No. 11-1898

In the

United States Court of Appeals

for the

Eighth Circuit

Tom Brady, *et al.*,

Plaintiffs-Appellees,

vs.

National Football League, *et al.*,

Defendants-Appellants.

APPELLANTS' REPLY IN SUPPORT OF MOTION FOR A STAY PENDING APPEAL AND EXPEDITED APPEAL

Gregg H. Levy
Benjamin C. Block
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000
(202) 662-6291 (fax)

Paul D. Clement
BANCROFT PLLC
1919 M Street, NW
Washington, DC 20036
(202) 234-0090
(202) 234-2806 (fax)

David Boies
William A. Isaacson
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200
(914) 749-8300 (fax)

Daniel J. Connolly
Aaron D. Van Oort
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7806
(612) 766-1600 (fax)

May 2, 2011

The threshold question here is one of jurisdiction, and the District Court lacked it. Congress long ago determined that, to achieve and secure labor peace, federal courts may not interfere—on either side—in cases involving or growing out of a labor dispute. The Norris-LaGuardia Act imposed this jurisdictional bar in broad terms, utilizing a capacious definition of a "labor dispute" and expressly covering cases "involving *or growing out of*" such disputes. The text of the Act therefore resolves this appeal. The courts, including the Supreme Court, have consistently applied the Act according to its terms, with the result that only one district court had ever before enjoined a lockout—a ruling that was quickly reversed.

The Order here is incompatible with the plain meaning of the Act and should suffer the same fate. It is also inconsistent with the doctrine of primary jurisdiction and the nonstatutory labor exemption as explained by the Supreme Court. The plaintiffs and the District Court attempt to sidestep all three obstacles by pointing to the union's unilateral disclaimer. But these legal principles and the policies underlying them are not so easily circumvented. Multiemployer bargaining would be all but impossible if a union could simply disclaim and immediately bring its bargaining demands to an antitrust court. The District Court and plaintiffs are wrong three times over that a disclaimer defeats these jurisdictional and legal obstacles.

The Norris-LaGuardia Act precludes the substitution of antitrust injunctions for collective bargaining. Even a valid disclaimer would not change the indisput-

able fact that this case involves or at least grows out of a labor dispute. The Act therefore bars the injunction. Nor would a valid disclaimer change the indisputable fact that this case is not "sufficiently distant in time or in circumstances" from the bargaining process, and that the nonstatutory exemption continues to apply.

And, of course, the question whether the purported disclaimer is actually valid is one within the primary jurisdiction of the NLRB. Even a brief review of governing Board precedent demonstrates that the agency is likely to find the disclaimer invalid. It is not unequivocal—NFLPA leadership, including several plaintiffs, indicated both before and after the purported disclaimer that they continue to seek a new collective bargaining agreement.[1] It is not in good faith—plaintiffs are not dissatisfied with the NFLPA or its leadership; indeed, they are represented in this lawsuit by the NFLPA's lawyers, including its Executive Director.[2] And the disclaimer admittedly was done as a tactic—an "ace in our sleeve"

---

[1] "We want a fair CBA. That's it." (Ex. 9 at 2.) "We're still going to act as if we are [a union … and] try as a whole to get a deal done." (Ex. 8 at 6.) After the Order, NFLPA representative Jay Feely said that a litigation settlement "would hopefully become a new collectively-bargained agreement." *See* http://espn.go.com/espnradio/player?rd=1#podcenter/?id=6435674).

[2] Plaintiff Mike Vrabel, a member of the NFLPA executive committee, in response to reports that some players felt unrepresented in the District Court mediation, said on April 21: "We're players here to represent players and De [Smith, Executive Director of the NFLPA] works for us. They do (have a seat). And if they're unhappy with that seat, we have to vote in a new executive committee and a new board of reps." *See* http://profootballtalk.nbcsports.com/2011/04/20.

(Ex. 6 at 10) and a "good strategy on our part as a union" (Ex. 7 at 1)—aimed to blunt the lockout in order to achieve desired terms and conditions of employment through the threat of treble damage liability. (*See* Ex. 12 at 45-46.)

On the balance of hardships, the District Court focused on the wrong time-frame. Considering it "unlikely" that this Court would decide the appeal "before the season begins," the District Court decried the potential for harm in the event of a "lost season." (Ex. 2 at 13.) But an expedited appeal, to which all parties have now agreed, could readily be resolved during the off-season. During this short interval, a stay would cause the players no material, and certainly no irreparable, harm.

Conversely, the absence of a stay *would* irreparably harm the NFL by undercutting its labor law rights and irreversibly scrambling the eggs of player-club transactions. Those harms would be real and immediate, and they more than adequately support the issuance of a stay here. "The fact must not be lost sight of, that however narrow the scope of injunctive relief may be in form, the issuance of the writ for any purpose in a labor dispute will generally tip the scales of the controversy. Plainly this was the very evil against which the Norris-LaGuardia Act was basically directed." *Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co.*, 118 F.2d 615, 616-17 (8th Cir. 1941).

I. The NFL Has Established a Strong Showing of Likely Success on the Merits.

"In deciding [a] motion for stay pending appeal … likelihood of success on the merits is the most significant" factor. *S&M Constrs., Inc. v. Foley Co.*, 959 F.2d 97, 98 (8th Cir. 1992). The NFL has made a strong showing of likelihood of success in three separate ways, including that the District Court lacked jurisdiction.

Norris-LaGuardia Act. The plain meaning of the text of the Norris-LaGuardia Act, confirmed by the governing case law, demonstrates that the District Court lacked jurisdiction to enjoin the lockout. Plaintiffs rely on inapposite cases that are readily answered by the statute's unambiguous text.[3]

The District Court assumed jurisdiction to issue the injunction by concluding that, in the absence of a union (itself a contested issue), this case does not present a "labor dispute." (Ex. 1 at 56.) That conclusion is contrary to the Act's plain text.

To begin, the Act applies to cases "involving *or growing out of*" a labor dispute. 29 U.S.C. §§ 101, 104 (emphasis added). Thus, even if disclaimer somehow magically brought the labor dispute to an end, it would not matter for purposes of the Act because disclaimer cannot retrospectively change the dispute's origins. This case and the injunction would still grow out of a labor dispute. And that alone

[3] The Court reviews this issue of law *de novo*. *See Heartland Academy Cmty. Church v. Waddle*, 335 F.3d 684, 689-90 (8th Cir. 2003). *Accord Burlington N. Santa Fe Ry. Co. v. Int'l Bhd. of Teamsters*, 203 F.3d 703, 707 (9th Cir. 2000) ("The existence of a 'labor dispute' within the meaning of the Norris-LaGuardia Act is … a question of law that we review *de novo*.").

is enough to resolve this stay request and ultimately this appeal, because the Act not only precludes injunctions against lockouts altogether, but it also imposes other jurisdictional requirements, such as an evidentiary hearing and certain factual findings, that were not satisfied here. (*See* Mot. at 9 n.3 (citing 29 U.S.C. § 107).)

But equally important, the District Court and plaintiffs are simply wrong that a union is required for a "labor dispute." The Act defines "labor dispute" broadly to include "*any* controversy concerning terms or conditions of employment." 29 U.S.C. § 113(c) (emphasis added). Controversies concerning terms or conditions of employment can and do occur whether or not employees are unionized. Section 2 of the Act confirms this common sense reading, observing than an employee can negotiate "*his* terms and conditions of employment" with or without associating with other employees. 29 U.S.C. § 102 (emphasis added); *compare* Opp. 26 (substituting "[their]" for "his" in the quotation).

The Supreme Court recognized and applied the plain terms of the Act in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938). There, Respondent Sanitary made the same argument that shaped the District Court's ruling here, asserting that the absence of a union translated into the absence of a "labor dispute" and thereby eliminated the Act's jurisdictional bar. It attempted to distinguish prior cases on the ground that "a recognized labor union or unions or individual members thereof were involved and directly interested as parties to the

causes [and] [*n*]*o such facts exist in the cause under review*." Br. for Resp., 1938 WL 39106 (Feb. 10, 1938), at *24 (emphasis added). The Supreme Court would have none of it. After examining the plain language of the Act, the Supreme Court rejected that argument, concluding that the dispute, which involved no union, fit squarely within the statute's jurisdictional bar. *See* 303 U.S. at 560-61.

Plaintiffs go even further than the District Court and argue that the Act bars injunctions against strikes but not lockouts. That position is flatly inconsistent with the authorities cited in our Motion (at 7), including *Chicago Midtown Milk Distribs., Inc. v. Dean Foods Co.,* 1970 WL 2761, at *1 (7th Cir. July 9, 1970). And try as they might (at 30 n.11), plaintiffs cannot explain why, if the Act bars injunctions only against strikes but not against lockouts, Section 208 of the Labor-Management Relations Act, 29 U.S.C. § 178, expressly exempts from the provisions of the Norris-LaGuardia Act extraordinary presidential requests for injunctions against *both* strikes *and* "lockouts." (*See* Mot. at 7 n.2.)

Plaintiffs instead offer a tortured analysis of the phrase "ceasing or refusing to remain in any relation of employment" in Section 4(a) of the Act, suggesting that the phrase covers only strikes. But a lockout is self-evidently a refusal to remain in a relation of employment. Moreover, Section 4 bars injunctions against persons "interested or participating in" a labor dispute, a term expressly defined to include both *management* and employees. 29 U.S.C. § 113(b). If the provisions of

Section 4 were meant to apply only to strikes, this definition would make no sense.[4]

As the District Court did not have jurisdiction to enter the Order under the Act, this Court is likely to reverse.

Primary Jurisdiction. The NFL has made an equally strong showing that the District Court should not have entered an injunction without the views of the NLRB concerning the validity of the NFLPA's disclaimer.

The District Court stated: "This Court, having found that the Union's unequivocal disclaimer is valid and effective, concludes there is no need to defer any issue to the NLRB." (Ex. 1 at 89.) That statement encapsulates the error: The District Court decided for itself—and without any evidentiary hearing—what it thought the NLRB would decide on a matter undeniably within the Board's specialized expertise. And it reached its conclusion by ignoring all of the evidence that the NFL had submitted demonstrating that the Union did not disclaim unequivocally, nor in good faith, but instead to seek a tactical advantage in negotiations.

---

[4] Plaintiffs contend that Section 4 was "drawn from Section 20 of the Clayton Act," 29 U.S.C. § 52. (Opp. 29.) But that argument gets them nowhere because courts have recognized that the language of the Clayton Act would proscribe injunctions against lockouts as well as strikes. *See, e.g.*, *NBA v. Williams*, 45 F.3d 684, 689 (2d Cir. 1995). Plaintiffs also assert (Opp. 30) that the Act does not apply to lockouts because it has been found not to bar reinstatement of employees wrongfully terminated in contravention of existing collective bargaining agreements. That argument, a complete non-sequitur, has nothing to do with lockouts.

Plaintiffs defend the Court's intrusion on the Board's primary jurisdiction by arguing that there is no need for "uniformity of resolution" concerning the validity of the disclaimer. (Opp. 24.) That position is self-evidently wrong: If the Board concludes that the disclaimer is invalid and seeks to enforce an order compelling the NFLPA to resume good-faith bargaining, there will be a direct conflict.

Plaintiffs separately argue that there is no need to defer to the expertise of the Board because the disclaimer is not a "sham." (Opp. 23.) Of course, that argument assumes its conclusion. And it rests on the unsupportable proposition that the Board will consider itself bound by a nonbinding 1991 advice memorandum instead of investigating the facts surrounding *this* disclaimer, which include the fact that the *last* disclaimer, which was avowedly "permanent and irreversible," turned out to be temporary. Plaintiffs attempt to dismiss this critical distinction by arguing that in 1993, the NFLPA "reunionized" against its will, an inapt assertion contradicted by Judge Doty's contemporaneous finding that the NFL had no role in the "recertification." *White v. NFL*, 836 F. Supp. 1458, 1465 & n.16 (D. Minn. 1993).[5]

[5] Plaintiffs contend that the NFL waived the right to argue that the disclaimer is a sham. The provision on which they rely would have applied only if the disclaimer had occurred *after* the CBA expired. But here, the NFLPA disclaimed *before* the CBA expired (in an attempt to avoid a six-month bar on antitrust lawsuits set forth in a companion CBA section) thereby rendering the "waiver" provision inapplicable. (*See* Dkt No. 34 at 39-41.)

Nonstatutory Labor Exemption. Plaintiffs' defense of the District Court's ruling on the nonstatutory labor exemption rests on a fundamental misreading of the Supreme Court's decision in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

The essence of *Brown* is that multiemployer bargaining, favored by federal labor law and federal labor policy, could not function if the exemption could disappear, exposing the members of the multiemployer bargaining unit to antitrust liability, at the moment of impasse. Virtually every word of the opinion—and certainly its underlying rationale—applies with no less force to the prospect that the exemption could disappear instantly upon a union's unilateral disclaimer.

Indeed, if plaintiffs prevail here, disclaimer would become unions' tactic of choice at or even before impasse, resulting in (a) *disincentives* for employers to engage in multiemployer bargaining in the first instance and (b) *disincentives* for unions engaged in multiemployer bargaining to negotiate in good faith. If plaintiffs prevail, in other industries disclaimer will become a temporary status like impasse, just as it has become in this industry.[6]

---

[6] It is no answer for plaintiffs to contend that the exemption must end because they have given up their right to strike. (Opp. 20.) The premise is not true: Workers can collectively cease or refuse to perform work without being in a union. And through this lawsuit, the NFLPA continues to seek to shape collective terms and conditions of player employment; it has simply substituted the antitrust courtroom for the collective bargaining table.

The District Court assumed that the exemption protects "only agreements that address the terms and conditions subject to mandatory collective bargaining," not economic tools, such as a lockout, used to negotiate those terms. (Ex. 1 at 83.) But the Supreme Court in *Brown* considered and expressly rejected that argument, holding that the exemption protects not only (a) agreements between employers and employees concerning "terms" of employment but also (b) agreements among the members of the multiemployer bargaining unit regarding "tactics" in collective bargaining. *Brown*, 518 U.S. at 243-44. And the Court flatly declared that "[l]abor law permits employers, after impasse, to engage in considerable joint behavior, including joint lockouts." *Id.* at 245.

The District Court also assumed that the "sufficiently distant" test does not apply after a union has disclaimed. (Ex. 1 at 85.) That was a twofold error. Under this Court's holding in *Powell*, the District Court erred in finding the exemption inapplicable before Board proceedings related to the disclaimer had been resolved. *See Powell v. NFL*, 930 F.2d 1293, 1303-04 (1989). The District Court was not free to decide the issue of the alleged validity of the disclaimer and asserted collapse of the bargaining relationship for itself.

But even if the disclaimer were valid, the issue of the exemption's continued applicability is *precisely* the issue that the Supreme Court *reserved* in *Brown*. It not only reserved the issue, but it also made clear that it would be inappropriate for it

or any other court to draw the outer limits of the exemption—including "*whether*" it ends upon the "collapse of the collective-bargaining relationship, as evidenced by the decertification of the union"—"without the detailed views of the Board." 518 U.S. at 250 (emphasis added).[7] Thus, it is beyond dispute that the District Court did precisely what the Supreme Court held that it would not and could not do without the input of the Board.

II. The Balance of Hardships Supports the Issuance of a Stay.

The District Court dismissed the notion that enjoining the lockout would harm the NFL by pointing to the fact that the League *wants* to have a full 2011 season. (*See* Ex. 2 at 11-12.) Of course the League wants to have a season—and of course the clubs took steps to prepare for it, both before and after the District Court issued its injunction and plaintiffs threatened contempt proceedings—but that wholly ignores the fact that the League locked out the players as part of a process, approved by federal labor law and protected by federal statute, to determine the terms and conditions of player employment for that season. The District Court's approach is the equivalent of saying that striking workers are not irreparably

[7] It bears mention that there has been no decertification election supervised and affirmed by the Board here. *See* 29 U.S.C. § 159(e). Instead, the NFLPA unilaterally purported to disclaim representation. "[T]he Board is not compelled to find a valid and effective disclaimer just because the union uses the word, and regardless of other facts in the case." *Capitol Market No. 1*, 145 NLRB 1430, 1431 (1964).

harmed by an order forcing them back to work because they want jobs, albeit on different terms.

Strikes and lockouts seek to influence the terms on which the employment relationship will go forward. Federal labor law permits an employer to institute a lockout "for the sole purpose of bringing economic pressure to bear in support of his legitimate bargaining position." *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965). The loss of that leverage and the consequent delay in reaching a comprehensive agreement on terms and conditions of employment are the essence of irreparable harm and fully support a stay. *See, e.g.*, *In re Pauly Jail*, 118 F.2d at 616-17 (injunctions would "tip the scale" in a labor dispute); *Dist. No. 1*, 723 F.2d 70, 75 (D.C. Cir. 1983) (federal labor policy opposes "federal court intervention in private labor disputes" because of the heavy and irreparable skewing effect of an injunctive order). *Cf. Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996) (finding irreparable harm when it would be "extremely difficult … to recreate the atmosphere of free negotiations that would have existed" in the absence of a challenged agency rule that altered the balance of negotiations).

The loss of the ability to maintain a lockout or a strike is the essence of irreparable harm in any labor dispute (and the *raison d'etre* of the Norris-LaGuardia Act). But in this particular context, there is much more. Absent a stay, there will be trades, player signings, players cut under existing contracts, and a host of other

changes in employment relationships—likely involving hundreds of player-employees and 32 club-employers—all occurring outside of the collective bargaining process. None of this could be restored if this Court fails to continue the stay and then concludes that the Order should not have issued. That harm, too, is irreparable. *See Powell v. NFL*, 690 F. Supp. 812, 818 (D. Minn. 1988) ("The potential migration of many key players from less attractive clubs to more desirable ones could have a devastating, long-term impact on the competitive balance within the League."); *id.* at 816 ("effects" of a "preliminary" injunction "may be felt for years since many players who moved would undoubtedly sign long-term contracts.").

The reality of that irreparable harm is not undermined by the modest steps—which did not include contract signings, trades, or cuts—that the NFL undertook in the wake of plaintiffs' threats to initiate contempt proceedings; plaintiffs' reliance on those steps is disingenuous and cynical at best. Those circumstances do, however, illustrate the Catch-22 in which plaintiffs seek to place (and in which the Order would place) the League by requiring operations, including necessarily collective agreements on certain terms and conditions of employment inherent in those operations, while simultaneously bringing a Section 1 antitrust challenge against any restraints in the market for player services.

As to harm to plaintiffs, they argued—and the District Court believed—that they would suffer irreparable harm due to the threat of a "lost playing season." (Ex.

1 at 16, 73-74; *see also id.* at 75 ("loss of an entire year"; "sitting out a season"); Ex. 2 at 8 n.3, 20.) But in an expedited appeal, this Court presumably will be able to address the merits well before a season is "lost," and likely well before the season would even begin.

Any harm suffered by the plaintiffs due to a delay in the start of free agency pending appellate review would not be irreparable. No plaintiff loses an opportunity "to play for [his] team of choice" (Ex. 1 at 73) if free agency begins in late June or early July as opposed to early May. The District Court's concerns about "difficulty in determining the salary and benefits that each player might have earned" in a lost season are similarly misplaced. (*Id.* at 74.)

The District Court also ignored evidence that many players, including plaintiffs Vincent Jackson and Logan Mankins, choose each year *not* to workout with their team in the offseason, and even to hold out well into the start of the regular season, indicating that missing time in the offseason is not irreparable harm. (Ex. 17 at ¶¶12-14 & Tab 2.) Indeed, public comments from players such as Ray Lewis and Wes Welker belie the assertion of irreparable harm: "To me, this is probably the greatest window of opportunity I've ever had in my life. It's been 25 years of my life that I've never had a summer to myself." (http://network.yardbarker.com/nfl/article_external/ray_lewis_ lockout_a_great_opportunity_to_do_something_else

/4523439); "Let's do a lockout every year." (http://www.nationalfootballpost.com/Wes-Welker-Lets-do-a-lockout-every-year.html).[8]

As to the public interest, "[i]t has always been held that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a[n order] pending the outcome of an appeal." *Nken v. Holder*, 129 S. Ct. 1749, 1754 (2009). That is true, *a fortiori*, in the context of a strong argument that the underlying injunction was not just flawed in some technical detail, but wholly *ultra vires* in light of the Norris-LaGuardia Act. The public interest in the orderly administration of justice, in promoting labor peace through collective bargaining, and in confining the courts to the jurisdiction granted by Congress all favor the grant of a stay.

CONCLUSION

For the foregoing reasons and those stated in our Emergency Motion, the injunction should be stayed pending expedited appellate review.

---

[8] The "evidence" of harm on which the District Court relied consisted primarily of the conclusory opinions of the NFLPA's General Counsel and some player agents. The NFL asked for, but did not receive, the opportunity to challenge those assertions on cross-examination at an evidentiary hearing (4/6/11 Hrg. Tr. at 48, 64, 74, 123), as required by Section 7 of the Norris-LaGuardia Act. (*See* p. 5, above.) Notably, not a single plaintiff attested to any harm being suffered.

Respectfully submitted,

/s/Paul D. Clement

Gregg H. Levy
Benjamin C. Block
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000
(202) 662-6291 (fax)

Paul D. Clement
BANCROFT PLLC
1919 M Street, NW
Washington, DC 20036
(202) 234-0090
(202) 234-2806 (fax)

David Boies
William A. Isaacson
BOIES, SCHILLER & FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200
(914) 749-8300 (fax)

Daniel J. Connolly
Aaron D. Van Oort
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7806
(612) 766-1600 (fax)

Counsel for Appellants

May 2, 2011

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2011, I electronically filed the foregoing, with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system, and that I will serve a copy of the foregoing on all participants in the case who are not registered CM/ECF users by mailing a copy of the same, first-class, postage paid, to the address listed on the Court's CM/ECF system.

s/Benjamin C. Block
Counsel for Appellants