

## No Excessive Celebration

Written by {ga=gdbenz}

Tuesday, May 17 2011 8:22 PM - Last Updated Tuesday, May 17 2011 8:40 PM

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If the National Football League Players Association, a union re-purposed as a trade association so it could sue its employers, was dancing in the streets when Judge Susan Richard Nelson lifted the NFL imposed lockout, they'll dance no longer.

In a stunning but not unexpected rebuke of Judge Nelson's ruling lifting the lockout, the 8th circuit court of appeals not only kept in place the stay of her order that it issued a few weeks ago, it let the union know that their chance of winning in court is even less than the Browns' chances of winning back-to-back Super Bowls the next two seasons.

Ok, they didn't quite use that analogy but they might as well have. What the appeals court did in no uncertain terms is let the players and their trade association know is that their strategy of negotiation avoidance in favor of antitrust litigation was as ill-conceived as a Fox sitcom.

And while it's probably coincidental, how interesting is it that the appeals court issued its decision on the day the owners and the union returned to the mediation table? Very. What likely started out Monday morning as a strut by union leader DeMaurice Smith, who has been all full of himself since Judge Nelson's initial decision, ended up with Smith once again demonstrating the dignity and grace that has marked his short tenure in the job by deliberately misstating the nature of the owners' position.

Informed of the appeals court decision, Smith issued a snide congratulations to the owners for being the first sports league to sue its players in order to avoid playing the game. It was a

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repeat performance of the same lie he told just last weekend and was just as helpful to the underlying process.

Let's recap and throw in a little civics lesson as well by starting with the beginning of this particular lawsuit.

Just prior to the collective bargaining agreement expiring, the NFLPA filed a petition with the National Labor Relations Board disclaiming its status as a "union" serving as the exclusive bargaining representative of the players. Immediately thereafter, a group of players, backed by the NFLPA and its lawyers, sued the owners, claiming that the collective action of locking them out constituted a violation of federal antitrust law. They asked the judge to issue an injunction preventing the lockout.

The owners didn't file any lawsuit of their own or otherwise sue the players. All they've done is exercise their right under federal labor law to exert economic pressure on the workers by locking them out. Regarding the various lawsuits, all the owners have done is respond to the litigation initiated by the players and their union. First, the owners filed a charge with the National Labor Relations Board claiming that the decertification petition filed by the NFLPA was a sham. Next, they responded to the players' lawsuit by claiming that the district court lacked the legal authority under federal law to stop the lockout.

As we now know, the owners' weren't initially successful. Judge Nelson issued an injunction to prevent the lockout. In order to reach that decision, she had to reach two key legal conclusions. First, she ruled that a specific federal statute, known as the Norris-LaGuardia Act, didn't apply in this case. Under the Norris-LaGuardia Act, courts generally are prohibited from imposing an injunction to halt a labor dispute. Thus, if employees go on strike an employer can't get an injunction to prevent it. If an owner locks out its employees, a court generally can't grant an injunction to prevent that either.

Judge Nelson felt the Norris-LaGuardia Act didn't apply because the union's decertification meant that this was no longer a labor dispute but a commercial dispute.

Second, Judge Nelson ruled that she had jurisdiction to hear the dispute even though the owners were contesting the validity of the decertification before the NLRB. The owners

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contended the NLRB had the sole jurisdiction to determine if the decertification petition filed with them by the union was valid. Judge Nelson essentially ignored this argument and found that the union had validly withdrawn as the collective bargaining representative of the players. As a result, she said, it appeared likely that the owners were engaging in a violation of federal antitrust law. In order to prevent what she deemed to be irreparable harm to the players caused by the lockout, she issued an order preventing the lockout from taking place.

These rulings were always on very shaky legal ground, from the labeling of the dispute as commercial and not labor to the supposed irreparable harm by the players, and now the 8th circuit court of appeals has agreed. When the owners filed an appeal of Judge Nelson's underlying decision, they also asked the court to issue a stay of that decision, meaning that they wanted to put her decision on hold until the court of appeals could decide whether or not it she was legally correct. It's similar to a criminal defendant asking to halt the imposition of his sentence while he pursues his appeal to a higher court.

In order to get that stay, the owners had to show a number of things, a key one of which was that they had a likelihood of actually convincing the court of appeals that they would win the underlying appeal. After looking at the case and Judge Nelson's ruling, the court of appeals said just that: the owners have demonstrated that they will likely win their case.

In making that ruling the court of appeals completely undercut Judge Nelson's conclusion that this was not a labor dispute. In language that even Smith and every player could surely understand, the court said: "In sum, we have serious doubts that the district court had jurisdiction to enjoin the League's lockout, and accordingly conclude that the League has made a strong showing that it is likely to succeed on the merits."

If there has been an "uh oh" moment in any of this it had to come when Smith and the players learned that their carefully constructed strategy of avoiding difficult negotiations with the owners was falling apart around them. And while the alpha male instincts of Smith and his followers will kick in immediately and make them more defiant, it should sink in rather quickly that the leverage they thought they once had as quickly disappeared and with it their chance of beating back the owners' will to change the economic equation within the NFL.

Sure, Smith will tell the players that there are more cards to play in court and that's true. But they aren't good cards. There's a chance that the court of appeals will reverse course when it issues its final decision, but that isn't likely. The players can ask the court to reconsider its

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decision, but they rarely do. The players can appeal to the Supreme Court, but it isn't required to hear the case and probably wouldn't because it doesn't present any real novel question of law. That means the lockout, in place now, will stay in place until the owners decide to lift it.

The players still have their main lawsuit, the one alleging violations of antitrust law, pending in district court. But that is likely a non-starter if not legally, then practically. With the lockout hanging over their heads, the players would have to be willing to forgo football and the paychecks it brings for the next few years. How many players would stand for that scenario?

The short answer is, few. The reason the players have never been successful at a strike is because they cannot make a commitment to solidarity. The average 12-year old manages his allowance better than the average football player manages his money. The could no more afford to go without paychecks for years than the average worker at the GM plant. Sure, they make more money, but then again they spend more money, too.

There's no question that the dynamics of this dispute have changed dramatically. Armed with the leverage that comes from beating back the union's ill-conceived strategy, the question for the owners is how exactly they want to use it. If they're smart, they'll follow the rule they've imposed on players when they make a play on the field—avoid any excessive celebration.

These are parties that have to live together for a very long time and just because Smith has pursued a search and destroy approach to the relationship doesn't mean it's necessary to return the favor in kind. This labor dispute always called for an even-handed solution and now is the best opportunity for the owners to use their new found leverage for good and not evil and craft the solution the union could never do for themselves.