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A Stronger Defensive Line: Extending NFL Owners' Antitrust Immunity Through the Norris-Laguardia Act in *Brady v. NFL*

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A STRONGER DEFENSIVE LINE: EXTENDING NFL OWNERS' ANTITRUST IMMUNITY THROUGH THE NORRIS-LAGUARDIA ACT IN *BRADY v. NFL*

Abstract: On July 8, 2011, in *Brady v. NFL*, the U.S. Court of Appeals for the Eighth Circuit held that the Norris-LaGuardia Act prevented the injunction of an NFL lockout. In so doing, the court provided to the NFL an additional shield from antitrust scrutiny. This Comment argues that by immunizing NFL lockouts from antitrust scrutiny, NFL players will lose an important bargaining tool: the antitrust challenge.

Introduction

On July 25, 2011 the National Football League (NFL) announced that its owners and players had reached a ten-year collective bargaining agreement, thereby preserving the 2011 professional football season.[1] This agreement ended a 136-day "lockout"—the longest in NFL history—during which players could not practice or use any NFL facilities.[2]

During the stalemate, nine professional players—including some of the game's most well-known athletes—and one prospective player (the "Players") filed *Brady v. NFL* in the U.S. District Court for the District of Minnesota, seeking an injunction to end the NFL's lockout.[3] The Players' complaint alleged that the lockout constituted a collusive agreement among the team owners and violated federal antitrust laws.[4] The district court granted a preliminary injunction of the lockout and the NFL appealed.[5] On July 8, 2011, the U.S. Court of Appeals for the Eighth Circuit vacated the district court's injunction in *Brady,* finding

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[1] *See* Jarrett Bell, *Deal Done, NFL on Fast Track,* USA Today, July 26, 2011, at 1C.

[2] *See* Brady v. NFL (*Brady II*), 644 F.3d 661, 663 (8th Cir. 2011); Bell, *supra* note 1.

[3] *See* Brady v. NFL (*Brady I*), 779 F. Supp. 2d 992, 998 (D. Minn. 2011), *rev'd,* 644 F.3d 661 (8th Cir. 2011).

[4] *See id.* at 998, 1004. Section 1 of the Sherman Antitrust Act prohibits agreements and conspiracies "in restraint of trade." 15 U.S.C. § 1 (2006). The Players' complaint alleged that the lockout constituted an illegal agreement among the NFL teams to coerce the players into agreeing to "drastically" reduced compensation levels. First Amended Class Action Complaint at 2–3, *Brady I,* 779 F. Supp. 2d 992 (No. 11-CV-639).

[5] *Brady II,* 644 F.3d at 669 (hearing the appeal); *Brady I,* 779 F. Supp. 2d at 1043 (granting the injunction).

that the Norris-LaGuardia Act (NLGA) proscribed court intervention in such a dispute.[6]

Part I of this Comment outlines the courts' historical use of the "non-statutory labor exemption"—a limited exemption from antitrust laws for union-employer agreements—to balance the competing aims of federal antitrust and labor policies.[7] Then, Part II examines the Eighth Circuit's novel use of the NLGA in *Brady* to achieve this same purpose.[8] Finally, Part III explores the consequences of *Brady* and argues that applying the NLGA to NFL lockouts thwarts players' abilities to bargain effectively and protect their rights.[9]

I. The Non-Statutory Labor Exemption Historically Has Determined the Availability of Antitrust Relief in NFL Suits

From the NFL's inception in 1920 until 1968, the NFL's club owners unilaterally controlled the NFL's operations.[10] In 1968, the National Labor Relations Board (the "Labor Board") recognized the NFL Players Association (the "Players Union") as the exclusive bargaining representative of all NFL players.[11] Later that year, the NFL and the Players Union entered into their first collective-bargaining agreement ("CBA").[12]

Since 1968, the NFL and the Players Union have negotiated several CBAs, and have engaged in multiple lawsuits.[13] Typically, the players have brought suit to enjoin the NFL from enforcing certain terms of employment, such as wages or free agency restrictions, and have argued that the enforcement of such terms by all NFL club owners violates antitrust laws.[14]

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[6] *Brady II,* 644 F.3d at 663. The NLGA prohibits courts from issuing injunctions "in a case involving or growing out of a labor dispute," except under certain conditions set forth in the Act. Norris-LaGuardia Act § 4, 29 U.S.C. § 104 (2006).

[7] *See infra* notes 10–34 and accompanying text.

[8] *See infra* notes 35–93 and accompanying text

[9] *See infra* notes 94–113 and accompanying text.

[10] *See* Mackey v. NFL, 543 F.2d 606, 610 (8th Cir. 1976).

[11] *See id.* The Labor Board is an independent federal agency which oversees the certification of unions and also adjudicates charges of unfair labor practices. *What We Do,* NLRB, https://www.nlrb.gov/what-we-do (last visited Jan. 16, 2012).

[12] *See Mackey*, 543 F.2d at 610.

[13] *See, e.g.*, Brown v. Pro Football, Inc. 518 U.S. 231, 234 (1996); Powell v. NFL (*Powell II*), 930 F.2d 1293, 1295–96 (8th Cir. 1989); *Mackey,* 543 F.2d at 609.

[14] *See, e.g., Brown,* 518 U.S. at 234 (challenging development squad wages); *Mackey,* 543 F.2d at 609 (challenging free agency restrictions).

Yet, before a court can address the antitrust claims, it must first determine whether the non-statutory labor exemption applies.[15] The non-statutory labor exemption is a judicially-created shield which insulates certain agreements between unions and employers from antitrust scrutiny.[16] Although statutory exemptions were created to protect unions from antitrust scrutiny (despite their inherently anticompetitive nature), the statutes did not explicitly exempt the *agreements* between unions and employers, such as the CBAs between the NFL and the Players Union.[17]

The Supreme Court created the non-statutory labor exemption to allow such collective bargaining to work: without antitrust immunity for the agreement between a union and employer, there would be no agreement.[18] Because the non-statutory labor exemption protects the agreement between unions and employers, either side can invoke the exemption.[19] Therefore, when the non-statutory labor exemption applies to the terms of a CBA, the NFL effectively achieves immunity from antitrust scrutiny on those terms.[20]

The Eighth Circuit first addressed the applicability of the non-statutory labor exemption in the NFL context in 1976 in *Mackey v. NFL*.[21] In *Mackey,* a group of players sought injunctive relief from the "Rozelle Rule," which severely restricted the ability of free agents to switch teams, and had been included in the two prior CBAs.[22] To determine whether the non-statutory labor exemption applied, the court set forth the *Mackey* test, which required that: (1) the restraint on trade

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[15] *See, e.g.*, *Brown,* 518 U.S. at 235 (holding that the Court could not address the antitrust claims because the non-statutory labor exemption applied); *Powell II,* 930 F.2d at 1297 (same); *Mackey,* 543 F.2d at 611–12, 616 (holding that the court could address the antitrust claims because the non-statutory labor exemption did not apply); McNeil v. NFL, 790 F. Supp. 871, 885 (D. Minn. 1992) (holding that the court could proceed with a trial on the merits on the antitrust claims because the non-statutory labor exemption did not apply).

[16] *See Mackey,* 543 F.2d at 611–12.

[17] *See* 29 U.S.C. §§ 104, 105 (2006) (prohibiting injunctions in labor disputes); *id.* § 113 (defining labor disputes); Clayton Act § 6, 15 U.S.C. § 17 (2006) (declaring that labor organizations are not illegal combinations in violation of antitrust laws); Clayton Act § 20, 29 U.S.C. § 52 (prohibiting injunctions of certain strikes and other labor organization activities); *Mackey,* 543 F.2d at 611–12.

[18] *See Mackey,* 543 F.2d at 611–12 (citing Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616, 621–22 (1975); Meat Cutters v. Jewel Tea, 381 U.S. 676, 689–90 (1965)).

[19] *See id.* at 612 (citing *Meat Cutters,* 381 U.S. at 729–32 (Goldberg, J., concurring); Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 847 n.14 (3d Cir. 1974)).

[20] *See, e.g.*, *Brown,* 518 U.S. at 235; *Powell II,* 930 F.2d at 1297; *Mackey,* 543 F.2d at 611; *McNeil,* 790 F. Supp. at 885.

[21] *See* 543 F.2d at 614.

[22] *See id.* at 609–10.

primarily affect only the parties to the collective bargaining agreement, (2) the agreement concern a mandatory subject of collective bargaining, and (3) the agreement be the product of bona fide arms-length bargaining.[23] Finding that the Rozelle Rule did not meet the third element, the Eighth Circuit held that the non-statutory labor exemption did not apply and that the Rozelle Rule violated federal antitrust laws.[24]

Yet, in 1989, the Eighth Circuit broadened the applicability of the non-statutory labor exemption in *Powell v. NFL* (*Powell II*) by including within the scope of the exemption negotiations after a CBA had expired.[25] In *Powell II,* a group of players and the Players Union sued to prevent the NFL from continuing to use a free agency restriction, which had been part of the expired CBA.[26] The court held that the non-statutory labor exemption continues to insulate a prior CBA after its expiration and beyond the point of impasse in the negotiations for a future CBA, if the prior CBA satisfies the three *Mackey* factors.[27] Although the Eighth Circuit did not determine when the exemption would end, it hinted that decertification of the Players Union could end the ongoing collective bargaining relationship and thus end the exemption.[28]

In 1991, the U.S. District Court for the District of Minnesota in *Powell v. NFL* (*Powell III*) confirmed the dicta of *Powell II,* by holding that the non-statutory labor exemption ceases to apply after a collective bargaining relationship ends.[29] Because the players had decertified the Players Union in the interim, the court held that the non-statutory la-

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[23] *See id.* at 614.

[24] *See id.* at 623.

[25] *See Powell II,* 930 F.2d at 1302–04 (holding that the non-statutory labor exemption continues after an agreement's expiration and beyond an impasse in negotiations on the subsequent collective bargaining agreement).

[26] *See id.* at 1295–96.

[27] *See id.* at 1302–04.

[28] *See id.* at 1303 ("[T]he nonstatutory labor exemption protects agreements conceived in an ongoing collective bargaining relationship from challenges under the antitrust laws.").

[29] *See* Powell v. NFL (*Powell III*), 764 F. Supp. 1351, 1358–59 (D. Minn. 1991); Sean W.L. Alford, Comment, *Dusting Off the AK-47: An Examination of NFL Players' Most Powerful Weapon in an Antitrust Lawsuit Against the NFL,* 88 N.C. L. Rev. 212, 223 (2009) ("[The non-statutory labor] exemption ceases to apply when the collective bargaining relationship between the players and the League terminates."); *see also Brown,* 518 U.S. at 250 (discussing the lower court's decision as "suggesting that [the non-statutory labor] exemption lasts until collapse of the collective-bargaining relationship, as evidenced by decertification of the union").

bor exemption no longer applied to the CBA and the continued use of the free agency restriction could be subject to antitrust scrutiny.[30]

Finally, in 1996, the Supreme Court in *Brown v. Pro Football, Inc.* further expanded the scope of the non-statutory labor exemption to cover certain terms that had never been included in a CBA.[31] During negotiations for a new CBA, the NFL proposed $1000 weekly salaries to all practice squad players.[32] The Players Union disagreed and after an impasse in the negotiations, the NFL unilaterally implemented its plan.[33] Relying heavily on the exemption's rationale to protect the collective bargaining process, the Court held that the non-statutory labor exemption protected the NFL's rule which "grew out of, and was directly related to, the lawful operation of the bargaining process."[34]

II. *Brady* Provides Extra Protection from Antitrust Suits Against NFL Lockouts

Against this backdrop, in 2006, the NFL and the Players Union agreed on a new CBA which would operate through the 2012–2013 football season, but which gave both sides the option to terminate the agreement in March 2011 upon written notice.[35] In May 2008, the NFL exercised this option, believing that the existing agreement gave the players too large a share of revenue.[36] The NFL indicated that it would impose a lockout unless a new agreement was reached before the expiration of the existing CBA.[37]

Rather than acquiesce to the NFL's demands, the Players opted to challenge the NFL's lockout as an anticompetitive agreement among the NFL teams in violation of antitrust laws.[38] The Players, attempting to end the collective bargaining relationship, decertified their union.[39] Based on their understanding of *Powell III,* the Players believed that their decertification would strip the NFL of its non-statutory labor ex-

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[30] *See Powell III,* 764 F. Supp. at 1359 ("Because no 'ongoing collective bargaining relationship' exists, the court determines that [the] nonstatutory labor exemption has ended.").

[31] *See Brown,* 518 U.S. at 234–35.

[32] *See id.* at 234.

[33] *See id.* at 234–35.

[34] *See id.* at 242, 250.

[35] *See* Brady v. NFL (*Brady II*), 644 F.3d 661, 666 (8th Cir. 2011).

[36] *See* White v. NFL, 766 F. Supp. 2d 941, 944 (D. Minn. 2011).

[37] *See Brady II,* 644 F.3d at 663.

[38] *See* First Amended Class Action Complaint, *supra* note 4, at 2–3.

[39] *See id.*

emption shield, thereby requiring the NFL to convince a court that the lockout did not violate antitrust laws.[40]

In the hours before the CBA expired on March 11, 2011, the Players Union notified the NFL that it would no longer represent NFL players as a union.[41] Later that day, nine individual players and one prospective player (the "Players") filed an antitrust action against the NFL seeking to enjoin the NFL's planned lockout.[42] The CBA expired at 11:59 p.m. on March 11, and at 12:00 a.m. on March 12 the NFL instituted a lockout, prohibiting NFL players from using NFL facilities, from receiving compensation or benefits, and from performing any employment duties.[43] The district court ruled that the suit was not exempt from the antitrust laws and granted a preliminary injunction of the lockout.[44] The NFL appealed.[45]

In *Brady,* the NFL argued that the district court's injunction of the NFL's lockout was invalid.[46] As noted above, the Players had disclaimed the Players Union as their bargaining representative before filing the initial suit, hoping to defeat the NFL's non-statutory labor exemption defense.[47] The Eighth Circuit, however, did not even address whether the non-statutory labor exemption applied.[48] Instead, it held that the Norris-LaGuardia Act (NLGA), which prohibits injunctions in cases "involving or growing out of a labor dispute," stripped the district court of power to issue the injunction.[49] Consequently, the Eighth Circuit vacated the injunction, thereby allowing the NFL to continue its lockout.[50]

Unlike prior suits between the Players Union and the NFL, in which plaintiffs sought to enjoin the imposition of certain terms of employment, in *Brady* the plaintiffs sought to enjoin a lockout.[51] Therefore, although previously the court had applied the NLGA haphazardly,

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[40] *See id.*

[41] *See Brady II,* 644 F.3d at 667.

[42] *See id.*

[43] *See id.* at 668.

[44] *See* Brady v. NFL (*Brady I*), 779 F. Supp. 2d 992, 1043 (D. Minn. 2011), *rev'd,* 644 F.3d 661 (8th Cir. 2011).

[45] *See Brady II,* 644 F.3d at 669.

[46] *See id.* at 663.

[47] *See id.* at 667.

[48] *See id.* at 682.

[49] *See* Norris-LaGuardia Act § 1, 29 U.S.C. § 101 (2006); *Brady II,* 644 F.3d at 682.

[50] *See Brady II,* 644 F.3d at 682.

[51] *See History,* NFL Players Ass'n, https://www.nflplayers.com/about-us/History (last visited Jan. 16, 2011) (stating that last lockout before 2011 occurred in 1970).

Brady may indicate that in the future courts will apply the NLGA in any case challenging an NFL lockout.[52]

The NLGA comprises five sections that are relevant here.[53] First, except in certain circumstances, section 1 prohibits courts from issuing injunctions in cases "involving or growing out of a labor dispute."[54] Second, section 13(c) defines "labor dispute."[55] Third, section 2 declares the public policy of the NLGA, namely to protect the right of the "individual unorganized worker" to organize with fellow workers.[56] Fourth, section 4 lists certain specific acts which are protected by the NLGA.[57] Finally, section 7 allows an exception to the NLGA and lists certain requirements which must be met before an injunction may be issued.[58]

The prior use of the NLGA in the NFL context has been very limited, with very few cases even referencing it.[59] Furthermore, there have been only two cases in which the court has found the NLGA applicable.[60] First, in 1988 in *Powell v. NFL* (*Powell I*), the U.S. District Court for the District of Minnesota held that the NLGA prohibited the court from issuing an injunction because the "collective bargaining process remain[ed] intact," and therefore the controversy constituted a labor dispute.[61] Second, in 1989 in *NFL Players Ass'n v. NFL,* the U.S. District Court for the District of Columbia simply stated that "[t]he clear congressional policy against judicial interference in labor disputes, as expressed in the Norris-LaGuardia Act . . . poses a formidable obstacle to Plaintiffs' request" and held that the players did not meet the exception to the NLGA.[62]

Despite the limited use of the NLGA in the NFL context, the Eighth Circuit applied the NLGA in *Brady* through a literal construction of the NLGA text.[63] In vacating the injunction, the Eighth Circuit

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[52] *See Brady II,* 644 F.3d at 675–77 (explaining that Section 4(a) of the NLGA prohibits injunctions of employer lockouts); *infra* notes 59–62 and accompanying text.

[53] *See* 29 U.S.C. §§ 101, 102, 104, 107, 113(c).

[54] *Id.* § 101.

[55] *Id.* § 113(c).

[56] *Id.* § 102.

[57] *Id.* § 104.

[58] *Id.* § 107.

[59] *See* Mackey v. NFL, 543 F.2d 606, 623 (8th Cir. 1976); NFL Players Ass'n v. NFL (*2008 NFL Players Ass'n*), 598 F. Supp. 2d 971, 978 (D. Minn. 2008); NFL Players Ass'n v. NFL (*1989 NFL Players Ass'n*), 724 F. Supp. 1027, 1027–28 (D.D.C. 1989); Powell v. NFL (*Powell I*), 690 F. Supp. 812, 814 (D. Minn. 1988); Jackson v. NFL, 802 F. Supp. 226, 233 (D. Minn. 1992).

[60] *See Powell I,* 690 F. Supp. at 814–17; *1989 NFL Players Ass'n,* 724 F. Supp. at 1027–28.

[61] *See Powell I,* 690 F. Supp. at 815.

[62] *See 1989 NFL Players Ass'n,* 724 F. Supp. at 1028.

[63] *See Brady II,* 644 F.3d at 682.

made three holdings.[64] First, it held that the fact that the Players Union disclaimed its union status did not avoid the existence of a "labor dispute" under the NLGA.[65] Second, it held that section 4(a) of the NLGA deprived the court of its power to enjoin the lockout of players then under contract.[66] Finally, it held that the district court had failed to meet the procedural requirements of section 7 of the NLGA to enjoin non-employees such as rookies and free agents, despite the fact that the NLGA did not otherwise prohibit an injunction of the lockout of these non-employees.[67]

Unlike the court in *Powell I,* which required an ongoing collective bargaining relationship to qualify a controversy as a labor dispute, the Eighth Circuit in *Brady* found that a labor dispute existed even though the collective bargaining relationship had ended.[68] Further, the Eighth Circuit held that the controversy in *Brady* was a labor dispute because it "involve[d] persons who are engaged in the same industry, trade, craft, or occupation"—professional football.[69] Despite the NLGA's broad definition of a labor dispute, other courts interpreting the NLGA in the NFL context have found the NLGA applicable only if the parties were in a collective bargaining relationship both when the act sought to be enjoined began and when the suit began.[70] Accordingly, under these interpretations, because the NFL imposed the lockout after the collective bargaining relationship ended, the controversy should not be considered a labor dispute.[71]

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[64] *See id.* at 673, 680–81.

[65] *See id.* at 673.

[66] *See id.* at 680–81.

[67] *See id.* at 681.

[68] *Compare Brady II,* 644 F.3d at 673 (finding that "[t]he text of the Norris-LaGuardia Act and the cases interpreting the term 'labor dispute' do not require the present existence of a union to establish a labor dispute"), *with Powell I,* 690 F. Supp. at 817 (finding that a labor dispute requires "the bargaining relationship and the collective bargaining process [to remain] intact").

[69] 29 U.S.C. § 113(a) (2006); *see Brady II,* 644 F.3d at 671.

[70] *See Mackey,* 543 F.2d at 616, 623 (finding it "not clear that the instant controversy constitutes . . . a labor dispute" when the disputed restraint was imposed outside the collective bargaining relationship); *Jackson,* 802 F. Supp. at 233 (holding that the NLGA did not apply when the collective bargaining relationship had ended); *1989 NFL Players Ass'n,* 724 F. Supp. at 1027–28 (holding that the NLGA applied when the parties were in a collective bargaining relationship when the restraint was imposed and when the suit was commenced); *Powell I,* 690 F. Supp. at 815 (holding that when "the bargaining relationship and the collective bargaining process remain[] intact, a controversy regarding terms or conditions of employment constitutes a labor dispute").

[71] *See Brown,* 518 U.S. at 250 (implying that decertification of a union will end a collective bargaining relationship).

To support its holding that a labor dispute can exist between the NFL and non-unionized Players, the court cited two cases in which no union existed but the Supreme Court nevertheless found that the parties were part of a labor dispute.[72] First, in 1938, the Supreme Court in *New Negro Alliance v. Sanitary Grocery Co.* held that a labor dispute existed between a grocery store and a non-unionized, but organized, "corporation composed of colored persons"[73] who picketed and boycotted the store to pressure it to employ African-Americans.[74] Second, the Supreme Court in 1962 in *NLRB v. Washington Aluminum Co.* held that a walkout of seven "wholly unorganized" employees to protest cold working conditions grew out of a labor dispute.[75]

Unlike in *Brady,* the goal of litigation in both *Sanitary Grocery Co.* and *Washington Aluminum Co.* conformed with the policy behind the NLGA: to protect agreements among employees.[76] In both cases, an employer sought to enjoin concerted activity among its employees—the exact scenario Congress wanted to prevent by enacting the NLGA.[77] In *Brady,* however, individual players sued the NFL seeking to enjoin a lockout.[78]

After the Eighth Circuit concluded that the controversy arose out of a labor dispute, and that the NLGA was therefore applicable, the court then determined that the NLGA prohibited the district court's injunction of the NFL's lockout.[79] Relying on the text of section 4, the court found that the NLGA prohibited a court from issuing an injunction against an employer engaging in a lockout of its employees.[80]

Because the text of section 4 protects "any person or persons participating or interested" in the labor dispute from court injunction, the court held that the protection extends to employers as well as employees.[81] Based on the plain language of section 4 as well as other Eighth Circuit cases interpreting that language, the court rejected the Players'

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[72] *See id.* at 671–72 (citing NLRB v. Wash. Aluminum Co., 370 U.S. 9, 14–15 (1962); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 555 (1938)).

[73] 303 U.S. at 555.

[74] *See id.*; *Brady II,* 644 F.3d at 671–72.

[75] 370 U.S. at 14–15; *Brady II,* 644 F.3d at 671–72.

[76] *See Wash. Aluminum Co.*, 370 U.S. at 14–15; *Sanitary Grocery Co.*, 303 U.S. at 555; *Brady II,* 644 F.3d at 667–68.

[77] *See Wash. Aluminum Co.*, 370 U.S. at 14–15; *Sanitary Grocery Co.*, 303 U.S. at 555; *Powell I,* 690 F. Supp. at 816.

[78] *See Brady II,* 644 F.3d at 667–68.

[79] *See id.* at 681.

[80] *See id.* at 674–81.

[81] *See id.* at 675–76 (quoting 29 U.S.C. § 104 (2006)).

assertion that section 4 extends to employers only when employers are explicitly listed in a subsection.[82]

Yet, as the dissent in *Brady* noted, the Eighth Circuit's holding—that the NLGA prohibits injunctions of employer lockouts—conflicts with at least three other circuits that have addressed the issue.[83] For example, in 1970, in *de Arroyo v. Sindicato de Trabajadores Packinghouse,* the U.S. Court of Appeals for the First Circuit rejected a literal interpretation of section 4(a) because the legislative history indicated that it "was not intended as a protection for employers."[84] Additionally, in 1962 in *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad Co.*, the U.S. Court of Appeals for the Seventh Circuit held that the language and history of section 4 demonstrated that Congress' intent "was to protect only employees and unions."[85] Finally, in 1981 the U.S. Court of Appeals for the Ninth Circuit in *Local 2750, Lumber & Sawmill Workers Union v. Cole* echoed these opinions, stating that section 4 "was clearly intended to apply to the termination of the work relationship by the employee rather than the employer."[86]

Nevertheless, the court found that despite legislative history suggesting that the NLGA was enacted to protect employees, the Act could be applied to employers.[87] In addition, the court cited legislative history and Supreme Court cases, which demonstrated a more general congressional intent to limit courts' interference with labor disputes.[88] According to the court, that material suggested that both employees and employers could invoke the protection of the NLGA.[89]

Although the court held that under the NLGA the NFL could lockout players under contract, it also held that under the NLGA the NFL could be enjoined from refusing to deal with players not under contract, such as free agents and prospective players.[90] Nonetheless, the court held that the district court's injunction of the players not under contract did not conform to the requirements set forth in section 7 of the NLGA.[91] Section 7 requires a court to hear "testimony of witnesses in open court (with opportunity for cross-examination) in support of

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[82] *See id.* at 675–76.
[83] *See id.* at 687 (Bye, J., dissenting).
[84] 425 F.2d 281, 291 (1st Cir. 1970); *see Brady II,* 644 F.3d at 687–88 (Bye, J., dissenting).
[85] 310 F.2d 513, 517 (7th Cir. 1962); *see Brady II,* 644 F.3d at 688 (Bye, J., dissenting).
[86] 663 F.2d 983, 986 (9th Cir. 1981).
[87] *See Brady II,* 644 F.3d at 678.
[88] *See id.* at 677–80.
[89] *See id.*
[90] *See id.* at 681.
[91] *See id.*

the allegations of a complaint made under oath" before issuing an injunction in a case involving a labor dispute.[92] Because the district court did not go through such procedures, the Eighth Circuit vacated the injunction.[93]

III. The *Brady* Decision Undermines the Policy of the NLGA by Destroying the Players' Bargaining Power

The Eighth Circuit's decision in *Brady* frustrates the stated public policy of the Norris-LaGuardia Act (NLGA).[94] In enacting the NLGA, Congress intended to protect labor organizations from coercion by employers.[95] Yet, the *Brady* decision destroys the players' ability to negotiate effectively with the NFL by stripping the players of one of the most important bargaining tools in their arsenal: the "antitrust lever."[96]

At first glance, it might seem that the *Brady* decision benefited everyone; the NFL and the Players negotiated an agreement to end the lockout without interference from the courts.[97] Furthermore, the agreement negotiated immediately after *Brady* benefited both sides; the NFL owners received a larger share of the revenue than under the previous CBA, and the players received increased minimum salaries.[98] In the future, however, the *Brady* decision gives the NFL a trump card, because the NFL now can lock out players to coerce them to agree to onerous terms.[99]

Without recourse to the courts to enjoin a lockout in the future, players may be powerless to the NFL's demands in negotiations.[100] Unlike employers in competitive labor markets, which must pay their

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[92] 29 U.S.C. § 107 (2006).

[93] *See Brady II,* 644 F.3d at 681–82.

[94] *See* Norris-LaGuardia Act § 2, 29 U.S.C. § 102 (2006); *supra* notes 53–93 and accompanying text.

[95] *See* 29 U.S.C. § 102 (declaring the public policy of the NLGA to be for the protection of individual unorganized workers to associate with each other "to negotiate the terms and conditions of [] employment . . . free from the interference, restraint, or coercion of employers").

[96] *See* Brady v. NFL (*Brady II*), 644 F.3d 661, 682; Powell v. NFL (*Powell II*), 930 F.2d 1293, 1307 (1989) (Heaney, J., dissenting) (stating that by extending the protection of the non-statutory labor exemption beyond impasse, "the majority has eliminated the owners' fear of the antitrust lever").

[97] *See* Bell, *supra* note 1.

[98] *See* Gregg Rosenthal, *Winners, Losers from the NFL Lockout,* Pro Football Talk (July 25, 2011, 3:15 PM), http://profootballtalk.nbcsports.com/2011/07/25/winners-losers-from-the-nfl-lockout/.

[99] *See infra* notes 100–113 and accompanying text.

[100] See *infra* notes 101–113 for a discussion of the relative bargaining power of the NFL and the players after the *Brady* decision.

employees a market wage, a monopsonist like the NFL can set a low wage without losing employees to competing employers because no competitors exist.[101]

In the wake of *Brady,* the NFL might exercise its monopsony power to underpay players.[102] Another lockout to strong-arm the players into agreeing to low wages is not forbidden.[103] The highly-specialized skills of professional football players are not easily transferable to other careers and players may have limited career alternatives.[104] Because of these limited alternative options, players have incentives to agree to almost any wage rate the NFL sets, as long as that rate is above their next-best career options.[105]

Moreover, the offsetting tools available to the NFL in labor negotiations are far more effective than the offsetting tools available to the players.[106] For example, when the NFL imposes a lockout, the players have no other market in which they can "sell" their services.[107] In contrast, when the players decide to strike, the NFL can replace the players

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[101] *See* John A. Litwinski, *Regulation of Labor Market Monopsony,* 22 Berkeley J. Emp. & Lab. L. 49, 62 (2001). "Monopsony is often thought of as the flip side of monopoly. A monopolist is a seller with no rivals; a monopsonist is a buyer with no rivals. . . . Monopsony injures efficient allocation by reducing the quantity of the input product or service below the efficient level." Black's Law Dictionary 1933 (9th ed. 2009). The NFL, like other professional sports leagues, is arguably monopsonist because professional football athletes cannot readily transfer their talents to other careers, athletic or otherwise, and thus the NFL does not compete with other employers of professional football talent. *See* Chi. Prof'l Sports Ltd. P'ship v. NBA, 95 F.3d 593, 599 (7th Cir. 1996). In defining relevant markets for antitrust purposes, courts have noted that the entertainment provided by NFL football games is unique and that there are "limited substitutes" for consumers of NFL games. *See* Michael A. McCann, *Antitrust, Governance, and Postseason College Football,* 52 B.C. L. Rev. 517, 535 (2011) (arguing that an antitrust review of college football's Bowl Championship Series system would likely utilize a constricted relevant market similar to that used in the NFL context due to the unique characteristics of each). Analogously, the talents of professional football players are unique and the substitute career options for them are even more limited. *See Chi. Prof'l Sports,* 95 F.3d at 599.

[102] *See* Litwinski, *supra* note 101, at 62.

[103] *See id.* Although it is unlikely that the salaries of professional athletes will ever fall to a level that most would consider to be "low," the wages will likely fall to be lower than what the players would earn in a competitive labor market. *See id.* In a competitive labor market, employees would be paid a wage equal to their marginal product (i.e., the value of what they produce). *See id.* at 56. Arguably, any rate below an employee's marginal product is "low." *See id.*

[104] *See id.* at 62 (discussing how "firm-specific training"—training that is useless to other employers—allows a monopsony to "exploit" workers by paying them less than their marginal product).

[105] *See id.*

[106] *See infra* notes 107–09 and accompanying text.

[107] *See supra* notes 104–105 and accompanying text.

with non-unionized players.[108] In fact, when the players decided to strike in 1987 to pressure the NFL to change the free agency rule, the NFL hired replacement players without suffering significant financial damage.[109]

Accordingly, the *Brady* decision vitiates the players' bargaining power against the clear public policy of the NLGA.[110] The majority in *Brady* states that insulating employer lockouts is not necessarily contrary to the NLGA public policy because the "broader purpose" of the NLGA is to allow the "natural interplay of the competing economic forces of labor and capital."[111] Yet, as interpreted by the majority, the NLGA hamstrings the players, forcing them to accept the terms imposed by the NFL because they have no economic force with which to negotiate.[112] This result is not contemplated by either the stated public policy of the NLGA nor the "broader purpose" the *Brady* majority advances.[113]

Conclusion

In 2011, the U.S. Court of Appeals for the Eighth Circuit held in *Brady v. NFL* that a district court did not have the power to issue an injunction of the NFL's lockout. Unlike many cases before, in which the courts have used the non-statutory labor exemption to determine the appropriate balance between federal labor policy and federal antitrust policy, the *Brady* court applied the NLGA. In so doing, the court forfeited its power to analyze the antitrust merits of the case and further

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[108] *See* Kevin W. Wells, *Labor Relations in the National Football League: A Historical and Legal Perspective,* 18 Sports Law J. 93, 98 (2011).

[109] *See* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports,* 1989 Duke L.J. 339, 404.

> In 1987, many fans attended the replacement games and, when the walkout ended, fans seemed to forget the strike ever took place. Few employers in other industries could respond to a work stoppage by hiring inferior employees and producing an inferior product without the fear of losing market share and employees to a competitor. Few other employers or multi-employer bargaining units enjoy the type of monopoly and monopsony power enjoyed by the NFL owners. Not surprisingly, few unions face the same disadvantages at the bargaining table as the NFLPA.

Id.

[110] *See* 29 U.S.C. § 102 (2006).

[111] *See Brady II,* 644 F.3d at 678 (quoting Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R., 353 U.S. 30, 40 (1957)).

[112] *See Brady II,* 644 F.3d at 669–681 (interpreting the NLGA to prohibit enjoining lockouts of employees whether or not they are unionized); *supra* notes 100–105 and accompanying text.

[113] *See* 29 U.S.C. § 102; *Brady II,* 644 F.3d at 678.

insulated the NFL, a monopsony in the market for high-level football talent, from antitrust scrutiny. As a result, the court deprived NFL players of important bargaining leverage, thus allowing them to be subject to more oppressive demands from the monopsonistic NFL.

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