends.³³ Thus, explanations for labor's weakness that focus less upon the economic and social factors and more upon the role of employer resistance in a world of diminishing legal protections have some explanatory power.³⁴ And I think the NBA lockout illustrates some of that power.

With the passage of the Wagner Act in 1935, American labor was accorded unprecedented power to exercise its economic might without fear of the reprisals traditionally taken by employers. But what Congress gave, the courts, at least partially, took away. In *NLRB v. Mackay Radio & Telegraph Co.*,³⁵ for example, the Supreme Court held that an employer may not base a decision to reinstate on union activity, but then went on to note—in some of the most famous dicta in the Court's history—that an employer may permanently replace economic strikers.³⁶ What should have been a relatively innocuous decision became, at least in theory, a powerful limit on the rights of workers to strike. And while the full ex-

32. For a summary of this argument, see GOLDFIELD, *supra* note 29, at 96-99.

33. See, e.g., WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 168 (1991) (arguing that the widespread use of labor injunctions at the turn of the century tempered the more radical goals of the American labor movement). Forbath is but one example of a growing number of scholars who question the relegation of law and legal institutions to the status of mere epiphenomena of history. See, e.g., Robert Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 57 (1984) (attempting "to give a brief account of the impulses that have prompted the Critical scholars to their chosen ways of writing history").

34. For a general discussion of the employer-resistance theory of the decline of labor, see Chaison & Rose, *supra* note 30, at 22-24. Employers, of course, make use of both legal and illegal tactics in fighting union representation. Some of the principal illegal tactics include firing union supporters and refusing to bargain with newly certified unions. See, e.g., Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 *HARV. L. REV.* 1769, 1773-79 (1983). There are, however, a wide range of legal obstacles that employers may place in the path of unions, and those legal obstacles are the focus of this essay. See Remarks of NLRB Chairman Gould to New York University's National Conference on Labor, *Cooperation or Conflict: Problems and Potential in the National Labor Relations Act*, Daily Lab. Rep. (BNA) No. 105, at D-25 (June 1, 1995) (arguing that legal reform of rules governing the use of permanent replacements, penalties for the discharge of union supporters, and non-employee access to employer premises would strengthen labor).

35. 304 U.S. 333 (1938).

36. See *id.* at 345-46.

tent of an employer's right to use temporary or permanent replacements during lockouts is less settled, employers clearly retain some prerogative to replace the workers they have locked out.³⁷

For decades, employers rarely exercised their right to permanently replace striking workers, perhaps because the effect of doing so was often unpredictable.³⁸ But in the 1970s and 1980s, employers began to doubt the advantages of the postwar labor accord, and started to exercise their dormant powers to replace workers.³⁹ The use of replacements was not, of course, the only weapon in management's arsenal of legal and illegal union busting tactics, but it was a prominent one, and one that can be reasonably well-charted.

President Reagan's replacement of striking air traffic controllers during the PATCO dispute is widely viewed as the signal to employers to take the offensive when it comes to work stoppages.⁴⁰ A decade later, the legacy of that initial signal played out in another high profile dispute—the Caterpillar strike and lockout. During a contract dispute with Caterpillar, the United Auto Workers called for a strike of the company's East Peoria and Decatur, Illinois, plants.⁴¹ The company responded by locking out workers in two other locations, triggering a full-blown work stoppage involving over twelve thousand employees.⁴² Several months into the strike, Caterpillar announced that it planned to permanently replace striking workers.⁴³ Shortly thereafter, the union called an end to its strike, with one UAW lobbyist commenting that the announcement to hire permanent replacements “had a ‘devastating’ impact . . . especially among middle-aged workers with families or those nearing retirement who could not risk losing their jobs.”⁴⁴

37. See ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING* 360-61 (1976).

38. See Daily Lab. Rep. (BNA) No. 74, at A-11 (Apr. 16, 1992).

39. See Richard Edwards & Michael Podgursky, *The Unraveling Accord: American Unions in Crisis*, in *UNIONS IN CRISES AND BEYOND: PERSPECTIVES FROM SIX COUNTRIES* 15, 32-33 (Richard Edwards et al. eds., 1986).

40. See Michael H. LeRoy, *Severance of Bargaining Relationships During Replacement Strikes and Union Decertifications: An Empirical Analysis and Proposal to Amend Section 9(c)(3) of the NLRA*, 29 U.C. DAVIS L. REV. 1019, 1051-52 n.133 (1996).

41. For a concise history of the Caterpillar dispute, see Marc J. Bloch & Scott A. Moorman, *Working to Rule and Other Alternate Job Actions*, 9 LAB. LAW. 169, 175-78 (1993).

42. See *id.* at 175.

43. See *Caterpillar Threatens to Replace Strikers*, N.Y. TIMES, Apr. 2, 1992, at D1.

44. Daily Lab. Rep. (BNA) No. 74, at A-12 (Apr. 16, 1992).

The PATCO and Caterpillar strikes were not just high profile signals to other employers—and labor unions—of the potency of the threat of permanent replacement. The strikes also signaled the willingness of employers to replace relatively highly-skilled employees. The striking air traffic controllers, despite the illegality of their strike, believed that the government would never—indeed, could never—replace them. They were wrong. Union leaders in the Caterpillar strike believed that because Caterpillar's workers were so highly-skilled, the company could not make a credible threat of replacement.⁴⁵ They were also wrong.

By the early 1990s, a survey of over 273 employers by the Bureau of National Affairs revealed that thirty-two percent said that they would replace striking workers and another forty-eight percent said that they would consider such a move; only eighteen percent said that they would not replace striking workers.⁴⁶ It takes no great leap of faith to conclude that this attitudinal change toward the use of replacements, coupled with the state's relatively weak protections against such tactics, has played a role in stripping the strike and threat of strike of their power and contributed greatly to the decline in the number of work stoppages.

As the use of such tactics increases, labor unions and the workers that they protect suffer. But like most suffering, it does not befall everyone equally. While such tactics have been used against relatively highly-skilled workers, it is clearly the lesser skilled and unskilled workers who have the most to fear, simply because they are most easily replaced. More highly-skilled workers have less to fear, and the most highly-skilled workers—workers that may even be irreplaceable—have nothing to fear and, indeed, may actually be emboldened by their unique status. Which brings us to a worker on the far end of the highly-skilled spectrum: the professional athlete.

Professional athletes are some of the most highly-skilled workers in the world. They possess natural physical abilities, honed by years of practice, that cannot be easily duplicated with mere hard work or good fortune. With some training, and thicker

45. See Daily Lab. Rep. (BNA) No. 182, at A-5 (Sept. 18, 1992).

46. See Kirk Victor *Labor's Saved-Off Stick*, NAT'L J., June 6, 1992, at 1353. While little hard data on the use of striker replacements exists, a study by the General Accounting Office concluded that the use of replacements was more commonplace in the late 1980s than in the late 1970s. See Matthew W. Finkin, *Labor Policy and the Elevation of the Economic Strike*, 1990 U. ILL. L. REV. 547, 548-49 n.12 (1990).

glasses, I could probably be a competent air traffic controller. With some years of education as an actor or a rock musician, and a lucky break, I might be able to make a living in the entertainment industry. However, much to my dismay, I will never play in the NBA. One cannot simply take an ordinary person, train them for a few years, and turn them into a power forward that can square off with Karl Malone or, for that matter, into a centerfielder with a chance of hitting a Roger Clemens' fastball.

The unique status of the professional athlete is highlighted whenever a work stoppage occurs. Owners of professional sports franchises, even when faced with the revenue losses that may accompany a strike or lockout, rarely consider using temporary or permanent replacements. There is no evidence that the owners in the current NBA lockout ever seriously considered using replacements.⁴⁷ During the Major League Baseball strike in 1994, some of the owners embarrassed themselves by toying with the idea of continuing the season using replacement players.⁴⁸ And though replacement players were used for three games during the 1987 professional football strike, the effort was not very successful, and probably only possible because football players, with the exception of star players in the skill positions, are relatively anonymous in comparison to their counterparts in baseball, basketball, and hockey.⁴⁹ Professional athletes operate in what is essentially a closed labor market, which gives them a tremendous advantage over their counterparts in other occupations.⁵⁰

The unique status of most professional athletes gives their unions power and may be one of the primary reasons that sports unions are thriving while their more traditional counterparts are in deep trouble.⁵¹ The unique status also helps explain why, in this world of fewer and fewer work stoppages, we see so many upscale labor disputes, such as the NBA lockout or the American Airlines'

47. N.B.A. Commissioner David Stern noted, in rejecting the union's final offer, that he could "envision" the use of replacement players. See Mike Wise, *Its Offer Spurned, Union Will Vote on N.B.A. Plan*, N.Y. TIMES, Jan. 5 1999, at A1. However, there is little evidence that this was ever a serious threat.

48. See Steven Greenhouse, *Power Bargaining: Walking the Picket Line in Gucci loafers*, N.Y. TIMES, Nov. 22, 1998, § 4, at 4.

49. See Murray Chass, *As Trade Unions Struggle, Their Sports Cousins Thrive*, N.Y. TIMES, Sept. 5, 1994, § 1, at 1.

50. Professional sports leagues also operate in a market sheltered from competition from this country or abroad. See *id.*

51. See *id.*

pilot sickout,⁵² and fewer stoppages involving less skilled workers. Professional athletes and other highly-skilled workers are more willing to engage in a work stoppage either by initiating a strike or by standing up to management in the face of a lockout.

Of course, it should come as no surprise that an NBA athlete is in a stronger position than a line worker at the Caterpillar plant. Highly-skilled workers have always been better situated than their lesser-skilled counterparts to exercise their rights to engage in concerted action—a difference that in part explains the historical division of craft and industrial unions. After passage of the National Labor Relations Act, however, the combination of legal protections and employer norms allowed both groups to effectively wield economic power by engaging in work stoppages. As demonstrated by the precipitous decline in the number of work stoppages, this is no longer the case. Fewer and fewer workers feel free to make their demands felt in the same ways that they have in the past. Even the professional basketball players, despite their ability to weather a long lockout, settled on terms favorable to the owners.

The NBA lockout, then, is a high profile example of a labor dispute involving one of the few groups of workers that retains the ability to make use of one of labor's traditional prerogatives—the right to withhold one's labor. While such resolve may at first glance appear as a form of labor's strength, it must be viewed against a backdrop of the diminishing ability of less-skilled employees to withhold their labor in the face of weak legal protections and increasingly aggressive employer tactics. Professional basketball players are merely the exception that proves the new order—an order in which the most vulnerable workers are given the least protection.

IV. THE LOCKOUT AND PUBLIC ATTITUDES TOWARD LABOR

While the NBA labor dispute illustrates the widening gap in the power of highly-skilled and less-skilled workers to engage in work stoppages, and thus highlights one aspect of the decline of labor in the United States, the dispute may also make its own small contribution to that decline. Most workers probably perceive

52. See Laurence Zuckerman, *330 American Flights Are Canceled in a Dispute With Pilots*, N.Y. TIMES, Feb. 8, 1999, at A14.

few similarities between their working lives and the working lives of professional basketball players, and those perceptions were only enhanced by the way the players' union and its members were portrayed in the popular press. As a result, the NBA lockout may have strengthened the view of many that unions are out of touch with their lives and thus have little to offer them.

The NBA players certainly did little to enhance their connection with the average American worker (or fan). New York Knicks center Patrick Ewing, who is one of the leaders of the players' union and earns over \$18.5 million dollars per year,⁵³ complained that the owners were trying to take food out of his mouth.⁵⁴ Boston Celtics point guard Kenny Anderson became the poster boy for a group of disconnected, filthy-rich players in late October when he joked in an interview about the financial strain of the lockout.⁵⁵ Anderson whined about the financial burden of maintaining his Beverly Hills home (rented at \$12,500 per month), his fleet of eight luxury cars, and his monthly child support of \$7,200 for two children born to different women.⁵⁶ He noted that the loss of his NBA paycheck meant that he had to "get tight," a prospect that may have meant selling one of his eight cars.⁵⁷

The players' association did little to correct this image. The union chose Las Vegas, of all places, to hold its primary strategy session.⁵⁸ Later, a group of star players and their agents announced their intention to play a charity benefit game with the proceeds to go to UNICEF and, somewhat surprisingly, cash-strapped NBA players.⁵⁹ After being besieged by the negative publicity that came with asking the public to pay up to five hundred dollars per seat to benefit players who had trouble managing, at a minimum, \$275,000 per year, the game's organizers announced that all the proceeds would go to charitable organizations.⁶⁰ The players' un-

53. See Mike Wise, *N.B.A., Players to Talk Without Preconditions*, N.Y. TIMES, Dec. 2, 1998, at D5.

54. See George Vecsey, *Players Saw It Was Time To Provide*, N.Y. TIMES, Jan. 8, 1999, at D1.

55. See Mike Wise, *When Millionaires Are Laid Off*, N.Y. TIMES, Oct. 26, 1998, at D1.

56. See *id.*

57. *Id.* He did not have to sell any of the cars. See Mike Wise, *He Keeps Cars and Helps Others*, N.Y. TIMES, Nov. 24, 1998, at D2.

58. See William C. Rhoden, *Hardly The Boys Next Door*, N.Y. TIMES, Oct. 28, 1998, at D1.

59. See Selena Roberts, *Players Seek To Give, and Receive, Too*, N.Y. TIMES, Dec. 8, 1998, at D1.

60. See Mike Wise, *Proceeds Won't Go To Players*, N.Y. TIMES, Dec. 11, 1998, at D4.

ion seemed more like a social club for the rich and famous than an advocate for employee rights, and the players and their representative did little to dispel that perception.

Though the members of the players' union were savaged in the press as a group of spoiled millionaires, surprisingly little was written about such things as their philanthropic enterprises⁶¹ or their willingness to sacrifice an entire year of their relatively short careers for the good of the collective. But the most glaring press omission may have been a general lack of discussion of the one thing that would have put the players' salaries in perspective—the owners' profits.⁶² In part, this lack of coverage may have been because the players were losing large sums of money every time another set of games was canceled, and the owners were, by and large, losing only the revenue gained from ticket and concession sales. For while the players' contracts were not guaranteed, the owners' contracts with the National Broadcasting Company and Turner Sports for \$465 million provided an uninterrupted revenue flow throughout the course of the lockout.⁶³ NBA franchises continued to be a valued asset during the lockout and, indeed, some franchises actually came out ahead (principally because the lockout removed their biggest expense—player salaries).⁶⁴ But since

Some viewed the charity game as a step toward player autonomy that was unjustly criticized by the popular press. One noted,

At first glance, the negative media reaction is simply a response to an ill-conceived game. More subtly, it is an indirect rebuke of the players for not saving for a rainy day. But the criticism runs deeper than that and cuddles up to a deep-seated paternalism that often places the news media closer to management than to players. It's all right for players to make money for owners, to keep the plantation lighted and warm. But take a step — even an uncertain baby step — toward autonomy, and the whip-wielders crack the whip.

William C. Rhoden, *Where Charity Begins*, N.Y. TIMES, Dec. 12, 1998, at D1. While I sympathize with that position, I think the negative media reaction was largely due to the promotion of the game as a *charitable* contribution to NBA players (and UNICEF), not a generalized reaction to the players attempting to seize control of their own labor by establishing, for example, a rival basketball league.

61. See, e.g., Wise, *supra* note 55, at D1 (detailing some of Kenny Anderson's philanthropic activities).

62. Oscar Robertson, a former president of the players union and member of the Basketball Hall of Fame, was one of the few commentators to attempt to put the players' salaries in perspective. See Oscar Robertson, *Instead of Hoops, the Blame Game*, N.Y. TIMES, Nov. 7, 1998, at A15.

63. See Richard Sandomir, *Charting Profit And Loss in the N.B.A.*, N.Y. TIMES, Dec. 24, 1998, at D1.

64. See *id.*; Paul G. Barr, *Lockout Can't Sink Most NBA Stocks*, PENSIONS & INVESTMENTS, Nov. 2, 1998, at 1.

tales of financial hardship sell better than stories of success, especially when the tales involve complaints of rich celebrities, the owners emerged from the lockout relatively unscathed while the players and their union were portrayed as personifications of avarice.⁶⁵

Failing to cement its underdog image through poverty, the union turned to race. The dispute, after all, pitted a union whose membership was about eighty-five percent black against owners who were, without exception, white.⁶⁶ Many of the players, including some on the union's negotiating committee, publicly stated that they thought the league showed the players' union a lack of respect that was based, at least in part, on race.⁶⁷ The owners claimed that the union was just using racial identity to maintain union discipline and strengthen its bargaining position.⁶⁸ In any case, both owners and players said that race complicated the negotiations.⁶⁹

Race, though, never became an issue that connected the athletes with their more workaday counterparts. Perhaps this is because the issue was viewed as a negotiating strategy without any real roots in player dissatisfaction. As one commentator noted, the players' collective awareness of being black was "sold to NBA Properties a long time ago."⁷⁰ Whatever the reason, the union and its member players were never really able to use race as an effective means of plugging into a larger group identity, or of forging a connection with a working public that could not see fit to sympathize with the players' plight.

The tremendous differences between the concerns of NBA players and those of average workers may have left the public with little sense that unions can make a difference in their working lives. That perception would only be enhanced by many of the other high profile labor disputes involving unions with affluent

65. See, e.g., Rick Reilly, *Just Trying to Make an Indecent Wage*, SPORTS ILLUSTRATED, Nov. 9, 1998, at 142 (contrasting the NBA labor dispute with the ongoing strike by 1,200 Peterbilt truck workers and concluding that "[t]here are two major labor disputes in America right now . . . [and] one of them is a joke").

66. See Selena Roberts & Mike Wise, *Both Sides in N.B.A. Lockout Say Race Complicates Talks*, N.Y. TIMES, Dec. 16, 1998, at A1.

67. See *id.*

68. See *id.*

69. See *id.*

70. Rhoden, *supra* note 60, at D1.

memberships. Airline pilots, for example, have been flexing their muscle despite the fact that their rights to strike are severely limited under the Railway Labor Act. And physicians—the archetype of an elite profession—are organizing in astonishing numbers in reaction to the dominance of health maintenance organizations.⁷¹ So as labor is receiving some well-deserved publicity, the headlines reinforce the public perception of a labor movement that increasingly caters to the wealthy and powerful. And, given the recent difficulties that more ordinary unions have had exercising their power, that perception may not be far from reality.

This public image of the detached state of labor has only been strengthened by a recent spate of stories of union corruption. In New York City, for example, officials of District Council 37, a union representing 120,000 municipal workers, may have embezzled millions of dollars and engaged in voter fraud to ensure ratification of an unpopular contract.⁷² The prominence of elite bargaining units and the tales of corruption may contribute to the public's feeling that many unions have nothing to offer the average worker.

The message sent by the NBA lockout might have been: "If Michael Jordan can use the collective bargaining process to achieve results, so can you." But professional athletes are not coal miners or factory workers, and the public seems to recognize it. Union leaders acknowledge that the recent high profile disputes with pilots and professional basketball players do not help labor's image.⁷³ And polls that reflect decreasing support for labor point to the allegedly harmful effect that unions have on the economy and union corruption.⁷⁴ The NBA dispute, by highlighting a group of wealthy employees completely disconnected from the fans and greater public, will only strengthen negative opinions of labor.

The potentially negative publicity attendant to the lockout will only add to labor's woes. At the root of many explanations for labor's decline is that workers' general attitudes toward unions have changed. And, those attitudes may be some of the best predictors

71. See Steven Greenhouse, *Angered by H.M.O.'s Treatment, More Doctors Are Joining Unions*, N.Y. TIMES, Feb. 4, 1999, at A1.

72. See Steven Greenhouse, *Scandals Affirm New York As Union Corruption Capital*, N.Y. TIMES, Feb. 15, 1999, at B1. For a good catalogue of recent instances of union corruption, see Steven Greenhouse, *Corruption Tests Labor While It Recruits*, N.Y. TIMES, Jan. 3, 1999, § 1, at 14.

73. See Greenhouse, *supra* note 49, at 4.

74. See James Atleson, *Law and Union Power: Thoughts on the United States and Canada*, 42 BUFF. L. REV. 463, 486 (1994).

of the outcome of certification elections.⁷⁵ Without a sense of the collective, workers may be more prone to see unions as unresponsive to their needs, and high profile labor disputes such as the NBA lockout only reinforce those views.

V. CONCLUSION

The players stood their ground, the lockout ended, and a season of professional basketball, albeit an abridged version, has been salvaged. While the dispute had very little, if any, effect upon the development of labor law doctrine, it does provide an illuminating contrast with the weakened state of the American labor movement. Ironically enough, the only actual effect of the labor dispute on the landscape may be its contribution to growing cynicism that the labor movement has little to offer the ordinary worker. And, despite some isolated labor victories,⁷⁶ that view may not be far off the mark.

75. See, e.g., Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor's Decline*, 16 HOFSTRA LAB. & EMP. L.J. 133, 135-36 (1998) (arguing that any "serious attempt to explain labor's decline . . . must take into account social attitudes of workers"). But see Chaison & Rose, *supra* note 30, at 30-31 (cataloging the studies on the effect of public attitudes about labor as a factor in the growth or decline of union membership, and concluding that such attitudes have little explanatory power).

76. See, e.g., Steven Greenhouse, *In Biggest Drive Since 1937, Union Gains A Victory*, N.Y. TIMES, Feb. 26, 1999, at A1 (reporting a union's success in organizing California homecare workers).