

Bargainer's Remorse: Collective Bargaining Agreement Highlights Limited Ability to Appeal Arbitral Awards in Deflategate Appeal

Norm Emblem and Barbara Capes

A 2-1 majority of the United States Second Circuit Court of Appeals reinstated Tom Brady's four-game "Deflategate" suspension on the grounds that courts owe substantial deference to arbitral awards issued pursuant to collective bargaining agreements. Such agreements are negotiated by the parties to reflect their priorities and expectations. Where the parties fail to limit an arbitrator's authority or discretion through the collective bargaining process, the application of such broad powers is not in and of itself tantamount to unfairness or a lack of due process.

In April 2016, the NFL succeeded in reinstating the four-game suspension originally imposed on Tom Brady in 2015 and affirmed on appeal by NFL Commissioner, and sometimes arbitrator, Roger Goodell.¹ A federal court's standard of review of labour arbitration awards is highly deferential. In this case, the Court's review turned on whether the Commissioner, acting as arbitrator, was "even arguably construing or applying the contract and acting within the scope of his authority" and did not "ignore the plain language of the contract". Further, the award must "draw its essence from the collective bargaining agreement" ("CBA") and must not constitute an arbitrator's "own brand of industrial justice". To the chagrin of Patriots' fans everywhere, the Court of Appeals concluded that Brady was not deprived of fundamental fairness and the CBA gave the Commissioner broad discretion that he appropriately applied in the circumstances.

Arbitrator-in-chief: You Get What You Bargained For

The Court of Appeals found that the Commissioner's power stemmed directly from the CBA. The parties could have negotiated limits to that power during the collective bargaining process. Without those limits however, the application of such power did not constitute unfairness or a lack of due process. Having negotiated the CBA, the NFLPA (and Brady) could only expect as much impartiality as they had built into their dispute resolution mechanism. Both parties were aware of the Commissioner's broad authority, including his sole power to determine and discipline "conduct detrimental" to the NFL, and his ability to preside over any subsequent appeal brought under Article 46 of the CBA.

Notice Requirement

In his reasons for decision, the Commissioner noted that Brady's four-game suspension is the same discipline that the NFL administers for a first-time violation of its policy on steroids. Where the District Court found that there was no comparability between Brady's alleged misconduct and steroid use, the Court of Appeals concluded that receipt of the player policies had given Brady notice that "Other Uniform/Equipment Violations" were subject to fines and "other forms of discipline, including higher fines and suspension". Further, the Court found that deference to arbitral awards entails generous latitude in the phrasing and the chosen analogies of the arbitrator.

Exclusion of Testimony by Jeff Pash, Co-lead Investigator of Deflategate

Generally, arbitrators have substantial discretion to admit or exclude evidence. Nevertheless, the *Federal Arbitration Act* provides an exception for vacatur where “the arbitrators are guilty of misconduct... in refusing to hear evidence pertinent and material to the controversy” and where “fundamental fairness is violated”.

The Commissioner denied Brady the opportunity to question Pash and the District Court concluded that Brady had consequently been denied access to evidence that was pertinent and material to the controversy surrounding the “independence” of the Deflategate investigation. The Court of Appeals disagreed, finding that the CBA does not require independent investigations, and therefore Pash’s testimony was neither pertinent, nor material.

Unequal Access to Investigative Files

The Commissioner also denied the NFLPA’s motion for access to the Deflategate investigative documents on the grounds that discovery under the CBA “does not contemplate the production of any other documents”. The District Court found that, as a result, Brady was not placed in the same position as access to the documents would have afforded him.

The Court of Appeals concluded that the parties had agreed to comprehensive discovery for specific proceedings under the CBA. Nevertheless, in proceedings under Article 46, the parties’ discovery was limited to exchanging copies of any exhibits “upon which they intend to rely”. Ultimately, the Court found that the parties had failed to bargain for more expansive discovery and were consequently bound by that decision.

The Dissent

The Court of Appeals’ decision was not unanimous. Chief Judge Katzmman sided with the District Court, concluding that the Commissioner had applied “his own brand of industrial justice” thereby undercutting the protections for which the NFLPA had bargained. The CBA grants the Commissioner the authority, as arbitrator, to determine whether initial disciplinary decisions were erroneous. Nevertheless, the Chief Judge concluded that the Commissioner’s arbitral award went beyond the scope of the initial disciplinary decision on appeal. The Commissioner effectively exceeded his authority when he justified Brady’s suspension on misconduct found for the first time in his award.

Negotiate Wisely, Or Else!

Nearly all collective bargaining agreements and other employment agreements have arbitration clauses. Compared to litigation, arbitration is often a more efficient, cost-effective and inexpensive dispute resolution mechanism for the parties. The Court of Appeals’ Deflategate decision is a reminder of the limits on appealing arbitral awards. The parties to an arbitration agreement should consider and account for these limits at the drafting stage. Just ask Tom Brady: He likely has a few agenda items for the NFL’s next collective bargaining meeting...

Note: On July 13, 2016, the Court of Appeals denied the NFLPA’s request for an ‘en banc’ review of its decision by the complete Circuit. The NFLPA has a final option to appeal to the U.S. Supreme Court.

[Norm Emblem](#) is a senior partner in the Litigation and Dispute Resolution Group at Dentons Canada LLP. He is also the proud owner of at least one football that has only been inflated to 11 psi.

[Barbara Capes](#) is an associate in the Litigation and Dispute Resolution Group at Dentons Canada LLP. She is also a lifelong New England Patriots fan.

ⁱ For greater detail, see Norm Emblem and Barbara Capes, “When Pash Comes to Shove – Lessons from “Deflategate” / Quand le jeu devient sérieux – Leçons tirées de l’affaire Deflategate”, ADR Perspectives/Perspectives PRD, December 2015.