

David Menchel on Holdouts in Sports

Introduction:

Contract holdouts in sports present an interesting phenomenon, one that is unusual in most other labor markets. In sports, we find that players who are under contract, often for millions of dollars per year, sometimes refuse to perform their end of a contractual bargain, namely their service as a player for whatever team for which they had agreed to play. They typically do so because they are dissatisfied with their contract and wish to commandeer a higher salary from their team, despite their having already signed for a previously agreed-upon amount. Such an occurrence is a foreign concept for most contracted laborers; a typical worker cannot successfully coerce his employer to pay him more by refusing to come in to his job. Not only would most people feel that doing so is intuitively wrong and dishonorable, such a practice would likely result in the employee's dismissal from his position. However, ballplayers are not typical employees, and the contract holdout situation is but one of the differing aspects in sports' employer/employee relationship which demonstrates this.

Why do holdouts occur? This question does not have one answer, as numerous varying factors can contribute to the result of a player holdout. However, what is shared by all such circumstances is that a bargaining failure has transpired. Something must have gone wrong in the player negotiation process which results in the player feeling mistreated under his current contract and not feeling a duty to honor the contract that he has signed.

Why should we be interested in what is at the root of contract holdouts? It seems pretty clear that contract holdouts have a detrimental effect on the sports in which they take place. One article elaborates on various ways in which contract holdouts have a harmful effect on sports, claiming the holdout “creates a media frenzy, upsets team chemistry, alienates fans and damages the league’s reputation.”ⁱ Fans are disappointed by not being able to see their favorite players play and by the team they root for not being able to play at full strength. Season and non-season ticket holders feel cheated in that they are not receiving what they intended to buy tickets for, namely watching the full team play and compete to the best of its ability. Possibly worst of all, the perceived disloyalty of the player to his team will often alienate fan interest in both the specific team and the sport in general, as followers of the game are forced to see sports as merely a series of self-interested transactions, in which money is the end-all for the parties involved. Fans have a hard time relating to players who are unwilling to play for the millions of dollars for which the players themselves had already agreed to play. Also, fans view the player who opts to hold out as putting his own interest ahead of the team’s, a behavior that is shunned in the context of team sports. This perceived selfishness undermines interest in the game, the players and the drama which sport is so successful in fostering. Instead of fans being captivated by the sport, the selfish business dealings overshadow team and individual performance.

The disutility which holdouts present to all involved parties presents an interesting conundrum that is worthwhile to investigate. The league and sport are hurt, the fans are devastated and, often enough, the players end up hurting themselves by holding out, as they ultimately lose out on valuable salary and gain nothing because the

team refuses to cave in to the renegotiation demands. Theoretically, the owners should be able to use their power to protect themselves from having their teams held hostage by an individual player's demands, yet we see that they are not able to preclude the holdouts from happening.

Looking at which players in professional sports are most likely to holdout and most successful in doing so may shed light on what factors lead to the occurrence of such holdouts. In particular, it may be useful to look at which sports are most prone to holdouts in order to try to deduce what factors are shared by those sports, but absent in others, which may lead to holdout situations.

The vast majority of recent holdouts by players who are under contract seem to occur in football and hockey. Holdouts in hockey, however, were largely a product of a unique circumstance that is no longer prevalent. In the latter half of the 1990s, when the number of holdouts by hockey players under contract experienced a drastic and sudden increase, the hockey players' union had chosen to exert an unusually high amount of influence on individual player contract negotiations, according to Bill Daly, Chief Legal Officer of the NHL.ⁱⁱ Feeling that it could assist its members in obtaining higher salaries, Daly claimed, the union instructed players' agents as to what appropriate salaries for individual players should be, and recommended using the contract holdout as a means to insist that the demands be met.ⁱⁱⁱ Once the union succeeded in driving salaries up to the desired level, however, it ceased to involve itself to such an extent in individual player negotiations and holdouts, and the frequency of holdouts has returned to being rare, as it had been prior to the decision for union involvement.

Though the period of heightened holdout activity in hockey has abated, and can thus be seen as an aberration stemming from a unique circumstance, frequent holdouts in football still persist. Football is unique among the four major team sports in this respect, and this paper will attempt to understand why football is most prone to the holdout problem and if anything which may be useful in ameliorating the holdout problem can be learned from such hypotheses.

Which Players Hold Out?

The classification of player holdouts can be subdivided into two contexts. The first involves players who are not under contract who refuse to sign a contract until their team makes an offer to them that they deem acceptable. This category is comprised primarily of recently drafted players who are waiting to sign their first professional contract, as well as players who are not eligible for free agency though their contracts have expired, such as younger players who have not passed the threshold for free agency eligibility or players who are bound to their teams for some other reason. This category of holdouts, though somewhat disruptive to teams' preparation for the upcoming season and disheartening to the morale of fans who hope to watch such players, does not comprise the brunt of the holdout problem. What these players are doing is using whatever leverage they have in negotiating their employment contract in a market that is somewhat closed to them, since they cannot offer their services to anyone else. It is not disloyal or dishonest to refuse to sign a contract in the first place if one is dissatisfied with the contract terms being offered. Rather, this is the only way these players can resist

a unilateral imposition of contract terms, including salary, by the teams to which they are bound, under league rules.

The category of holdouts by players who are already under contract, however, is an entirely different story. Here, the players have already bound themselves by legal document to contribute their services to teams which have agreed to pay them and which have reasonably relied on the players' services being performed. According to one strand of jurisprudence, it is inherently immoral to break a contract that one has agreed to perform, and that is precisely what these players are doing. It is these holdouts who have a truly detrimental effect on their teams, fan morale and their sport in general. The teams had, with good reason, relied on having these players' services for that year, and will often be unable to find adequate replacements at that point. Fans become frustrated and outraged by the selfishness of what appears to be selfish and spoiled millionaires who show no loyalty due to their desire to make more millions. It is such situations that bare the ugly, self-interested side of the sports business that prevents sports enthusiasts from the escapist bliss and captivating entertainment which they seek from sports. These holdouts are the ones who warrant being labeled as "the holdout problem," and it is these who are the primary concern of this paper.

Only a small subset of players could consider placing themselves within this group of contracted players who holdout. In order to accomplish anything by holding out, a player must be deemed not easily replaceable by his team; otherwise, teams would not even consider caving in to such players' demands when they could more easily save face by replacing the holdout with another player of similar caliber and less trouble. Thus, the only players who could gain any leverage by holding out are the most

indispensable ones, namely star players who typically play more skilled positions. It is these players whose absence could really thwart the teams' game-plan for the season. Consequently, the teams may feel compelled to do what they would otherwise be unwilling to do for more dispensable players, namely renegotiate a contract to give a higher salary, in order to retain these players' services for the season. As much as the teams will not want to pay more money than they had planned, and as much as the teams do not want to set a precedent for caving in to demands to renegotiate, some players have such a high expected impact on their teams' performance, as well as fans' attendance, that teams will feel compelled to renegotiate as a last resort to ensure that the player will join the team.

Even among indispensable star players, which ones choose to holdout in order to force a renegotiation? Most players remain at least reasonably content with contracts that they have signed. There must be some factor causing the player to think that the deal he signed is unfair or at the very least that he can receive a higher salary than what his contract had provided. The situation of players choosing to hold out would be reasonably expected to have undergone some change that induces the player to think he could or should get more than he was supposed to receive. Several possible scenarios demonstrate what types of change could drive a player to think he deserves, or at least is capable of demanding, a higher salary. The most common example would be a player who has a breakout season, one in which his status catapults to a much higher level, such as a good player turning into a superstar. If the player had signed a multiple year contract that paid him the amount deserved by a good player, and then he elevated his game to a point that

placed him among the league's elite, he may be found demanding to be compensated commensurate to his newfound elite status.

Also if a player's team elevates itself to a new level of play, the player may find his indispensability rise. While the best player on a below average team would be expected to be unable to gain much leverage from holding out, since the team would not be much worse without him, if the team made a drastic rise to the level of championship contender, then management is expected to be more reluctant to lose a player who would be considered a key component to that success. Holding out in such a situation would give the player a certain amount of leverage that he would not have had without his team's newfound success.

Aside from the player or his team's performance rising to a new level, external circumstances could change as well that might lead the player to think he could or should receive a higher salary. If other players in the league were to receive contracts which left a player feeling he was not being compensated on a comparable scale, based on talent or value to his team, then he may choose to holdout and demand what he would claim is a more equitable salary. If a player saw that players who he was superior to received new contracts paying them an amount that was disproportionately higher than the marginal talent differential between him and them, he would feel underpaid and his argument that he "deserves" a higher salary becomes more persuasive. (This writer finds a claim that one deserves more money than he had already contracted to receive for a given time period to be dubious at best.) Similarly, if comparably skilled players received contracts with salaries significantly higher than a player's, then he would also feel underpaid and that his demand for renegotiation is justified and may be successful.

Holdout Differences in Sports: Why?

The crux of this paper will attempt to arrive at some understanding as to why football has significantly more holdouts than other sports. Hopefully, elucidating this will shed some light on what motivates holdouts in general, and what, if anything, can be done to curb them. I plan to explore whether various factors which lead to more holdouts in football is inherent in the sport itself, or whether the holdout problem could be solved, or at least ameliorated, so that the quantity of holdouts in football more resembles the minimal amount of holdouts which tend to occur in baseball and basketball.

At first glance, football would seem to be the least likely of sports to have holdouts, given that the average career span in football is significantly shorter than in all three other major American team sports. The average player in football plays for under four years.^{iv} With so few years of salary-earning capability, it is hard to fathom why players would be willing to forgo one year of salary while still at the peak of their short careers. The year of salary on which a player loses out when he holds out for a year amounts to an extremely high percentage of the amount he stands to make over his entire career as a football player, after which his earning potential will typically suffer a gargantuan drop-off. It seems likely that the expected return of a player holdout, factoring the amount the player stands to gain multiplied by the likelihood of succeeding in obtaining that amount in a salary renegotiation with his team, would not necessarily outweigh the risk which the player faces of losing a substantial fraction of his livelihood,

an amount which he may never be able to recoup once his short playing career is over. One may see this as a strong motivation not to hold out; the risk of losing out on one quarter of one's income in a football career seems incredibly daunting.

Upon analyzing the factor of short career spans as a potential deterrent to player holdouts, however, one realizes that a contract holdout, even if it lasts for an entire season, will not necessarily be likely to subtract salary-earning time away from a player's career. The reason for the truncated average career span in football is primarily due to the grueling physical nature of the sport, which takes a toll on players' bodies to the point that their level of play becomes diminished in less time than it would in other, less physically punishing sports. Thus, while a player's career may typically span for only four years, one would expect that those four years would have to be playing years in the sport for them to directly lead to retirement. Time off while holding out should not aggregate to the figure of the average career span. A year of holding out, when a player's body is not being battered on the field as it would while playing, would presumably not cast a harmful toll on the player's muscles, bones and joints; if anything, a year off possibly allows the player some much-needed additional time to recuperate and regain strength after a prior season of incurring physical punishment. Consequently, players probably do not fear that holding out for one year would result in subtracting one wage-earning year away from an already brief career; taking a year off should typically only defer that year of wage earning to one year later, a small cost when compared to what the player thinks he stands to gain if the team were to cave in to his demand for a higher salary.

The physically grueling nature of the game, which is the root of the shortened career spans in football, may actually be a factor that contributes to the likelihood of player holdouts. As already mentioned, the year off could in fact be beneficial to the player's effort to extend his career in that it provides more time for recovery from a year of physical punishment. Allowing one's body to heal for more time before returning to the bone-crunching battlefield which the football gridiron often becomes would probably increase the propensity of that player's career to outlast the average, considering that most players will not have the luxury of that extra time off.

In fact, the physical gruel in sport is a point of commonality between football and hockey, the other sport that has been more prone to holdouts, that is not shared nearly to the same extent by baseball and basketball. While physical force is constantly levied from one player to the next in football and hockey, such that one aspect of valued talent in those two games is measured by how hard one hits, baseball and basketball involve no such element of colliding into other players at full force. The nature of football and hockey is such that, as a result, the sports are highly conducive to serious injuries and skill deterioration in a way that baseball and basketball do not parallel. Any single play in hockey or basketball has the potential of ending a player's season or career, and may even result in permanently damaging effects on the player's body. While players have been seriously injured over the course of the history of professional baseball and basketball, the quantity and gravity of such injuries pale in comparison to that of the injuries suffered in football and hockey.

Due to the injury prone nature of football and hockey, players know that any given play may be their last, and the fragility of their careers must always be lurking in

their minds, especially when considering their contract and salary. In the event that a player's career were to be tragically halted by a serious injury suffered over the course of the football playing season, the player is assured of collecting the remaining salary for that year, but would not be paid his salary for subsequent years on the contract. Instead, the NFL Collective Bargaining Agreement provides minimal injury protection, which sets a maximum payment of \$250,000 (for the 2004 season) for the year following a severe physical injury that prevents a player from playing at all during that year.^v The debilitated player is to receive no payment for any subsequent years following the year after the severe injury, regardless of the term of the player's contract.^{vi} Further, it goes without saying that such a player whose career is ended by severe injury will have no possibility of receiving another lucrative player contract. In hockey, the player would be able to collect whatever is owed to him for the remainder of the term of his contract,^{vii} but that will be the end of his high earning potential. The player is unlikely to see another contract like he had as a player for the rest of his life.

The susceptibility to skill deterioration or career-altering or ending injuries is likely to thrust immediacy into football and hockey players' minds more than would be so in sports in which players endure less of a physical pounding. Knowing that any year of receiving salary in football, or any contract term duration in hockey, may be the last profitable one for that player pressures the player to try to receive as much money as they can as soon as possible. Thus, if a player becomes more crucial to his team, either by elevating his own performance or by the team elevating its performance, he may be wary to wait until after his current contract expires to cash in on his newfound indispensability,

since he would be rather unsure if his level of play will remain stable until then or even whether that next contract will come.

Thus, when a football player has a standout year and becomes a member of the league's elite, he will often want to profit from his success immediately, knowing that it may be his only chance to do so. Especially in football, in which the average career only lasts for less than four years, there are far fewer opportunities for signing big contracts, so players feel the need to maximize whichever contracts they do have. Therefore, if the contract a football player has signed now seems inadequate to him, he is less likely to abide by its terms if he thinks he can force them to be altered in his favor. Baseball and basketball players do not feel the need for such immediacy in salary maximizing, since they are less likely to experience drastic deterioration of their level of play over a short period of time or to suffer severe injuries that leave them unable to secure any future contract after their current one has expired. Thus, when a football player is still under contract but his situation has changed such that he feels he deserves a higher salary, holding out may be his best way of ensuring that he is able to cash in on the changed circumstances.

In sum, the physically grueling nature of football (as well as hockey, to some extent) causes opportunities to cash in on success to be potentially fleeting, and this could be a prime motivator of holdouts. This sentiment was reflected by one well-known football holdout, former Atlanta Falcons running back Jamal Anderson, who wrote to his fans on his website during his holdout, "I would be a fool not to get what I'm worth. If something should happen to me without a good deal, alas [New England Patriots running back] Robert Edwards [who blew out his knee in a beach football exhibition at the Pro

Bowl], you guys will be sad (maybe) but pay my bills? You will not. Provide for my family? I don't think so.”^{viii}

Another result of the shorter career span in football which favors player holdouts is that players who hold out bear less of a reputation cost than players in sports in which there will be numerous opportunities for free agency or new contract signings due to higher longevity of career. Once a player holds out, he is likely to become known as someone who will not necessarily honor a contract which he signs. Teams certainly view this as an undesirable trait; when a player is signed to a multiple year deal, management want the security of knowing that it will have his services without disruption until the contract expires. The player will also possibly become thought of as one who places his own self-interest above the best interests of his team. This is a particularly undesirable trait in team sports in which a team is most likely to attain success if all of its players are acting in concert towards the same goals. With a self-centered player, teams are concerned that the player will prioritize his own individual statistics and renown over the team's success in such situations when their goals do not converge. For both of the reasons, holding out may damage a player's reputation in a way that makes him less desirable to teams, which may make a player think twice before commencing a holdout.

When a player's career will span for many years, he can expect that he will either be a free agent or negotiate a new contract several times. Once a player's reputation is tainted due to a holdout, his potential value to teams may drop and some teams may even shy away from pursuing his services. He certainly faces the risk of not being able to negotiate a deal for as high of a salary as he would have received had he remained as would be considered an upstanding citizen for teams. However, when the expected span

of a player's career is short, and there is less likelihood of becoming a free agent or making it to a point where his team seeks to extend his contract, there will be less concern for how the player's reputation may be tarnished by a holdout. This too favors football players holding out, with their average career span of under four years, more than baseball, hockey or basketball players who anticipate playing for significantly longer.

Another important area to look in order to understand why holdouts are more prevalent in football than in baseball and basketball is the collective bargaining agreements and labor relations in the various sports. Since holding out is a mechanism employed by players to gain more leverage which they can use to force management to grant them more favorable contract terms, it would make sense that players in the leagues that give the players the least leverage will be the ones who are most likely to hold out.

Consistent with this idea is the fact that the football CBA is the most restrictive on its players, both with regards to placing impediments to players' attainment of free agency and with regard to enabling players to contract for assurance of long term security. Free agency is seriously limited for star players, who are the only ones who could possibly have the leverage to hold out in the first place, due to the ability of teams to designate Franchise and Transition Players. By designating a player as a Franchise Player, the team is able to effectively limit a would-be unrestricted free agent from exercising his free agency as long as the team offers him a one year contract which would pay the higher of the average of the five highest paid players at that position from the previous year or 120% of what he had earned in the previous year.^{ix} Other teams could still sign the Franchise Player after the designation and offer were made, but they would forfeit two first round draft picks to the player's prior team,^x which usually is a sufficient

deterrent to prevent teams from signing Franchise Players. By designating a player a Transition Player, teams can secure for themselves a right of first refusal on that player,^{xi} which could deter other teams from investing the effort in trying to sign such free agents. Even when players are not designated Franchise or Transition players, the free agency system is such that many free agents fall under the Restricted free agent category,^{xii} which makes it harder for them to receive offers from other teams.

In addition to obstacles players face due to free agency under the NFL Collective Bargaining Agreement, the agreement also institutes a waiver system which obliterates most of any sense of job security that players would have after signing a contract. The CBA provides that any player who has finished four years in the league can have his contract terminated over the off-season.^{xiii} Essentially, the team is given an out by which management can choose not to honor previously signed contracts. What the players who hold out may be trying to do is capture that same benefit which the teams had contracted for themselves, namely to be let out of a contract if situations change from when the contract had been signed. A player probably does not find it equitable that if he signs a long term contract and then his level of play falls to the point that he is not worth the salary for which he had contracted, the team can choose to release itself from his contract, but if his level of play rises to the point that he is worth more than the salary for which he signed there is nothing he can do to force the team to pay him more. As a result, players may see holdouts as a way of trying to even the playing field of leverage between themselves and management. The problem with this reasoning is that when a team waives a player, the possibility of waiver was a condition to the contract due to its

inclusion in the CBA, while a player who holds out is blatantly breaching his contract, as no CBA provision stipulated the validity of such a negotiating maneuver.

The collective bargaining agreements of the NBA and MLB impose neither of these impediments to the players who seek to negotiate their contracts. A result of this could possibly be that players in baseball and basketball find themselves more content with the contracts they had signed than football players do, and therefore feel less of a need to holdout. Another possibility is that the players in baseball and basketball do not feel like the owners already have “one up” on them in the negotiation process by virtue of the procedures which the CBAs had instated, and therefore do not feel the need to fight by whatever means possible to attain any bargaining leverage which they are able to muster.

Lastly, the nature of the salary cap in football is significantly more rigid than in either baseball or basketball. Without elaborating on the specific details of each league’s salary cap, the NFL’s salary cap is known to be the closest to a “hard” cap, characterized by rigidity against surpassing the maximum salary amount, as opposed to the varying levels of flexibility which the other leagues afford in exceptions to team salary limits. The rigidity of the NFL’s cap is closely tied to the high level of revenue sharing in the NFL, which many have heralded as providing the best competitive balance of the major sports. In contrast, baseball has the most flexible salary cap and least revenue sharing, but has struggled the most with maintaining a competitive balance in the league. One necessary byproduct of a hard salary cap, however, is less flexibility for teams to accede to players’ salary demands; NFL teams’ hands are often tied, as giving more to one player inherently requires giving less to others. Thus, the NFL’s salary cap rigidity too is

a likely cause of holdouts, as the more rigid the salary cap is, the less capable a team is of meeting its players' salary demands.

Anecdotal Data

Since no empirical studies appear to have been done on football holdouts, I will look at an assortment of recent holdouts in football and the try to discern what conditions gave rise to them. In most years, these seem to be at least a couple non-rookie holdouts who are under contract but refrain from joining their teams (to the exclusion of players such as Franchise Player designees, who are not under contract but cannot enter free agency), at least for the summer training camps, with the hope of obtaining a higher salaried contract.

I plan to analyze a number of holdouts that are somewhat representative of the varying situations leading up to holdouts by players under contract, with the hope that some trends and propensities can be culled from the anecdotes as typical for holdout situations. Recurring issues for holdouts, as seen in some of the following anecdotes, include the need for long-term security, both financially and with a specific team, influenced by the fear of injury, as well as feeling underpaid following outstanding, overachieving seasons for the player and/or his team. Other holdouts, as will be seen, have been message holdouts, intended to show the team that the player feels he has been disrespected or treated improperly, and that he has means of defending himself against this and leverage to exercise.

Duce Staley:

This star running back for the Philadelphia Eagles held out prior to the 2003 season because he was unhappy with the team's failure to extend his contract. His twenty-seven day holdout lasted from his absence at the team's late July training camp until August 23, which was approximately two weeks before the start of the season. Staley was coming off the best year of his career, having rushed for over one thousand yards and gained a total of 1,570 yards from scrimmage. The Eagles had advanced to the NFC Championship game, and Staley was voted team MVP. After six years playing for the Eagles, Staley was entering into the last year of his contract, for which he was scheduled to earn \$2.2 million. His holdout was a negotiation tactic being employed to gain leverage to push management to give him a contract extension past the last remaining year on his contract. Staley had seen several players receive contract renegotiations and extensions with free agency looming, while others had been "treated unfairly and left to dry" without security for the future.^{xiv} As Staley explained,

I just completed the best year of my career and I am heading into the final year of my contract with the team. I was just interested to know how I fit into the team's plans in the future, including an extension that would have me finishing my career with the Eagles. Unfortunately, not one person in the Eagles front office has given me any idea of what the future holds for me as a player for the Eagles beyond this season.^{xv}

Staley reported to the team after his unsuccessful holdout, after having been fined the maximum allowed amount of \$5,000 per day for a total of \$135,000.^{xvi} Staley's efforts for long-term security with the Eagles ultimately contributed to the end of his career with the team. Management and Philadelphia fans were angered by his holdout and he never regained his status as the featured running back after he returned from his holdout, as he was forced to share playing time with two other Eagles running backs. After the 2003 season, the Eagles chose not to re-sign Staley.

Jamal Anderson:

This star running back held out from the Atlanta Falcons prior to the 1999 season, following a season in which he led his team to an unexpected Super Bowl appearance. Anderson had one year remaining on his contract, which was to pay him \$2.6 million for his final year. He was seeking a contract extension for five more years which would pay him a signing bonus of at least \$8 million.^{xvii} In the Falcons' Super Bowl season, Anderson had led the team with 1,836 yards rushing and set an NFL record with 410 carries.^{xviii} While the two parties had agreed to a five-year extension for approximately \$32 million, the team had been offering a signing bonus of approximately \$7 million and less money guaranteed at the front end of the contract. As mentioned earlier, Anderson wanted the added financial security that more guaranteed money would provide him, given the injury-prone nature of the sport. Further, he claimed that he wanted to be paid what was market value for one of the league's best running backs. The team contended that the extra million dollars of guaranteed money that Anderson was seeking would obstruct the team's efforts to improve in other areas, since the salary cap constrained their total payments to players. Anderson also was fined the allowed maximum of \$5,000 per day absent from training camp, for a total of at least \$85,000 before he ended his 17-day holdout.^{xix} The upshot of Anderson's holdout was a compromise on the contractual terms being sought; his signing bonus was agreed upon for \$7.5 million, and some of the salary that Anderson was scheduled to receive in the fourth and fifth years of his new contract were shifted to the first two years.^{xx} Anderson's holdout ended one month prior to the

start of the season, which was Anderson's goal from the start, since he claimed that one month is all that anyone needs to prepare for the season.^{xxi} Anderson's concern for capitalizing on his success immediately thereafter, for concern over potential future injuries, was well-founded; in one of the first few games of the season, he tore his ACL while playing, which led to him missing the entire season and never fully recovering to become the player he once had been.

Jimmy Smith:

This star wide receiver held out from the Jacksonville Jaguars for 38 days prior to the 2002 season. After making the Pro Bowl for five consecutive seasons, Smith was unsatisfied with his contract, which was set to pay him an average of \$3 million per year over the remaining five years of the contract.^{xxii} Smith was seeking a renegotiation which would pay him \$12 million over two years,^{xxiii} after claiming that his team had reneged on their oral promise to him.^{xxiv} The team was reluctant to cave to Smith's demands, partially because of his history of health problems as well as due to the salary cap problems that the renegotiation would pose. Smith's holdout ended up lasting for 38 days, including all of training camp and all preseason games. The team's passing game had been abysmal during the preseason, as the absence of Smith's presence was certainly felt.^{xxv} The leverage which Smith held apparently was pretty strong, as Jaguars management agreed to a renegotiated deal for five years which would pay Smith approximately \$10 million over the first two years. The deal was reached shortly before the start of the regular season, which reflected a desire by management not to begin the season without their star receiver.

Kevin Greene

In 1997, coming off a career season, this standout linebacker demanded a renegotiation of the last year of his two-year contract. Greene had led the NFL with 14½ sacks in the prior season, which helped lead the surprising Carolina Panthers to the NFC Championship game in only its second season in the league, which marked an unusually early level of success for an expansion franchise. The two-year deal which Greene had signed the previous off-season was scheduled to pay him between \$1-\$1.6 million, depending on whether he attained certain incentives which the contract stipulated, and Carolina had offered to renegotiate so that \$1.25 million was guaranteed. Greene was dissatisfied with this sum following his outstanding season which contributed significantly to his team's unlikely success, so he held out. Greene ultimately lost out significantly as a result of his 75-day holdout, as the Panthers did not cede to his demands and ultimately cut him from their roster on the final possible day for player cuts. At that point, the fines that Greene had accumulated totaled \$292,626.^{xxvi} Greene was ordered by an arbitrator to return \$350,000 of the roster bonus that he had received from the Panthers for that season, but was released from payment of the fines since he was cut before the season.^{xxvii} Aside from costing Greene, the holdout hurt the Panthers as well. The player who was signed to replace Greene failed to adapt successfully to the team's defensive system and struggled as a result, which led to his being released the year after he was signed.^{xxviii} Though Greene's gamble did not pay off, the holdout did not cost Greene as much as it could have in the end, as his release from the Panthers enabled him sign a contract the next day with the San Francisco 49ers. His new contract paid him a guaranteed \$950,000 with the potential for an additional \$550,000 in performance

bonuses for that season, which was still less than he would have earned with the Panthers. After signing with the 49ers, Greene claimed his holdout was not about money but about fairness, stating “It's not money to me. It's about playing for something you believe in and playing for a team that treats you fair.”^{xxix} Strangely, after Greene’s lone season with the 49ers, he ended up returned to finishing his career playing two more seasons for Carolina, so apparently the Panthers were not deterred from signing a player who had already been a holdout from their team.

Joe Horn

The New Orleans Saints wide receiver Joe Horn held out for one month during the 2002 off-season. Following two seasons as the Saints’ leading wide receiver after signing as a free agent with the team in 2000, Horn refused to participate in off-season team workouts until his contract would be extended to his liking. Horn maintained that Saints management had made an oral commitment to extend his contract after the 2001 season if he was selected for the Pro Bowl for a second consecutive year. After succeeding in accomplishing this, Horn held out to protest his contract situation, which he perceived as unfair. At the time of the holdout, Horn was under contract for another two years; he was scheduled to be paid \$2.7 million plus a \$200,000 roster bonus in 2003, and \$2.9 million plus a \$100,000 roster bonus in 2004. Horn was seeking a contract extension that would result in his being paid approximately \$5-\$6 million per year, but there had been disagreements about both the length of the extension and the salary under the renegotiated contract. Horn was 31 at the time of the holdout and had been recovering from shoulder surgery in the off-season, which may have contributed both to the team’s

consternation about paying him more as well as his insistence on the security of a higher salary and longer contract. Despite being fined the league maximum of \$5,000 per day missed, the upshot of Horn's holdout was a success for him, as the team agreed to renegotiate and gave him a \$6.8 million signing bonus along with a one-year extension. Upon returning to training camp after his holdout, Horn quipped, "I know what my stats say and I feel I know what I'm worth and a lot of other people do too around the league, but I'm under contract with the New Orleans Saints and they feel that I should stay with the contract I have right now. That's what I'm going to do..."

Aaron Brooks

This starting quarterback held out for three days of training camp during the 2002 off-season, prior to the last year of his four-year contract that he had signed upon entering the league with the Green Bay Packers.^{xxx} The contract had been for \$1.37 over four years, with a base salary of \$450,000 for the 2002 season, and amount which ranked as the third lowest in the league among starting quarterbacks.^{xxxi} After his first full year as the teams starting quarterback, Brooks had emerged as one the league's top young quarterbacks, having completed 26 touchdown passes that year and setting new team season records for rushing yards by a quarterback and total offense.^{xxxii} Despite the fact that starting quarterbacks are generally among the higher paid players on the team, thirty-four players on the Saints were to receive higher salaries than Brooks, including his two backups.^{xxxiii} The Saints apparently recognized that Brooks was underpaid, and prior to the holdout had been offering a substantial raise, with a contract extension of six years for \$20 million plus a \$3 million signing bonus,^{xxxiv} but Brooks had been seeking a signing bonus of \$13

million.^{xxxv} General Manager Mickey Loomis denied that Brooks' holdout would strengthen his bargaining position, saying "We're not going to negotiate with anyone that's not in training camp and under contract."^{xxxvi}

Ultimately, Brooks' holdout was short-lived; he re-signed with the Saints after a three-day absence with no new deal in hand, but with the hope for a contract extension before the start of the season. Brooks' holdout apparently was intended to convey a message to management rather than as a long-term refusal to play until demands would be met, as Brooks said that he felt he was successful in conveying his feelings to management though he was still not satisfied with his current contract.^{xxxvii} Like many other holdouts, Brooks expressed a feeling that his contract disrespected him, stating, "First of all, I'm kind of disappointed with management not taking care of the situation at hand. I felt like the star quarterback should have been taken care of as the first priority... I'm making money that I haven't seen before. But at the same time, treat me with respect. I feel like I'm one of the top five, top 10 quarterbacks in this league, and I deserve to be treated like one."^{xxxviii} His return to training camp, Brooks explained, was because he felt he owed it to the city of New Orleans and to the fans out here who have been Saints' fans from Day One."^{xxxix} Ultimately, Brooks did get his contract extension the week before the start of the season, in a \$36 million deal for six years,^{xl} though it is unclear whether his holdout helped his effort or not.

Derrick Brooks:

Derrick Brooks also used his 2001 holdout to send a message to management, which after he felt it had been conveyed, he was able to return to the team even with no new deal for

a contract extension in hand. Brooks had been the anchor of the Tampa Bay Buccaneers' defense, one of the most fearsome in the league, as he had led them in tackles made for the previous three seasons and was a four time Pro-Bowl invitee.^{xli} At the time of Brooks' holdout, his contract was to pay him a little over \$3 million for the upcoming 2001 season, and \$5.5 million for the following season.^{xlii} Though these figures would place him as one of the highest paid linebackers in the league, Brooks sought to be amongst the highest paid NFL players, given his elite status on a team that had become renowned for its defense that he led.^{xliii} The duration of Brooks' holdout was ten days, transpiring at the start of training camp, after attempts to come to an agreement as to a contract extension had been ongoing since the previous November.^{xliv} Upon returning without a new deal in place yet, Brooks anticipated that his holdout had helped bring management and him closer to terms, claiming "Basically, we've come to a mutual understanding. We're back on the same page. The stalemate is over, more or less. I expect things to intensify the next couple of weeks."^{xlv} Implicit in Brooks' return without a deal was that if agreement on a new contract did not occur by the start of the regular season, Brooks may hold out again.^{xlvi} The upshot of Brooks' contract dispute was a four-year contract extension for \$29 million, \$12 million of which came guaranteed as a signing bonus.^{xlvii}

Can the Holdout Problem be Fixed?

In a previous article concerning holdouts in sports, one writer suggests that amending the CBA would be the best way to solve the holdout problem.^{xlviii} His two

suggestions are that a clause be amended to explicitly allow the commissioner to discipline players who holdout and fail to honor their contract and to define rules of free agency so that a year spent holding out will not count towards a player's threshold for attaining free-agency rights.^{xlix} He suggests that the first change would be rather unobjectionable, since it does not constitute much of an expansion from a commissioner's general duty to safeguard the best interests of the game.¹ However, several other obstacles are likely to prevent the commissioners from invoking this power, even if they were granted it. Since most player disputes are subject to arbitration, any commissionerial action could be appealed, and quite possibly reversed by arbitrators who tend not to show deference to leagues' commissioners in their disputes with players.^{li} Also, potential backlash that the commissioner may experience from both the players' unions and the sports' fans as a result of disciplining holdouts may dissuade a commissioner from pursuing disciplinary means that may be available to him.^{lii}

The second suggestion, requiring makeup service under the prior contract before free agency status is granted, has already been given effect by an NHL arbitrator who ruled that Alexei Yashin owed his team an additional year of service after he held out before he would be eligible for free agency (See Exhibit 1).^{liii} The NFL has also adopted this to some extent, in that it stipulates that in order for a season to be counted in the calculation of accrued seasons necessary to attain free agency, the player must report to his club at least thirty days prior to the season.^{liv} However, the NFL has not adopted this mechanism in the strongest way possible, as one step further would be to follow the arbitrator who ruled in the Yashin decision and halt the tolling of a player's contract with his individual team until the player actually plays the amount of years that the contract

prescribes. The article's writer suggests that this amendment to discourage holdouts would be difficult to pass, since players unions are extremely unaccommodating towards changes that make free agency harder for players to obtain.^{lv}

However, implementing such a rule as has been effectively applied in the NHL would certainly provide a strong deterrent to players holding out. Many of the players who have held out, including many of the ones discussed above, initiated their holdout with only one or two years left on their current contracts. Their ability to hold out was bolstered by their knowledge that they could leave the team as free agents and offer their services to the highest bidder within a relatively short amount of time, regardless of whether the team cedes to their demands. However, if the team were to hold on to them indefinitely until they played out the term of the contracts, holdouts would often fear being held hostage by the teams, such that their big payday in the form of free agency would be delayed, potentially indefinitely, until they played the remainder of the contract term following the holdout. Further, while monetary compensation on a per-year basis is a significant concern for the holdouts, they are also largely motivated by long-term stability in the form of long contracts. Currently, players who hold out sometimes try to commandeer such security from the team shortly before their free agency, requesting contracts for long durations when the team may not otherwise entertain offering such a long contract in free agency. Players use as leverage the team's desire to have them play out their contract as a means to extract a longer deal. However, if players will be forced to play out their contract term before attaining free agency anyways, this leverage is reduced to merely the team's desire to have the player playing as soon as possible, though

the team would be assured of that player's services at some point regardless, which is a much smaller incentive.

Other modifications to the CBA that may help deter holdouts include increasing the maximum allowed daily fine that teams may levy on holdout players. Certainly by making a holdout more costly, owners can force players and their agents to recalculate the expected net gain of a holdout. The NFL's current maximum fine is \$5,000 per day of a holdout,^{lvi} which is possibly not high enough to serve as a sufficient deterrent from holding out, considering the amount that players stand to gain if their contracts are renegotiated. However, though an increase in maximum fine amount may help deter holdouts, a comparison with the CBA of the other major sports demonstrates that the amount of fine is not what makes the NFL so much more prone to holdouts. The NBA has a similar limitation on fines for missing practices or games as the NFL's,^{lvii} while the CBA of the NHL only stipulates a maximum deduction of 1/275th of the player's salary for every day of training camp missed.^{lviii} MLB's CBA does not address fines for missing time due to a holdout or any limitation on such fines^{lix}.

Another possible contractual solution to the holdout problem would be for teams to modify the individual player contracts to incentivize not holding out. While increasing fines above the CBA's maximum is prohibited, a similar type of effect could be achieved by shifting some of the player's would-be salary into a "training camp bonus," in which that money would only be received if the player attended the entire preseason training camp. The problem with such a clause may be the difficulty that teams would encounter in convincing players to agree to this, given that it would require a departure from the way NFL contracts have generally been structured. The players could possibly be

induced by a slightly higher salary to accept such a clause, though given the hardship teams face in keeping their salaries under the cap, this may never be a true possibility. Even if this were to be accomplished, it would only have the effect of increasing the cost of a holdout for players, like a league-wide raise of the fine maximum would do, which would not necessarily deter all holdouts.

Also in the realm of individual player contracts, perhaps teams could contract for some non-pecuniary benefit, like a player option for an additional year, as contingent on the player not holding out at any point during the contract term. This solution would rarely be invoked by teams, though, as giving options in contracts to players is not common in the NFL, and it would be only in rare circumstances that a team would find the security of not having a player holdout to be worth giving an option when they otherwise would not have been willing to do so.

Conclusion

As one would expect, many situations of the football holdouts demonstrate similar circumstances and concerns. The fear of injury that motivates players to maximize immediate returns on their success stems from the inherent nature of the game and does not seem to be something that could be easily alleviated. Without a significant increase in the amounts received by players who suffer career-ending or debilitating injuries once they are no longer able to play, players will always fear having their ability to earn a livelihood being cut short, but it would be far too costly for owners to provide more security to them in such a physically intense sport.

The fact that players' values are subject to change, based on their own or their team's performance, or even external factors, such that their ex ante value at the time of signing a contract is less than their ex post value during the term of a contract following some change, is also inherent in all such sports. While it is a contributing factor that leads to holdouts, football should be no different in this respect than the other sports.

What ultimately seems to be driving the holdouts more than anything else is how the CBA is framed. Given its status as a product of lengthy negotiations between the players' union and the owners, one must conclude from football's success that the result of the CBA was one which both sides found palatable. Were the owners more adamant about preventing holdouts, there probably could have been changes in the CBA to reflect this, though it would have had to come at the expense of a concession of some other matter, as is typical in negotiation scenarios. Especially in football, in which the owners were able to get so much that they wanted, and effectuated a situation that favored them more than any of the other sports had, it is likely that they were willing to tolerate the holdouts, as undesirable as they are, as a byproduct of the system which otherwise favored them greatly. The possibility thus remains, if the holdout problem ever gets to the point which the owners deem it intolerable, for the owners to insist on negotiating a term into the CBA which would help curtail holdouts, though it would likely come at some cost to them.

Exhibit 1

Practising Law Institute
Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series
PLI Order No. G0-000D
February, 2001

Understanding Business & Legal Aspects of the Sports Industry 2001 Volume One

***353** IN THE MATTER OF ARBITRATION BETWEEN THE NATIONAL HOCKEY LEAGUE
PLAYERS
ASSOCIATION AND NATIONAL HOCKEY LEAGUE, GRIEVANCE OF ALEXEI YASHIN
(OTTAWA
SENATOR'S)

Copyright (c) 2001 Practising Law Institute

***355** Grievance of Alexei Yashin
Date of Award: June 28, 2000

Preliminary Statement

Arbitration hearings involving the above-captioned matter were held in New York City on May 24 & 25 and in Ottawa on May 30, 2000. Representing the National Hockey League Players Association at such hearings was John R. McCambridge, Esq., and representing the Ottawa Senators and the National Hockey League was L. Robert Batterman, Esq.. Both parties argued orally upon the conclusion of the hearings.

Issues

The parties agreed to submit the following issues for decision; they are:

"1. Whether Alexei Yashin's SPC expires on June 30, 2000, thus rendering Mr. Yashin a restricted free agent on July 1, 2000 subject to the Ottawa Senators' making a qualifying offer, or, in the alternative, whether by reason of Mr. Yashin's choosing not to play for the Ottawa Senators in the 1999/2000 season, Mr. Yashin's SPC does not expire until he provides an additional season of service to the Ottawa Senators under the terms of his SPC applicable to the 1999/2000 season?

"2. Damages

"a. Whether the Arbitrator has the authority and jurisdiction to award money damages to the Ottawa Senators, if any, as a result of Mr. Yashin's choosing not to play for the Ottawa Senators in the 1999/2000 season?

***356** "b. If 2.a. is answered in the affirmative, is the Club entitled to money damages as a result of Mr. Yashin's choosing not to play for Ottawa Senators during the 1999/2000 season and, if so, in what amount?"

Background

In the 1992 entry draft Alexei Yashin was the first round pick of the Ottawa Senators (hereinafter the Club). Mr. Yashin executed a standard player contract (hereinafter SPC) with the Club for a term of five years (4 & 1 at Club's option) commencing with the 1993-94 season. Following his first season of play (1993-94) in the NHL, Mr. Yashin asserted that an oral commitment had been previously made by the General Manager of the Club to renegotiate his contract and make him the Club's highest paid

player if he proved to be the Club's best player, and that, therefore, he wanted his contract renegotiated. The Club initially resisted this demand on grounds that no such commitment had been made, but then it ultimately relented and agreed to modify certain terms of Mr. Yashin's SPC in January 1995. The 1994-95 season was curtailed due to the lockout and did not begin until January 13, 1995.

In the fall of 1995 following the abbreviated 1994-95 season, Mr. Yashin chose not to report to training camp and, instead, signed a contract to play hockey for the Red Army Team. In late October 1995 the Red Army Team refused to honor its contract with Mr. Yashin due to pressure from the International Ice Hockey Federation (hereinafter IIHF). Mr. Yashin argued that the Red Army's repudiation of its contract with him made him a restricted free agent even though his contract with the Ottawa Senators had years left to run. This claim became the subject of an arbitration before Arbitrator George Nicolau, and Arbitrator Nicolau rejected Mr. Yashin's claim in a decision rendered December 3, 1995.

***357** In December 1995, the Club and Mr. Yashin again renegotiated Mr. Yashin's SPC including its term. This SPC specified that it ran for a "term of 5 years commencing October 1, 1995". More specifically, in Addendum A to the SPC, the term was defined as follows: "This Contract shall be for a period of five (5) seasons commencing with the 1995-96 season and concluding with the 1999/2000 season." This SPC provided that Mr. Yashin's compensation for the 1999-2000 season would be a base sum of US\$3,300,000 plus the potential of a bonus if Mr. Yashin received any NHL awards. Mr. Yashin finished in second place in the voting for the Hart Trophy following the 1998-99 season and thereby attained a US\$300,000 bonus to be added to his compensation for the 1999-2000 season for a total compensation of US\$3,600,000.

In July 1999, Mr. Yashin through his agent, Mark Gandler, informed the Club that he would not play the 1999-2000 season for the compensation specified in his SPC and requested to be traded. The Club refused to renegotiate the compensation specified in the SPC for the 1999-2000 season stating that Mr. Yashin's compensation would remain at 3.6 million not including various bonuses that could be earned for the 1999-2000 season; the Club also refused to consider a trade.

Further correspondence ensued between the parties, and there was no change in either party's position. In a letter dated August 27, 1999 Marshall Johnston, General Manager of the Club, informed Mark Gandler that Mr. Yashin's failure to report to training camp in September 1999 would place Mr. Yashin in breach of contract resulting in his immediate suspension without pay. Mr. Johnston also informed Mr. Gandler in that same letter that should Mr. Yashin remain suspended throughout the 1999-2000 season, the Club would be entitled to one more year of performance from Mr. Yashin under the SPC and the collective bargaining agreement (CBA). Mr. Johnston further informed Mr. Gandler that the Club would also seek damages from Mr. Yashin as a result of his breach of contract. Mr. Johnston urged in this letter that Mr. Yashin reconsider his decision, but Mr. Yashin remained ***358** resolute and never returned to the Club during the 1999-2000 hockey season.

In a conversation held on September 5, 1999 Mr. Gandler proposed to Mr. Johnston a new three year contract for Mr. Yashin commencing with the 1999-2000 season, and that Mr. Yashin be paid US\$3.3 million, US\$11 million and US\$12 million for each season respectively. The Club was unwilling to negotiate a new contract with Mr. Yashin until he had completed substantially all of his commitments for the last year of his contract, the 1999-2000 year.

The Association brought a grievance on behalf of Mr. Yashin asking that he be declared a restricted free agent upon the expiration of his 1999-2000 SPC, and the Club has resisted by stating that Mr. Yashin owes it one more year. The Club has brought a grievance seeking direct and consequential damages from Mr. Yashin due to his breach of contract, and the Association and Mr. Yashin have denied that damages are owed and state further that the Arbitrator has no jurisdiction/authority to award such damages. These two grievances have been consolidated for hearing, and the first phase of this case involves consideration of the restricted free agency issue only.

Position of the Parties

Position of the Association

The Association contends that Mr. Yashin's SPC expires at the end of the 1999-2000 season, namely, on June 30, 2000, and that at such time Mr. Yashin becomes a restricted free agent.

In particular, the Association observes that a restricted free agent is defined in Article 1 of the collective bargaining agreement and that it references contract expiration as the critical determinant. The Association says that since the term "expire", as used in Article 1, is not defined anywhere in the collective bargaining agreement, such word must be given its usual and ordinary *359 meaning. Its usual and ordinary meaning must be construed to mean the date that Mr. Yashin's SPC is scheduled to expire. Mr. Yashin's SPC states that it is for a term of 5 seasons concluding with the 1999-2000 season. Therefore, June 30, 2000 must be found to be the contract's expiration date. Since the contract language in question is clear and unambiguous on its face, there is no need to go beyond its plain meaning and consider parol evidence. The Association notes that in the recent IIHF case involving Mr. Yashin, the League referred to the stated expiration date of Mr. Yashin's contract as June 30, 2000.

The Association says that Mr. Yashin played for four seasons under his contract and withheld his services during the fifth season with the result that he was suspended and not paid for that final season. The Association argues that the Club has obtained benefits from the full five years of Mr. Yashin's contract. The Club enforced negative covenants against Mr. Yashin which prevented him from playing professional hockey for any other club on a worldwide basis during his fifth season. The Association says that the League is attempting to get a ruling that Mr. Yashin's SPC continues to run until he has given specific performance by playing for a fifth season, and that it is a well-established rule that courts will not grant specific performance with respect to contracts for personal services. The Association cites the Barry case in the NBA among others.

Also, the Association says that under Sec. 17.8 of the CBA, the Arbitrator may not grant a remedy unless it is provided for in the agreement, and that the remedy sought by the League is not provided for in the agreement. Under Sec. 17.8 the Arbitrator may not modify, add to or subtract from the parties' agreement or the player's SPC. Specifically, the Association says that the League sought unsuccessfully to obtain during the 1995 bargaining the very remedy which it seeks in this case, and that the Arbitrator should not now grant the League what it failed to obtain in bargaining. During bargaining the League sought a definition of restricted free agent *360 which would have required full performance under the contract's stated term of years, and ultimately the League withdrew this proposal; the League never stated across the table that expiration meant that the contract did not expire until full performance had been rendered. Thus, there is no basis for reading the term "expire" to include full performance.

The Association also says that League negotiator, Jeffrey Pash, never saw the documents on which Gil Stein was relying but had, simply, been told about them by Mr. Stein. All the bargaining notes have been produced by the Association. Mr. Pash's recording of the "dangerous" comment is fully consistent with the Association's explanation that it did not desire to leave this type of power in the League's hands. The Association also cites Yashin 1, decided by Arbitrator George Nicolau in December 1995, as evidence that Arbitrator Nicolau believed that contract expiration meant the contract's stated expiration date. That case involved a circumstance wherein Mr. Yashin did not fulfill the terms of his SPC before defecting to an unaffiliated club and then when he became free of his obligations to the unaffiliated club, he requested that he be declared a restricted free agent. The Association cites Arbitrator Nicolau's opinion in which he ruled that Mr. Yashin cannot become a restricted free agent before

the expiration date of his SPC and in which he also said that a SPC could expire without the player fulfilling its terms.

The Association argues that in the 1994-95 negotiations the parties scrapped old concepts of free agency including By-Law 9A and agreed upon a new system of free agency contained in Article 10 of the collective bargaining agreement. Consequently, documents from the Ziegler-Stein era should not be regarded as efficacious any longer since they were superseded by the new regime of free agency written into the 1995 collective bargaining agreement. The Association says that the current collective bargaining agreement supersedes all prior memoranda and understandings between the parties. Further, it should ***361** be noted that the Stein-Simpson correspondence as well as the Ziegler interpretation pertained to By-Law 9A which is now a dead letter; none of these relics from the past govern any longer under the newly devised Article 10.

The Association argues that former President Ziegler's interpretation should not be deemed to be a League Rule. The Association points out that it made a sustained, diligent effort to obtain League Rules both through steady correspondence as well as by filing a grievance which went to arbitration before Arbitrator Sands, and that nowhere among all the League Rules that were eventually produced was there any reference to former President Ziegler's interpretation that a player must render full performance under his SPC. Arbitrator Sands noted in his opinion that the Association should not be bound by what it has not been given. The Association says that the only pertinent rule that it was given in this area was a resolution indicating that a player who failed to perform could be suspended.

The Association also argues that there was no previous policy governing this subject matter. It notes that over a 30 year period there have been various holdouts, and that no player holding out has had his player contract tolled. The Association says that no Club has threatened tolling under the 1995 contract with respect to a dozen or so holdouts until now. The fact that a Club always capitulated to a player's demands is not a viable explanation.

The Association says that the focus in this case should be strictly upon what happened in collective bargaining and not upon some independent notion of where the equities ought to lie. The Association says that the answer must be that no remedy of tolling and contract extension exists; Mr. Yashin should be declared a restricted free agent at the end of the 1999-2000 season. The Association asks that its grievance be granted.

Position of the Club

***362** The Club contends that Mr. Yashin must fulfill the terms of his contract and play a fifth year before he is eligible for restricted free agency.

The Club first observes what this case does not concern. It says that it does not concern the issue of whether a mandatory injunction should be imposed upon Mr. Yashin. It is not asking that Mr. Yashin be forced to play hockey; he does not have to play if he decides not to play. The Club says that it is not seeking to overturn many years of Anglo-American jurisprudence [\[FN1\]](#). The Club points out that the full performance concept which is expressly written into the NFL and NBA agreements is a proper concept; otherwise, it would not exist in those agreements. The Club says that the difference between those agreements and the instant one is that in the NHL, while the same understanding exists, it is found in different content than in the NFL and NBA collective bargaining agreements.

The Club underscores the importance of this case to it by pointing out that in bilateral negotiations each party assumes certain risks, and that if players can default upon their obligations, the risk becomes one way rather than two way with potentially adverse consequences for all concerned. The Club argues that once a player enters into a binding contract, the player should have as much of an obligation to fulfill it as a club has. The Club asks why should a player obtain the benefits of free agency without fulfilling his contractual obligations. The Club cites opinions from the outside world

which support its view of this case. The Club points out that this is the first time there has been a full season holdout by a player inasmuch as this is the first time that a club has been willing to take a resolute stand. The Club says that the decision in this case should be limited to a discussion involving a full season holdout and should not go beyond that circumstance.

***363** The Club says that the fundamental question presented by this case is when does a SPC expire. The Club says that an SPC expires after a player has rendered full performance, and that such conclusion is buttressed by the following. The Club points out that the SPC in question speaks of years of service and not years under contract; the Club says that there is no fixed expiration date but, rather, that the SPC speaks in terms of the number of seasons and the compensation for each.

The Club says that Article 30.1 of the collective bargaining agreement provides that each player is bound by League Rules [\[FN2\]](#), and that League Rules encompass League By-Laws as well as official interpretations of League Rules. In 1980, when the League President was the final arbiter of issues surrounding the interpretation of League By-Laws, President Ziegler was asked to give an official interpretation of what happened when a player did not complete the term of his contract, and President Ziegler ruled that a SPC did not expire until a player had given complete performance. In subsequent correspondence in 1991 between Gil Stein, the League's General Counsel, and Sam Simpson, the Players Association Director of Operations, such advice was confirmed. Additionally, President Ziegler testified that in his many dealings with Alan Eagleson, the Association's then Executive Director, Mr. Eagleson was informed of this policy and expressed no challenge or objection. [\[FN3\]](#) Thus, the Club says that either as a matter of League Rule or as a matter of League policy and past practice, the Association was well aware of the League's position and was bound by it.

The Club contends that the Association has an erroneous view of the inferences to be drawn from the 1995 bargaining history. The Club says that the proper interpretation of what occurred during the 1995 ***364** bargaining was that the League was looking to obtain a bilateral codification of existing policy and not an additional right with respect to this issue. The Club cites a statement made by Jeffrey Pash in bargaining about which there is no dispute; Mr. Pash said to the Association that it "would be a useful statement of policy" to indicate that expiration of contract would require full performance. Notes taken by Mr. Pash indicate that from the Association's perspective it was "dangerous" to enter into discussions on this subject. The Club says that the League negotiators interpreted this to mean that the area was politically dangerous, and that when the League withdrew its proposal, it was understood that the status quo would prevail. The Club cites a document prepared by Association negotiator, John McCambridge, indicating "status quo". [\[FN4\]](#)

The Club also argues that the restructure of free agency during the 1994-95 negotiations does not change the outcome here. The restructure of free agency did not affect the remedies available to clubs when a player failed to fulfill the term of his contract. The Club says that the remedies for breach of contract are multiple and, as Arbitrator Nicolau pointed out in Yashin 1, include remedies broadly referenced but not specifically named in the CBA or the SPC.

The Club further contends that Yashin 1 did not involve in any shape or manner a tolling issue, and that any inference attributed to Arbitrator Nicolau should be regarded as dictum since he was not addressing the issue and was not presented with evidence regarding the issue.

In sum and for the reasons recited above, the Club asserts that Mr. Yashin must play a fifth year under his SPC before he is eligible for restricted free agency; it, therefore, asks that the grievance be denied.

Analysis

***365** Alexei Yashin withheld his services in breach of contract for the entire 1999-2000 playing season because he wanted more compensation than his contract provided. The Club responded to this breach by suspending him so that it would not be obliged to pay him. This breach occurred during the fifth and final season of Mr. Yashin's SPC. The issue to be decided in this phase of the case is whether or not Mr. Yashin's SPC has been tolled by virtue of the fact that he withheld his services for the entire 1999-2000 hockey playing season. If the SPC has been tolled, Mr. Yashin owes his Club another year of service before he is eligible to become a restricted free agent; if the SPC has not been tolled, Mr. Yashin becomes eligible for restricted free agency as of June 30, 2000.

The inquiry here begins with the definition of "Restricted Free Agent" as set forth in Article 1 of the collective bargaining agreement. That definition is as follows:

"'Restricted Free Agent' means a player whose Player Contract has expired, but who is still subject to a Right of First Refusal and/or Draft Choice Compensation in favor of his Prior Club as described in Article 10 (Free Agency)."

The fundamental question to be answered here is whether or not Alexei Yashin's SPC will have expired as of June 30, 2000. For all the reasons previously set forth herein the Club maintains that it will not have expired, and the Association asserts that it will have expired.

The Association contends that the word "expire" ought to be given its usual and ordinary meaning, and that if it were given such meaning, there would be no need to resort to parol evidence.

A significant amount of evidence was introduced as to the manner in which "expire" had been construed in the past and as to the parties' discussions during the 1995 bargaining. A fair question is whether, in light of such evidence, "expire" has taken on a special ***366** meaning. I believe it would be a serious mistake to rely on a dictionary definition without considering the evidence referenced above. [\[FN5\]](#) Therefore, I shall consider parol evidence in arriving at the meaning of the word "expire".

One critical factor in the determination to be made here is the interpretation to be placed upon the 1995 bargaining history. During the 1995 negotiations the League proposed a definition of restricted free agent which included, as an element, "fully rendering the playing services called for thereunder" (hereinafter referred to as the full performance concept). This proposal was ultimately withdrawn by the League in favor of the "expire" language recited earlier in this opinion. The League's position is that its proposal, which was later withdrawn, was, simply, an attempt to codify existing policy, and that it so stated this purpose to the Association's bargainers. The Association's position is that it did not understand this to be a codification proposal but, rather, a definition which the League was unsuccessful in obtaining through bargaining.

The recollection of participants from opposing sides of the bargaining table differed over what was said about the full performance concept during bargaining. I believe that each party testified as to its own sincere, good faith recollection as to what was said during bargaining. A resolution of this difference in recollections is not necessary to the outcome of this case inasmuch as the parties' intent can be derived on the basis of reasonable inferences drawn from documents made during bargaining. The Association's notes from bargaining (PA #37) contain the following:

"They want statement that player fully perform his contract. They think it's a useful statement of policy."

***367** The notes go on to reference statements attributable to Jeffrey Pash, a League bargainer:

"Pash: Does not mean a guy who's injured. Means a guy under contract that holds out or goes overseas and misses last year of his contract."

These notes, particularly, the note indicating that "it's a useful statement of policy", tend to support the notion that the League's proposal was presented as one designed

to codify policy.

In addition, another bargaining document drawn up by the Association summarizing the status of bargaining (NHL #24) stated with respect to the definition of restricted free agent:

"RFA/UFA -- 'completely fulfilled' - status quo".

At the top of the document was a note in Mr. Pash's handwriting which said: "can't do completely fulfill language. Too dangerous." [FN6]

The strong inference here is that in the case of restricted free agency, both parties agreed to have the issue of full performance be governed by the "status quo". All of the above evidence leads me to the conclusion that the League was, indeed, seeking to codify existing policy with respect to full performance rather than seeking an additional right, and that the withdrawal of its codification proposal left the subject matter to be governed by existing policy, i.e., the "status quo".

This, then, leads to consideration of the other critical element in this case, namely, what was the existing policy or the "status quo". The Club introduced evidence of policy from an earlier time when there was a different administration in office at both the League and the Players Association. John Ziegler, League President from 1977 to 1992 and counsel to the Chicago Blackhawks before that, testified that full performance had been policy during his tenure as League President and even before that. His testimony was supported by documentation indicating that he had rendered an official interpretation in 1980 *368 concerning full performance. The report on that interpretation read as follows:

"The President was requested to provide his interpretation as to the rights of a Member Club in a situation where a player does not fulfill the full length of the term of his contract. The President stated that the player is obliged to fulfill the term of the contract including option year." (NHL #16)

The Club also introduced evidence concerning an exchange of memoranda in January 1991 between Sam Simpson, Director of Operations for the Association and Gil Stein, League Counsel. While one of the issues in that correspondence referenced rules under By-Law 9A, the other issue did not. Even though the parties replaced By-Law 9A with a new structure for free agency in the 1994-95 negotiations, they did not rework remedial consequences in the event of player refusal to serve a full contract term as I point out later herein. Given the fact that only one of the following scenarios specifically referenced By-Law 9A and the fact that, in any event, remedial consequences were not reworked, I think that this exchange of correspondence remains relevant and supports the testimony of former President Ziegler that full performance was the operative policy.

The correspondence follows. Sam Simpson of the Association initially wrote to Gil Stein of the League as follows:

"I have the following scenarios:

"1. A player playing out his option and who decides to leave the club in the middle of the season, does his contract expire the following July 1 and become a free agent subject to the rules of 9A?

"2. A player who is in his third year of professional hockey and who is in the middle of his contract and who leaves his club in the middle of the season, does the present year of his contract expire at the end of the year and is he considered a three year veteran at the end of the year?" (NHL #17)

Gil Stein's response was as follows:

"I respond to your two stated scenarios as follows:

*369 "1. The scenario describes a player who has played only half of the full season remaining on his contractual obligation, but has refused to perform the other half. Applying the principal (sic) that a player cannot become free of his contractual obligation to play for a club by failing to perform it, he would not become a free agent on the following July 1. Obviously where less than a full season is owed, the question will then arise whether he would become a free agent in the middle of the following season or have to wait until the following July 1.

"2. I know of no precedent dealing with whether a player's three-year veteran status is impacted by his failure to perform a portion of his first three seasons. However, it would seem consistent that the above principle should lead to a similar conclusion, i.e., that a player who has refused to perform one of the first three seasons under his contract would not be considered a three-year veteran." (NHL #18)

While evidence of policy arising under prior League and Association administrations should be carefully scrutinized, I find no sound reason to discount the efficacy of the evidence provided by former President Ziegler's testimony and the Simpson-Stein correspondence. No evidence of a contrary nature was introduced except, possibly, the case of Ken Dryden during the 1973-74 season [FN7]. Even if that case is on point, it is not sufficient to overcome the weight of the evidence behind the policy identified herein. Therefore, the testimony of former President Ziegler and the Simpson-Stein correspondence satisfactorily establishes what the existing policy was [FN8], and that the Association was on notice as to such policy. Also, there is no evidence that the Association expressed any objection to such policy during the time frame covered by the above evidence.

The Association argues that in the 1994-95 negotiations the parties scrapped By-Law 9A, which contained the prior iteration of free agency, and replaced it with a new structure for free agency. This thoroughgoing revision, says the Association, eliminated any full ***370** performance requirement that might have existed. While the parties did rework the entire structure of free agency in the 1994-95 negotiations, they did not rework remedial consequences in the event of player refusal to serve a full contract term. In fact, as this opinion makes clear, the parties during the 1994-95 bargaining chose to go with the status quo in terms of full performance requirements. In sum, then, the foregoing reveals that the existing policy at the time of the 1995 negotiations was one of full performance, and that the parties' intent in the 1995 negotiations was to leave the status quo unchanged.

Nevertheless, the Association argues that there are other considerations which influence the outcome here. The Association argues that adoption of a full performance requirement here is the equivalent of granting a mandatory injunction for the performance of personal services under a personal services contract, and that our jurisprudence does not approve of such injunctions. I am not persuaded that the full performance requirement amounts to the equivalent of a mandatory injunction. What the full performance concept requires is that the player render performance for the full term of years specified in a SPC without illegally holding out if the player wants to obtain the negotiated benefit of free agency. If a player chooses not to play at all, then that is the player's decision. [FN9] Pressure to render full performance may exist because a player desires the benefit of free agency or because a player desires to avoid damages stemming from a default on his contract; since the latter circumstance does not translate into the equivalent of granting a mandatory injunction, neither does the former. [FN10]

***371** The Association further argues that Arbitrator Nicolau in Yashin 1 indicated that the benefit of restricted free agency did not become realized until contract expiration and that a player did not have to play until contract expiration if he chose not to (pp. 16 & 17). I point out that Yashin 1 involved an altogether different issue than the issue presented here, and that most of the evidence introduced here was not presented to Arbitrator Nicolau. Consequently, I think that the Association makes too much of a remark made in passing (i.e., dictum) which was not central to the disposition of Yashin 1.

The Association also argues that full performance is not a remedy specifically identified in the collective bargaining agreement or the standard form SPC, and that it, therefore, should not be adopted here. The Association cites language found in Sec. 17.8 of the CBA in support of this position. I point out once again that I am not ordering full performance of Mr. Yashin's SPC; whether he plays again or not is his decision to make as I have previously stated. Sec. 17.8 of the CBA gives me the "authority to interpret, apply and determine compliance with any provision of this

Agreement, or an NHL Player Contract", and I have exercised that authority to determine what the term "expire" means as used in the definition of restricted free agent. In sum, I find this Association argument to be without merit. In conclusion and for all of the reasons recited herein, I find that Mr. Yashin's contract has been tolled by virtue of the fact that he withheld his services for the entire playing season, 1999-2000, and that his SPC does not expire until he provides one additional season of service to the Club.

Therefore, after having considered the evidence and arguments of the parties, I award as follows:

By reason of Mr. Yashin's choosing not to play for the Ottawa Senators in the 1999-2000 season, Mr. Yashin's SPC does not expire until he provides an additional season of service to the Ottawa Senators under the terms of his SPC applicable to the 1999-2000 season.

***372** Lawrence T. Holden, Jr. Arbitrator

***375** III. PLAYER CONDUCT AND DISCIPLINE

[\[FN1\]](#). The Club contends that reference to state law precedent, as provided by the Association, should be considered in light of the federal pre-emption doctrine contained in sec. 301 of the LMRA.

[\[FN2\]](#). The Club says that a League Rule can exist in the absence of notification to the Association and references dicta in the decisions of Arbitrators Nicolau and Sands.

[\[FN3\]](#). The Club says the fact that Mr. Eagleson was subsequently disgraced does not invalidate either the benefits obtained or the obligations undertaken during his regime.

[\[FN4\]](#). The Club says that any credibility contests regarding bargaining history should be resolved in the League's favor and cites a decision by ALJ Kern.

[\[FN5\]](#). I do not find any language in Mr. Yashin's SPC to be dispositive in and of itself as to when the SPC expires. The SPC merely identifies the contract term and states the seasons; it does not specify what happens to the term, if anything, in the event that the player breaches the SPC by voluntarily withholding his services for a full season. Moreover, the standard form SPC states: "(A)ny provisions of this Contract inconsistent with such Collective Bargaining Agreement are superseded by the provisions of the Collective Bargaining Agreement."

[\[FN6\]](#). The parties have argued over whether the "too dangerous" concept meant politically dangerous or dangerous in some other respect. That issue does not need to be resolved here.

[\[FN7\]](#). While Mr. Dryden held out in the final year of his contract, it is not entirely clear whether or not that contract had a perpetual option clause in it. In cases unlike Dryden where there had been partial season holdouts, the parties had apparently settled all those cases to everyone's satisfaction.

[\[FN8\]](#). The Club argued that this existing policy also took the form of a League Rule, but it was not among the League Rules submitted to the Association as a result of Arbitrator Sands' ruling or before. Arbitrator Sands noted in his decision on League Rules a statement by a League official that "Obviously, you can't be bound by what you don't have." P. 5 (Aug. 17, 1998)

[\[FN9\]](#). This observation is not intended to prejudge the next phase of the Yashin case

which is whether or not Mr. Yashin is liable for damages by withholding his services in violation of his contractual obligation.

[\[FN10\]](#). I further note that the full performance concept has been incorporated into the NFL & NBA collective bargaining agreements.
END OF DOCUMENT

-
- ⁱ Basil M. Loeb, Deterring Player Holdouts: Who Should Do It, How to Do It, and Why It Has to Be Done, 11 Marquette Sports L. Rev. 275 (2001).
- ⁱⁱ Interview with Bill Daly, Chief Legal Officer of the NHL, 4/22/04.
- ⁱⁱⁱ Id.
- ^{iv} William Buckley Briggs, Guest Lecturer, *Sports and the Law*, NYU School of Law, Professor Samuel Estreicher; 4/1/04.
- ^v NFL Collective Bargaining Agreement, 2002-2008; Article XII: Injury Protection.
- ^{vi} Id.
- ^{vii} NHL Collective Bargaining Agreement, Exhibit 1: Standard Player's Contract
- ^{viii} John Donovan, "Show Me the Money: With Millions on the Table, Holding Out is a Risky Business", CNN.com, http://sportsillustrated.cnn.com/inside_game/john_donovan/news/1998/08/04/holdouts/
- ^{ix} NFL Collective Bargaining Agreement 2002-2008, Article XX, Section 2(c)
- ^x Id.
- ^{xi} Id., Article XX, Section 3
- ^{xii} See Id. Article XIX.
- ^{xiii} Id., Article XXII, Section 1.
- ^{xiv} <http://eagles.theinsiders.com/2/165208.html>
- ^{xv} <http://eagles.theinsiders.com/2/165208.html>
- ^{xvi} <http://bengals.enquirer.com/2003/08/24/wwwben2nte24.html>
- ^{xvii} http://sportsillustrated.cnn.com/football/nfl/news/1999/08/09/falcons_anderson_ap/
- ^{xviii} Id.
- ^{xix} <http://www.savannahnow.com/stories/081199/SPTfalconsmainbar.shtml>
- ^{xx} http://www.onlineathens.com/stories/081299/spo_0812990021.shtml
- ^{xxi} http://www.onlineathens.com/stories/081299/spo_0812990021.shtml
- ^{xxii} <http://games.espn.go.com/cgi/ffl/playernewsarchive?statsId=2017>
- ^{xxiii} <http://games.espn.go.com/cgi/ffl/playernewsarchive?statsId=2017>
- ^{xxiv} <http://www.profootballtalk.com/8-1to8-15archive.htm>
- ^{xxv} <http://www.profootballweekly.com/PFW/Commentary/Spins/2002/spin082802.htm>
- ^{xxvi} "Panthers Cut Greene Loose: Long Holdout Helped Seal Fate of Linebacker," Associated Press, *Milwaukee Journal Sentinel*, August 25, 1997.
- ^{xxvii} "49ers Notebook," Gary Swan, *San Francisco Chronicle*; December 18, 1997.
- ^{xxviii} See "Vikes Buyers Squelch Houston Talks," Larry Weisman, *USA Today*; May 15, 1998.
- ^{xxix} "NFL Notebook: It's Not Easy Being Greene," Ed Bouchette, *Pittsburgh Post-Gazette*; August 31, 1997.
- ^{xxx} "NFL Insider: Some Rookies are Not Backing Down," Mike Mulligan, *Chicago Sun-Times*; August 4, 2002.
- ^{xxxi} Id.
- ^{xxxii} "Saints' Brooks No-Show; No. 1 QB's Absence Thought to be Linked to Contract Talks," *The Associated Press*, July 28, 2002.
- ^{xxxiii} "NFL Insider: Some Rookies are Not Backing Down," Mike Mulligan, *Chicago Sun-Times*; August 4, 2002.
- ^{xxxiv} "Brooks, Stallworth End Holdouts, Head to Camp; Quarterback Ends Holdout but Wants a Raise," Brian Allee-Walsh, *The Times Picayune*; July 30, 2002.
- ^{xxxv} "Around the NFL," Jason Cole, *The Miami Herald*; August 4, 2003.
- ^{xxxvi} "Saints' Brooks No-Show; No. 1 QB's Absence Thought to be Linked to Contract Talks," *The Associated Press*, July 28, 2002.
- ^{xxxvii} "Faulk Signs a Seven-Year Deal with the Rams; Brooks Shows up to Saints Training Camp but is still Dissatisfied with his Contract Talks," *Contra Costa Time*; July 30, 2002.
- ^{xxxviii} "Brooks, Stallworth End Holdouts, Head to Camp; Quarterback Ends Holdout but Wants a Raise," Brian Allee-Walsh, *The Times Picayune*; July 30, 2002.
- ^{xxxix} Id.
- ^{xl} "Saints Pull Fast One; Tampa Bay Falls Victim to Moves by 'Fast Freddie,'" Don Hammack, *The Sun Herald*; September 9, 2002.
- ^{xli} <http://www.detnews.com/2001/lions/0108/09/sports-264798.htm>
- ^{xlii} <http://www.detnews.com/2001/lions/0108/09/sports-264798.htm>

-
- xliii “Brooks back in Camp,” Roy Cummings, *The Tampa Tribune*; August 9, 2001.
- xliv *Id.*
- xlvi *Id.*
- xlvi *See Id.*
- xlvii “Miller Puts Ball in Browns’ Territory,” Tony Grossi, *The Plain Dealer*; April 27, 2002.
- xlviii Loed, *supra* note 1, at 293-294.
- xlix *Id.*
- ¹ *Id.*
- ^{li} *Id.* at 291.
- ^{lii} *Id.* at 291-293.
- ^{liii} In the Matter of Arbitration between the National Hockey League Players Association and National Hockey League, Grievance of Alexei Yashin (Ottawa Senators), *Understanding Business & Legal Aspects of the Sports Industry 2001 Volume One*, 638 PLI/Pat 353,
- ^{liv} NFL Collective Bargaining Agreement 2002-2008, Article XVIII, Section 1(b).
- ^{lv} *See* Loeb, *supra* note 1, at 294.
- ^{lvi} NFL Collective Bargaining Agreement, Article VIII: Club Discipline.
- ^{lvii} NBA Collective Bargaining Agreement, Article VI: Player Conduct, Section 1: General.
- ^{lviii} NHL Collective Bargaining Agreement, Article 15.3.e.
- ^{lix} *See* generally Basic Agreement Between the 30 Major League Clubs and Major League Baseball Players Association.