

# You Make the Call. . .



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## **In The Matter of National Basketball Players Association on Behalf of Various Players and National Basketball Association on Behalf of All Its Teams, OPINION & AWARD (October 19, 1998).**

### **NATIONAL BASKETBALL PLAYERS ASSOCIATION GRIEVANCE DENIED, PLAYER'S DO NOT NEED TO BE PAID DURING A LAWFUL LOCKOUT.**

On October 19, 1998, Grievance Arbitrator John D. Feerick declared that the National Basketball Association (NBA) is not obligated to make salary payments during a lawful lockout.

On June 30, 1998, the NBA terminated its Collective Bargaining Agreement with the National Basketball Players Association (NBPA). On July 1, 1998, the NBA began a lockout during which it refused to pay players any salaries that would become due for the 1998-99 basketball season. In anticipation of this action, on June 30, 1998, the NBPA filed a grievance claiming that the NBA breached the contracts of more than 200 players whose contracts were fully guaranteed for the 1998-99 season.

The NBPA sought to commence an arbitration with the NBA to resolve the status of whether players with guaranteed contracts should be paid during a lockout. However, the NBA would not consent to the use of an arbitrator. The NBA contended that since the Collective Bargaining Agreement had been terminated the dispute was not arbitrable. Further, the NBA argued that even if it was arbitrable, Feerick did not have jurisdiction over the matter because he was only authorized to serve for the duration of the Collective Bargaining Agreement.

On August 4, 1998, Feerick rendered a decision stating that he had jurisdiction and that the dispute was arbitrable. Feerick's decision was based on the fact that the Collective Bargaining Agreement and the Uniform Player Contract expressed that any dispute should be resolved by a Grievance Arbitrator. In addition, the NBPA grievance was filed prior to the termination of the Collective Bargaining Agreement, which was during Feerick's term as Grievance Arbitrator.

Next, Feerick addressed the issue of whether the players were entitled to be paid during the lockout. In coming to a resolution, Feerick took into consideration the parties' Collective Bargaining Agreement, individual player contracts, bargaining history, past practice, and principles and policies of federal labor law.

Under federal labor law, unions and employers may utilize certain economic weapons to support their bargaining positions. The right to lockout employees, along with the right to strike, is well established and firmly grounded in federal substantive labor law. Case law reveals that during a lawful lockout employers can withhold the wages or salaries of employees. As with many economic self-help rights, a lockout may be waived by agreement of the parties. However, the NBPA did not satisfy the clear and unmistakable waiver standard established by the National Labor Relations Board with respect to limitations on economic self-help. As a result, in interpreting the Collective Bargaining Agreement, Feerick concluded that the NBA did not waive its right to an effective lockout.

Feerick then found that the Uniform Player Contracts were controlled by, dependent upon, and closely intertwined with the Collective Bargaining Agreement. The language of the Collective Bargaining Agreement clearly states that the Uniform Player Contracts shall be governed by the Collective Bargaining Agreement. Feerick also stated that the Collective Bargaining Agreement superseded the Player Contract. Therefore, after the Collective Bargaining Agreement was terminated the salary provisions of the Uniform Player Contracts are no longer in effect.

During the course of the collective bargaining history, there have been threats of strikes and lockouts, with an actual lockout occurring in 1995. Throughout the bargaining history, the NBPA has never claimed that players have a right to be paid during the lockout. If the NBPA believed that the NBA had a right to withhold salary payments during the lockout in 1995, any intent to change that practice should have been included in the current Collective Bargaining Agreement.

Therefore, since Feerick was the designated Grievance Arbitrator outlined within the Collective Bargaining Agreement and the Uniform Player Contracts, he had jurisdiction to hear the dispute between the NBA and the NBPA. In the end, upon consideration of the law, the interpretation of the collective bargaining agreement, and the testimony of both parties, Feerick concluded that the salary provisions of the player contracts were not effective during a lawful lockout following the expiration of the collective bargaining agreement.

**Major League Umpires Association v. National League of Professional Baseball Clubs et al., 119 S.Ct. 542 (Mem.) (Nov. 30, 1998).**

**SUPREME COURT DENIES REVIEW OF BASEBALL UMPIRES ARBITRATION DISPUTE.**

On November 30, 1998, the United States Supreme Court denied the review of a petition filed by the Major League Umpires Association asking it to decide whether the umpires were entitled to "special events compensation" after the 1994 post-season was canceled due to a players strike. (Petition for Writ of Certiorari, Sep. 24, 1998)

The Umpires Association and Major League Baseball entered into a Collective Bargaining Agreement that was scheduled to expire on December 31, 1994. The agreement provided that

Association members were entitled to additional compensation for working special events. Special events included the All-Star Game and post-season play.

Due to the 1994 player's strike, Major League Baseball decided to cancel the remaining six weeks of the regular season as well as the post-season. After canceling the post-season, the league refused to pay the umpires their special event compensation. The Umpires Association then filed a grievance against Major League Baseball seeking \$1,440,000.00.

On October 7, 1996, the grievance arbitrator decided that there was no particular provision in the Collective Bargaining Agreement that applied to the dispute. The arbitrator then concluded that each umpire was entitled to a small portion of the special events compensation for 1994.

The district court (E.D. Pa., August 29, 1997, 160 L.R.R.M. (BNA) 2099, 1997 WL 587357) and the Third Circuit Court of Appeals (July 23, 1998, 159 F.3d 1352, 160 L.R.R.M. (BNA) 219 (referenced in 'Table of Decisions Without Reported Opinions)) recognized the arbitrators decision that there was no provision within the Collective Bargaining Agreement to interpret and apply to the dispute. However, both courts affirmed the award of the arbitrator.

The Umpires Association then filed a petition for certiorari to review the judgement of the Third Circuit Court of Appeals. The petition asked the Supreme Court to determine whether an arbitrator can resolve a dispute upon which the parties never contractually agreed. The Umpires Association argued that the arbitrator was not empowered to decide the dispute or to fashion a remedy pro-rating pool payments. They felt that the dispute was one that should have been left to the parties to resolve through the bargaining process, and not the arbitration process.

The Umpires Association argued that the arbitrator is authorized only to interpret the existing provisions of the collective bargaining agreement. The Umpires Association further contended that an arbitrator cannot base his decision on his own definition of "fairness." Thus, the Umpires Association concluded that if the Collective Bargaining Agreement cannot resolve the dispute, an arbitrator then has no authority.

Nonetheless, on November 30, 1998, the United States Supreme Court denied the petition for review of the decision.

### **Oakland Raiders v. National Football League, 81 Cal.Rptr.2d 773 (Ct. App. CA, Jan. 28, 1999)**

#### **RAIDERS TRADEMARK DISPUTE NOT SUBJECT TO ARBITRATION**

The Oakland Raiders (Raiders) brought trademark and trade dress dilution claims against the National Football League (NFL), National Football League Properties, Inc. (NFLP), other NFL teams, and other NFL related defendants. These claims asserted abuse of leadership power,

neglect of duties, favoritism, and arbitrary rule enforcement by the defendants. The Raiders asserted that this resulted in damage to their organization.

There are two issues central to these claims. First, the Raiders stated that they had an exclusive license agreement with the NFLP. This agreement provided the team with the nonexclusive right to use their intellectual property to advertise on the sidelines during games. The Raiders further asserted that the NFLP breached this agreement by allowing them only to wear NIKE created merchandise on the sidelines. The NFLP is the merchandising arm of the NFL.

The second issue concerned whether the NFLP and NFL Commissioner Paul Tagliabue diluted the team's distinctive trademark. The Raiders asserted that this was done by the approval of a similar team mark for another NFL team, the Tampa Bay Buccaneers; and by using colors similar to those in the Raider's mark for yet another NFL team, the Carolina Panthers. The NFL Constitution and Bylaws state that no team can make changes to their uniforms, in color or design without the approval of the Commissioner.

The defendants countered by submitting a petition to the trial court stating that the NFL Constitution and Bylaws state that the Commissioner has "full, complete, and final jurisdiction and authority" to arbitrate any dispute between two or more members of the NFL. Also included in the Bylaws are provisions stating that the Commissioner has the power to hear and settle disputes between NFL teams. This petition was denied and the defendants appealed. The appellate court affirmed the trial courts finding.

The appellate court stated that the claims brought by the Raiders required injunctive relief. Recognizing that arbitrators do not have the power to grant injunctive relief, the court found that the arbitration clause could not be upheld, in essence because arbitration statutes have placed the granting of injunctive relief solely with the courts.

The NFL argued that parties may waive private rights and remedies if they are not against public policy. Further, the NFL concluded that the Raiders had done so by agreeing to give the arbitrator injunctive rights through their agreement. The court did not find this a valid contention.

The dispute was at its core procedural. The Raiders chose the court as the forum in which to bring their claims. Seemingly, the Raiders found this to be the forum most likely to be fair in settling their disputes. The NFL asserted that as a member of the National Football League the team agreed to waive its private rights and further agreed to have disputes settled by an arbitrator. Ultimately, the court found that such a provision could not be applied because this particular dispute required injunctive relief and statutes prohibit arbitrators from having the power to award injunctive relief.

**Davis v. Baylor University. 976 S.W.2d 5 (D. Mo., June 30, 1998) & Brentwood Academy v. Tennessee Secondary Schools Athletic Association. 13 F. Supp.2d 670 (D. Tn., July 29, 1998).**

## **STUDENT-ATHLETE RECRUITING STILL A PROBLEM**

Two recent cases revolve around the recruitment of student-athletes.

In 1992, Tyrone A. Davis, Jr. was a student at State Fair Junior College in Sedalia, Missouri. In the Summer of 1992, Baylor University began recruiting Davis via letter, telephone and personal visits. In November, 1992, Davis signed a National Letter of Intent to play basketball at Baylor.

After leaving State Fair Community College in 1993, Davis was thirteen credit hours short of being eligible to play at Baylor. Among the things that Baylor arranged for Davis to do to become eligible was to take four hours of correspondence courses from a school in Florida. One of the events that led to this lawsuit was that someone from Baylor altered a number of Davis' answers and submitted the tests as Davis' own. After a series of investigations, Davis was barred from playing the 1993-94 season while the Baylor basketball program underwent further investigation.

Davis went on to play basketball for Kansas State University, and three members of the Baylor coaching staff were convicted on charges of conspiracy, wire fraud, and mail fraud related to Davis' situation. Davis subsequently sued Baylor University and a number of its employees on eleven separate counts, including breach of contract and tortious interference with his prospective business opportunities in college and professional basketball. Davis sued because he felt that the tortious conduct of the defendants reduced his opportunities for a lucrative career in professional basketball, forced him to relocate himself and his family, and caused him the stress of associating his name with a major scandal.

The Circuit Court of Jackson County, Missouri, dismissed the suit for lack of personal jurisdiction. Upon appeal, the Court of Appeals reversed the Circuit Court's decision, and remanded it with instructions to dismiss all counts which do not concern the alleged misrepresentations that occurred in Missouri.

The Circuit Court dismissed the suit due to Baylor's lack of sufficient minimum contacts with the State of Missouri. Davis argued that Baylor initiated contact by coming to Missouri to recruit him, while Baylor argued that the heart of the case involved the misconduct in Texas regarding the correspondence courses, which had no relation to its contact with Missouri. The Court of Appeals thus centered its analysis on the issue of sufficient minimum contacts.

The Court of Appeals examined a number of other recruiting cases and analyzed the various tests that courts have used to determine if personal jurisdiction should be asserted. The biggest factor is that from 1989-1996, Baylor representatives made thirty-two trips to Missouri for recruiting basketball players, including ten such trips to recruit Davis. The Court of Appeals found that Davis' claims for breach of contract and fraudulent misrepresentation were sufficiently related to the forum contacts in the case. However, these recruiting trips were instrumental in the formation of the National Letter of Intent agreement which Davis executed in Missouri.

As to Baylor University, the Court of Appeals reversed the trial court and remanded the case with instructions to dismiss the claims that did not concern the alleged misrepresentations in Missouri.

In the next case, Brentwood Academy sued the Tennessee State High School Athletic Association to prevent enforcement of a rule prohibiting the use of undue influence in recruitment of student-athletes. Brentwood alleged, among other things, a violation of its First Amendment right to free speech. Brentwood moved for summary judgment and a permanent injunction barring the TSSAA (Tennessee Secondary School Athletic Association) from enforcing its "Recruiting Rule."

Brentwood Academy is an independent college prep school in Brentwood, TN, and is a member of the TSSAA, an association of public, independent and parochial schools in Tennessee. By electing to be a member of the TSSAA, each member school agrees to abide by the Constitution and By-Laws of the TSSAA. Here, however, the TSSAA penalized Brentwood for not abiding by the recruiting rule.

The main question that the court addressed was whether the TSSAA's Recruiting Rule violated the First Amendment. The Recruiting Rule states that "[t]he use of undue influence on a student (with or without an athletic record), his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule."

The facts in dispute were as follows. In the spring of 1997, the father of an incoming ninth-grade student, who had been accepted for admission to Brentwood, had requested permission for his son to participate in Brentwood's spring football practice. To avoid the impression of favoritism, Brentwood sent a form letter to all new incoming male students ages nine and above informing them of the spring practice dates, and inviting them to participate if interested.

On July 29, 1997, Brentwood was notified that the TSSAA had found Brentwood Academy guilty of six violations of TSSAA rules, including sending out the spring practice letters. Brentwood appealed the sanctions, and the TSSAA altered the penalties. As a result of the penalties, Brentwood was placed on probation for four years, the football and boys' basketball teams were denied the chance to play in the playoffs for two years, Brentwood was fined \$3,000.00, and off-season practice for the football and boys' basketball teams were prohibited for two years.

The first thing that the court had to decide was whether the TSSAA was acting under the color of state law. After examining a number of other cases, including the various NCAA cases involving Jerry Tarkanian, the court agreed with the various district courts in Tennessee that have consistently ruled that the TSSAA is a state actor.

The next item to decide was whether the Recruiting Rule actually violated Brentwood's right to free speech. While it is clear that the TSSAA had an interest in protecting student-athletes from such things as undue influence, the district court found that the Recruiting Rule was too intrusive for the goal of protecting the student-athletes with no corresponding evidence that any student-

athlete had been harmed by these practices. Specifically, there was no evidence that any student was, or was likely to be, harmed by the spring football practice letter in question here.

The District Court granted Brentwood Academy's motion in part, as to its claim that TSSAA's Recruiting Rule violated its First Amendment rights on its face and as applied to Brentwood Academy. Therefore, the TSSAA is enjoined from any use of the Recruiting Rule, and all of the penalties the TSSAA imposed on Brentwood were thrown out.

In considering these cases together, it is important to note the distinctions. Initially, Davis involved a school making contacts with a particular player and committing violations in trying to help that particular student-athlete become eligible to play basketball at Baylor University, while Brentwood involved a school making contacts with a number of student-athletes who were already committed to attending Brentwood Academy. Also, in Davis, the rules were not in question, the contacts with the State of Missouri were. In Brentwood, it was the Recruiting Rule that was in question, and whether it violated the First Amendment. The bottom line is that recruitment of student-athletes, whether for high school or for college, is serious business, and needs to thought out carefully.

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