

The NBA's Nuclear Winter

Written by {ga=gdbenz}

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I love labor disputes in professional sports. They are the best, most sublime form of entertainment available to the sports/legal geek hybrid.

Labor disputes in real industries where real people lose real money to feed their real families and pay their real bills aren't any fun. They're serious stuff with serious consequences. But labor disputes in professional sports? They're silly stuff with silly consequences, except for the tangential businesses that rely on them.

The NBA owners and players are currently locked into the most ridiculous labor battle since the NHL players lost an entire season to their own admixture of hubris and stupidity. Unable to learn anything from the past, NBA players are in the midst of making the same mistakes as their other professional league predecessors.

What's really driving the NBA and their players to their nuclear winter (a brilliantly timed turn of the phrase by Commissioner David Stern) isn't merely hubris and stupidity, though each is playing its part. This time the lambs are being led to slaughter by those who supposedly are being paid to have their backs, their agents.

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The NBA players union is ostensibly led by Billy Hunter, a mostly ineffective middling labor executive. Hunter has been around awhile and his only discernable accomplishments to date has been to avoid any significant labor dispute through almost complete capitulation to whatever Stern has wanted.

In fairness, though, Stern hasn't wanted much until now. Now he wants plenty.

The owners, whom Stern represents, have been mostly transparent in their goal since the economy first turned in 2008. They want to change the economic equation that had long since gotten out of whack. Players were taking too big of a piece of the pie, revenues were not keeping up, and just about every aspect of their salary cap and its multitude of exceptions had made their business virtually unmanageable, at least according to them.

As unprepared as only professional players can be, the NBA players, like NFL players, like NHL players, never really did develop any goal outside of holding on to as much as they could. Not understanding at all what success could look like at the bargaining table there really was no chance that they could strike a deal that they'd ever consider fair.

And that is the nub of the problem. By not developing any concrete goals or otherwise defining victory for themselves, they left themselves open to back channel manipulation and those pulling the strings now are the agents who were supposed to be representing their interests.

A little back story first. There's a group of 5 or 6 of the biggest agents in the NBA who got together early in this process in order to try and manipulate the outcome. What drove them together was their lack of unity during negotiations for the last contract. That's the one where the union agreed to a couple of key items that have mostly hurt their agents: a rookie salary scale and maximum contracts for veterans. In each case there isn't much to negotiate for an agent representing either a rookie or a veteran and hence there isn't much of a fee that can get generated.

The other thing these agents understand is that the league's current economic structure is such a mess and the competitive balance so skewed that only a radical refiguring could straighten it out. Surmising correctly, the agents believed that this radical refiguring would in essence again further their ability to generate a fee.

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So they've been working behind the scenes, convincing their gullible and uninformed clients that they were getting screwed by Hunter and the union and the owners. The rejection by the players of the owners' last, best and final offer wasn't a surprise in that context. It really didn't matter what was in that proposal anyway. It was never going to be accepted.

What this group of agents has been gunning for mostly is to change the leverage proposition in these negotiations. The agents know that the Hunter-led union has never been a match at the bargaining table to Stern and his committee. Thus their goal has been to keep the union from striking a deal of any sort by offering litigation as a viable alternative to bargaining.

At first, they were the minority voice in the room. Hunter was able to keep the group together. Eventually he was not.

The problem with the agents' thinking is the same as the problem with the NFL players' thinking on this issue. There is no end game to this strategy. The only thing a court could eventually do, assuming that their legal strategy is sound, which it's not, is to force the parties to continue to negotiate. No court anywhere can force the NBA to moderate their proposals to the union or put in place any new deal.

What the agents have sold their players on is the likelihood of a court declaring that the lockout amounts to illegal concerted activity on behalf of all the owners and putting in place the status quo, meaning the old contract, until a new one is negotiated.

Certainly if that strategy was sound, it would force the owners to be more moderate, meaning more opportunities for the agents to preserve their fees. But that's a big "if." As we learned during the NFL strike, federal labor law provides an exemption to an antitrust claim during a labor dispute. There can be no question that there is a labor dispute in this case.

For the strategy to work, individual players need to file the antitrust lawsuit (which they have, in two courts) and make the difficult claim that a labor dispute no longer exists because they are no longer, in fact, represented by a union.

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It didn't work for the NFL players and there's no reason to think it's going to work any better this time, either. David Boies, a superstar antitrust lawyer representing the players, seems to think that his clients have the upper hand this time because the owners have given the players their final offer.

It's a nice theory but it isn't likely to hold up. The owners are perfectly within their legal rights to bargain hard and to give a last, best and final offer and to lock out the players. The players are within their legal rights to not accept that offer just as they have the right to strike. At some point, if nothing changes the economic pressures on each will increase to the point that one or both are likely to moderate their positions and strike a new deal.

That's the worse case scenario for the agents of course which is why they've been pushing the litigation strategy. If I had more respect for Hunter's abilities as a union leader, I would say that he let the litigation hawks pursue this avenue to prove that it won't work. More likely Hunter just gave up, like he has so many times before.

At this point there's no reason to expect any NBA games this season. Depending on your level of interest in the game, it might make no difference to you. Heck, I just realized a few months ago that the NHL was no longer on strike.

But even if you're the biggest NBA fan ever you still have to laugh at how ridiculous all this really is. The issues are, in large measure, idiotic. The inability of adults to figure out in an orderly, professional manner how to divide a discretionary pie this big is such a colossal failure that it ought to at least make you re-think exactly why you're a fan in the first place.

I've rethought it and yet remain. Why? For the laughs. For the laughs.