

# REPLACEMENTS AS A LABOR WEAPON:

## A 300-POUND LINEBACKER THE UNION LEADERS NEVER SAW COMING

THOMAS LLOYD

### *Forever A Memorable Game*

The stage was set for easily one of the most memorable games between National Football League division rivals Washington Redskins and Dallas Cowboys. It was mid-October and each team had amassed a 3-1 record, sufficient for a two-way tie for first place in the NFC East, and fans responded appropriately. Cowboy fans had Texas Stadium humming with a near capacity crowd of 60,612.<sup>1</sup> Back in Washington D.C., over 600,000 homes turned their televisions to ABC to watch the Monday Night Football showdown.<sup>2</sup> But this could arguably be expected, as division rivalry games usually result in increased fan interest, especially when it's the top seeds playing on a Monday Night.

However, this time was different. The year was 1987 and this was no regular game. Rather, it was the 42<sup>nd</sup> and final game to be played with replacement players in the NFL. The players' strike, headed by NFL Players Association (NFLPA) President Gene Upshaw, had been called off four full days prior – one day too late to meet the owners' deadline that would allow the regulars to play that week. The regular Washington Redskins, like all other football squads, had only played the season's first two regular season games before the strike sent them to the picket lines. After the entire league took the third week off to allow the building of replacement squads, NFL fans would see replacement-powered games for three straight weeks. For this final replacement game, the no-longer striking union Redskins stayed in D.C. and held practice at a facility they had just finished picketing. Meanwhile, the "Scabskins," "Subskins" or otherwise referred-to replacement players flew to Dallas.

The game's roster matched a stacked Dallas team against the visiting replacements. Unlike the replacement Redskins' prior opponents, this Dallas team had their eight best veterans back to play with their replacement team, six of whom they would later see start. In addition to starting quarterback Danny White, the Cowboys star running back Tony Dorsett, four defensive linemen, and one receiver crossed the picket lines.<sup>3</sup> But the one thing the Redskins surprisingly had going for them was the crowd. White and Dorsett were booed at home the week prior, and a local newspaper poll actually found the replacement team to be better liked than the union Cowboys.<sup>4</sup> The Redskins also had a somewhat successful replacement quarterback in Ed Rubbert. However, Rubbert's effectiveness would depend upon his replacement offensive linemen's ability to stop the attack of the Cowboy's all-pro veteran rushers Randy White, Ed "Too Tall" Jones and Don Smerek.

Commentators, fans, and even the Redskins' own coach Joe Gibbs spoke of the chance of victory over the union-laden Cowboys dismissively. Gibbs defended his over-matched team before the game by stating that "you wouldn't expect a team put together in 10 days to be able to

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<sup>1</sup> Christine Brennan, *Replacement Redskins Enjoy Happy Ending; Defense Keys Victory Over Dallas*, THE WASHINGTON POST, October 20, 1987, at E1.

<sup>2</sup> John Carmody, *The TV Column*, THE WASHINGTON POST, October 21, 1987, at B8.

<sup>3</sup> Christine Brennan, *Replacement Redskins Enjoy Happy Ending; Defense Keys Victory Over Dallas*, THE WASHINGTON POST, October 20, 1987, at E1.

<sup>4</sup> Christine Brennan, *New Redskins Play Closing Night; Unbeaten Replacements Tangle With Veteran-Laden Cowboys Team*, THE WASHINGTON POST, October 18, 1987, at C1.

play with a group of guys who have proven they're one of the best teams in the NFL."<sup>5</sup> Yet Gibbs may even still have been giving his rag-tag team too much credit. These replacements were comprised of pre-season cuts at camp or Canadian Football League players, and many of his replacement starters had gone un-drafted and were simply on break from their regular jobs.<sup>6</sup>

This would not hinder Gibbs' passion in the locker room before the game. "No one is giving you a chance in this game, which is exactly why you chose to do this," Gibbs told his players. "You came back here to prove you can play in the league. If you had just one chance to play in the NFL, tonight would be the night. On national television, you get to play the Dallas Cowboys with their starters. You want to prove yourselves, go prove it!"<sup>7</sup>

Gibbs' replacement players responded by roaring out of the locker room and establishing an impressive defensive showing. On the first drive of the game, Redskins defender Alec Gibson managed to slap the ball out of Dorsett's hand, allowing replacement Dan Benish to recover the ball at Dallas' 46-yard line.<sup>8</sup> The defense would manage to sack White six times, and force Dorsett to drop once again, all in the first half of the game.<sup>9</sup> Meanwhile, Dallas fans could not seem happier. They had booed White and Dorsett since the player introductions at the beginning of the game. Twice the crowd chanted "We Want Sweeney," the replacement quarterback Kevin Sweeney who won Dallas both of the earlier replacement games.<sup>10</sup>

Unlike the defense, the Redskin offense struggled. Rubbert manage to get his team to Dallas' 1-yard line before being forced to settle with a field goal. Rubbert would not get another shot, as the tough all-pro Cowboy defenders managed to force him from the game with a bruised shoulder. Instead, the fate of the Redskins would turn on back-up replacement quarterback Tony Robinson.

Robinson, a rare black quarterback in the 1980s, traced success back to high school where he went 29-4 over three years and completed a record 59% of his passes.<sup>11</sup> Accolades continued into college, where Robinson continued to shatter records at the University of Tennessee. He was a contender for the 1985 Heisman and had even been featured on the cover of Sports Illustrated.<sup>12</sup> Everything came crashing down for Robinson, however, his senior year. First came injury: a bad hit tore his knee ligaments and required surgery and rehabilitation.<sup>13</sup> Second came legal troubles: Robinson was arrested after a sting operation for cocaine trafficking and was a primary recipient of illicit support from boosters that would later result in NCAA sanctions against the school.<sup>14</sup> Robinson served six months in jail before his lawyer convinced a judge to free him temporarily to play for the Continental Interstate Football League's Richmond Ravens in Virginia, upon the condition he return to jail for three months after the season ended.<sup>15</sup> It was during this period the NFL strike was declared and Robinson got called up to D.C. to meet with the Redskins.

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<sup>5</sup> Id.

<sup>6</sup> David Elfin, *Stock of 'Subskins' soared in upset of stacked Dallas*, THE WASHINGTON TIMES, October 8, 1997, at B1.

<sup>7</sup> Chris Harry, *NFL Strike of 1987 Created Bizarre Season*, ORLANDO SENTINEL, October 6, 2002, at D1.

<sup>8</sup> Christine Brennan, *Replacement Redskins Enjoy Happy Ending; Defense Keys Victory Over Dallas*, THE WASHINGTON POST, October 20, 1987, at E1.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Lisa Frazier, *The Replacement; The movie was a mediocre comedy. The real story behind the Redskins' most unlikely hero was a bona fide tragedy*, THE WASHINGTON POST, October 29, 2000, at F01.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id.

Robinson started the third quarter off big, completing a 42-yard pass to tight end Craig McEwen on the first play. The drive terminated in a 16-yard touchdown to receiver Teddy Wilson, resulting in the lowly replacements leading the veteran-laden Cowboys 10-0.<sup>16</sup> In all, Robinson went 11 for 18 for 152 yards, and despite his two interceptions, gave enough for the Redskins to attain a 13-7 lead with 6:13 remaining.<sup>17</sup> Significant help came in the form of running back Lionel Vital, a player who was cut during the Redskins' training camp, but would out-gain the Cowboy star running back 136 yards to 80.<sup>18</sup> However, the game was now up to the replacement Redskins' defense to hold the Cowboys' veteran-staffed offense to less than a touchdown.

The defense started off well, picking off White early on in the drive. However, Robinson and his replacement offense quickly found themselves out of gas and out of downs. The Redskins' special teams punt pinned the Cowboys on their own 3-yard line with only a little more than 2:00 left in the game. The Cowboys were in a tough spot, but scoring a touchdown in two minutes was certainly possible given the fact they were playing with veterans against a bunch of replacements. White responded well to the situation, as one would expect, and the Cowboys quickly and easily moved the ball well into Washington territory with about a minute to go.<sup>19</sup> But that's when the wheels came off of the Cowboy machine. Dallas ended up on the Redskin 20-yard line with 50 seconds to go.<sup>20</sup> It was fourth-and-three and White dropped back to pass. The coverage held, and White threw a tough pass at receiver Kelvin Edwards.<sup>21</sup>

To the Redskins' delight, the pass sailed well out of reach of Edwards' grasp, thus sealing the Cowboys' fate and the replacement Redskins' role in history. Washington defenders celebrated profusely by dancing and hugging in the middle of the field.<sup>22</sup> Jack Kent Cooke, the 75-year old owner of the Redskins, rushed down to the locker room. Upon giving Coach Gibbs "the tightest of bear hugs in the middle of a mad, mad visiting locker room," he proclaimed, "It was heaven... I don't think I've ever been so excited."<sup>23</sup> Gibbs would recall the post-game celebration in the locker room to be one of the most emotional he'd ever been in.<sup>24</sup> "I've never seen a team give so much on the field... I'm really proud of these guys for the way they played," said Gibbs after the game.<sup>25</sup>

As for the rest of the season, the regular Redskins retained their division lead after the strike and secured a playoff position. Despite eventually playing well enough to beat Denver in Super Bowl XXII, the fans occasionally reminded the regular players of the role the

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<sup>16</sup> David Elfin, *Stock of 'Subskins' soared in upset of stacked Dallas*, THE WASHINGTON TIMES, October 8, 1997, at B1.

<sup>17</sup> Christine Brennan, *Replacement Redskins Enjoy Happy Ending; Defense Keys Victory Over Dallas*, THE WASHINGTON POST, October 20, 1987, at E1.

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Id.

<sup>23</sup> Michael Wilbon, *Night Has Bittersweet Ending for Robinson and Replacements*, THE WASHINGTON POST, October 20, 1987, at E5.

<sup>24</sup> Christine Brennan, *Replacement Redskins Enjoy Happy Ending; Defense Keys Victory Over Dallas*, THE WASHINGTON POST, October 20, 1987, at E1.

<sup>25</sup> Bob Molinaro, *0-4 VS. 0-4: WILL SKINS OR COWBOYS GET LAST LAUGH?*, THE VIRGINIAN-PILOT, October 15, 2001, at C1.

replacements played that year. At one point when floundering against the New York Jets at home, Redskin fans began to chant, “We want the scabs! We want the scabs!”<sup>26</sup>

Yet most of the replacement players who had earned the respect of the fans with their perfect streak of 3-0 watched the remainder of the season from home. Robinson, one of the great Redskin heroes of the Cowboy game, would watch the Super Bowl from his jail cell where he finished out his prior sentence. Sadly, he would return to jail a number of times over the following decade for additional drug-related offenses and would never again return to the NFL.<sup>27</sup>

This replacement game’s place in history signifies more than a huge football upset and a testament to the power of heart, determination and teamwork. Rather, a historical perspective of this game sees the defeat of the union Cowboys by the replacement “Scabskins” as a crushing defeat to the NFLPA and their ability to successfully strike during an important labor dispute. Yet to understand this perspective, one must trace the history of the NFL labor movement and look at how the owners’ use of replacement players in 1987 have forever since altered labor disputes in professional sports.

### *Early History*

The NFL began as an unincorporated association controlled by member teams and would not become known as its current name, the National Football League, until 1922.<sup>28</sup> The league entity has since served various functions, including organizing and scheduling games, as well as determining the rules. The NFL’s constitution and bylaws govern its activities and those of its members.<sup>29</sup>

It would take another twenty years following the institution of a draft for the players to begin to form a union. The National Football Players League (as it was then called) formed in 1956, when the players from the Green Bay Packers and the Cleveland Browns sought a salary floor of \$5,000 a year, reimbursement for player equipment expenses, and continued salary for injured players.<sup>30</sup> Recruitment for the union was headed by Don Shula of the Baltimore Colts, Frank Gifford and Sam Huff of the New York Giants, and Norm Van Brocklin of the Los Angeles Rams.<sup>31</sup>

The first organized action of the union was to strike at the last preseason game of the season in 1956 between the Baltimore Colts and the Washington Redskins. The owners would never respond to the players’ proposals, but responded to their action by uniting and declaring that the game would commence with or without the striking players.<sup>32</sup> The event provided the first instance in modern NFL history that owners threatened, at a minimum by implication, the use of replacement players to combat union demands. The players caved on their demands, returned to work, and the game commenced without interruption.<sup>33</sup>

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<sup>26</sup> Scott Patton, *First Down And Nowhere To Go; At RFK With a Fill-In Skin*, THE WASHINGTON POST, October 26, 1987, at C1.

<sup>27</sup> Lisa Frazier, *The Replacement; The movie was a mediocre comedy. The real story behind the Redskins' most unlikely hero was a bona fide tragedy*, THE WASHINGTON POST, October 29, 2000, at F01.

<sup>28</sup> NFL History, <http://www.nfl.com/history/> (last visited Apr. 13, 2008).

<sup>29</sup> Wikipedia, *National Football League Players Association*, [http://en.wikipedia.org/wiki/National\\_Football\\_League\\_Players\\_Association](http://en.wikipedia.org/wiki/National_Football_League_Players_Association) (as of Apr. 13, 2008, 10:00pm GMT).

<sup>30</sup> Paul D. Staudohar, *The Football Strike of 1987: The Question of Free Agency*, 111 MONTHLY LAB. REV. 26 (Aug. 1988); NFL Players Association History, available at [http://www.nflpa.org/AboutUs/NFLPA\\_History.aspx](http://www.nflpa.org/AboutUs/NFLPA_History.aspx) (last visited Feb. 7, 2008).

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id.

Widespread union-led strikes would appear in the 1960s, as players sought a combination of more money and improved working conditions - primarily in the form of pensions, life insurance and health coverage benefits. The union, which by this point had officially changed its name to NFL Players Association (NFLPA), sought minimum salaries of \$15,000 for rookies and \$20,000 for veterans, as well as \$500 for each exhibition game, a lowered retirement age, and impartial grievance arbitration.<sup>34</sup>

Unlike in 1956, the NFL of the 1960s had a true competitor: the American Football League (AFL). The AFL was a well-funded competing league that had even managed to successfully out-bid for half of the NFL's first-round draft choices in its very first year of existence.<sup>35</sup> The competition between the leagues for talent, fans, and, most importantly, television broadcast contracts, grew particularly fierce by 1965 when the AFL signed a very lucrative broadcast agreement with NBC.<sup>36</sup> The new cash-flush league spent every penny of NBC's \$36 million to lure blockbuster players such as Joe Namath to its ranks.<sup>37</sup>

Without a doubt, the new AFL / NFL rivalry was the greatest boon to newly entering superstar players. With two leagues competing for the top talent, these players collected ever-increasing guaranteed money in their contracts. Meanwhile, however, the NFLPA floundered and ultimately caved on many issues important to the many players who were not signing the superstar contracts. And the competitive position for these players would get even worse by the end of the 1960s when the AFL and NFL formally announced a merger. No longer would there be two parallel player drafts or escalating player compensation as a result of the leagues competing for fans and broadcasting rights. By 1970, the combined AFL and NFL players associations had not come even close to their original goals. Salaries had bumped up to a meager \$9,000 for rookies and \$10,000 for veterans, exhibition pay stayed at \$50 per game, the commissioner remained the arbitrator for any disputes that arose, and the retirement age remained unchanged.<sup>38</sup>

### ***The Labor War Heats Up, Introduces a New Battlefield***

From 1947 to 1963, free agency was governed by the "one-year option" rule. This meant teams had the right to force a one-year extension of a prior contract upon a player if a new contract could not be worked out with the player. At the termination of the contract, a player would be free from any restrictions as a free agent.<sup>39</sup> However, the real rule was an unwritten one: NFL owners had a gentleman's agreement to never sign players from other teams, thus keeping the price of player contracts artificially low by eliminating competition between teams and forcing players to work out their contracts with their existing owners.<sup>40</sup>

It only took one owner's deviation to convince the league to solidify that gentleman's agreement with a binding policy. In 1963, R.C. Owens, a celebrated receiver known for a very impressive jumping ability, played out his option with the San Francisco 49ers. To the shock

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<sup>34</sup> Id.

<sup>35</sup> Paul D. Staudohar, *The Football Strike of 1987: The Question of Free Agency*, 111 Monthly Lab. Rev. 26 (Aug. 1988).

<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> NFL History, <http://www.nfl.com/history/> (last visited Apr. 13, 2008).

<sup>39</sup> Peter N. Katz, Comment, *A History Of Free Agency in the United States and Great Britain: Who's Leading the Charge?*, 15 Comp. Lab. L. 371, 386-87 (1994).

<sup>40</sup> Donn Sinn, *History 101: 49ers And Free Agency* (Jan. 6, 2004), [http://www.49ers.com/pressbox/news\\_detail.php?PRKey=1660](http://www.49ers.com/pressbox/news_detail.php?PRKey=1660).

and dismay of NFL owners, Carol Rosenbloom of the Baltimore Colts broke the longstanding unstated agreement and signed Owens to a multi-year contract for more money.<sup>41</sup> Owners acted swiftly by amending the League Constitution with a rule later dubbed “the Rozelle Rule” after then-NFL commissioner Pete Rozelle. The rule contained a set of compensatory requirements that were so restrictive they would all but bring a halt to free agency. According to the rule, any team who obtained a player through free agency must compensate the player’s former team with something of equal value (either players, draft picks, or money).<sup>42</sup> Should the teams not agree between themselves (thus the equivalent of a player-prompted trade), the rule provided the commissioner with discretionary power to determine “fair and equitable” compensation.<sup>43</sup>

Having achieved so little success in the past, the union decided to initially put off its attack of the Roselle Rule and see first what it could do in the meantime for stagnant player compensation. The union battled with the league through the late 1960s and conducted strikes in the 1970, 1974, and 1975 seasons.<sup>44</sup> The owners responded to each strike by locking out the players from training camps. The lockouts worked well and the union continued to make little headway.

But the NFLPA did not ignore the Rozelle Rule for very long. Repeated failure in one-on-one dealing led the union to attack the league with the assistance of the courts in *Mackey v. National Football League*.<sup>45</sup> The Eighth Circuit held that the Rozelle Rule lacked sufficient procedural safeguards and thus violated a rule of reason analysis.<sup>46</sup> However, the Court then needed to determine if the “non-statutory labor exemption” allowed the acts that would otherwise be held to be violations to be outside the realm of recovery for the union.<sup>47</sup> The Court concluded that the exemption applies if a three-prong test is met: (1) the practice must affect only the parties to the agreement; (2) the restrictions must pertain to a mandatory subject of bargaining; and, (3) the restrictions must be a product of good faith, arms-length collective bargaining.<sup>48</sup>

*Mackey* had not been the first time a NFL practice or rule was tested in court under antitrust law. Other examples of rules found to violate the rule of reason included the draft,<sup>49</sup> and the NFL Standard Player Contract.<sup>50</sup> However, the NFL was able to avoid antitrust liability in each instance because the courts determined that the three prongs of *Mackey* had been met, and thus the league policy was protected under the non-statutory labor exemption. But the NFL would not be so lucky with *Mackey*: the Eighth Circuit determined the NFL violated the third prong of the nonstatutory labor exemption test because it imposed the Rozelle Rule unilaterally.<sup>51</sup> With *Mackey*, the union had finally found a forum where it could succeed.

The two sides responded to *Mackey* with a settlement in 1977 and the institution of a new free agency system jointly developed by the union and the league known either as the “right of first refusal” or “compensation system,” which was a modification to the Rozelle Rule.<sup>52</sup> The new system was designed to address the biggest perceived problem of the existing system:

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<sup>41</sup> Id.

<sup>42</sup> Katz, 15 Comp. Lab. L. at 386-87.

<sup>43</sup> Id.

<sup>44</sup> *Mackey v. National Football League*, 543 F.2d 606, 610 (8th Cir. 1976).

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> Katz, 15 Comp. Lab. L. at 387.

<sup>48</sup> Id.

<sup>49</sup> *Smith v. Pro Football Inc.*, 593 F.2d 1173 (D.C. Cir. 1978).

<sup>50</sup> *Kapp v. Nat'l Football League*, 586 F.2d 644 (9<sup>th</sup> Cir. 1978).

<sup>51</sup> Katz, 15 Comp. Lab. L. at 387.

<sup>52</sup> *Powell v. NFL*, 678 F. Supp. 777, 779-781 (D. Minn. 1988).

owners did not bid for free agents because they feared what unknown compensation terms may result when the commissioner valued the deal.<sup>53</sup> Instead, this new framework established a valuation that was predictable and would be included as a matrix in the CBA (as opposed to being at the discretion of the commissioner).<sup>54</sup> Ultimately the matrix determined how high of a draft pick the acquiring team would be required to give to the player's former team as compensation. The horizontal line of the matrix represented years of experience in the league, the vertical line represented the salary offer amount, and several diagonal lines established the draft choice compensation.<sup>55</sup>

The decision to value free agents in this manner, however, would later prove to be another self-imposed disaster for the union. The new system was very successful in its intended effect of eliminating the fear associated with the Rozelle Rule's unknown compensation values determined by the commissioner (*after* the teams had already made their offer to a player). However, the new system did not take into account the potential that the market may naturally lead to increased player compensation across the board. When club revenues increased over the decade following the 1977 collective bargaining agreement, owners had more money to make higher offers to players. Higher player offers meant that even relatively obscure players were "worth" more than a first-round choice when they became free agents (according to the locked-in valuation matrix of the prior CBA).<sup>56</sup> The result was a total halt to the player free agency market, erasing one of the few "wins" the union had been able to achieve in its two-decade existence. In fact, fewer than 50 out of 600 players received offers from other NFL teams after becoming free agents.<sup>57</sup>

### ***1982 Strike: The Lessons Owners Learned for 1987***

The year 1982 became important for the union and the union's new executive director Ed Garvey. The league owners were flush with new cash from a record broadcasting agreement, increasing each owner's share from \$5.8 million to \$14.2 million.<sup>58</sup> Although the much wealthier league had become a curse to the free agency system established in 1977, the much richer owners also became bigger targets for Garvey to seek higher player compensation and benefits, something the union had long failed to achieve on its own (as past increases were largely attributable to outside factors such as a competing league). All told, the size of the pie at issue in 1982 was \$1.6 billion, and both sides admitted the primary issue that year was money.<sup>59</sup>

The NFLPA began its strike at the conclusion of the second weekend of regular games in 1982. The NFL labor negotiator Jack Donlan immediately responded by shutting down all league operations and barring players from entering team property. Players were left to meet at high schools for informal practices to stay fit.<sup>60</sup> But networks were also left in the dark, and

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<sup>53</sup> Carol T. Rieger and Charles J. Lloyd, *The Effect of McNeil v. NFL on Contract Negotiation in the NFL – That was Then, This Is Now*, 3 Marq. Sports L.J. 45, 50-51 (1992).

<sup>54</sup> Note that the player's old team the opportunity to match the offer.

<sup>55</sup> *Id.*

<sup>56</sup> NFL Players Association History, available at [http://www.nflpa.org/AboutUs/NFLPA\\_History.aspx](http://www.nflpa.org/AboutUs/NFLPA_History.aspx) (last visited Feb. 7, 2008).

<sup>57</sup> Powell, 678 F. Supp. at 780.

<sup>58</sup> Tom Callahan, *Stop-Action in the N.F.L.*, TIME, Oct. 4, 1982, <http://www.time.com/time/printout/0,8816,925802,00.html>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

each responded differently to the strike. ABC chose to show movies, CBS re-ran games from the prior season, and NBC began broadcasting games from the Canadian Football League.<sup>61</sup>

The primary motivation to ultimately end the strike was the threat to both sides that the season would be a total loss, an outcome that would inflict financial pain to players and owners alike. Yet, a tentative return-to-work agreement did not come without dissension. Some players for teams in regions such as Detroit or Chicago refused to return to practice until owners signed off on a complete agreement.<sup>62</sup> Meanwhile, other teams in San Francisco or New Orleans were back to practice before the tentative settlement was even reached on November 16.<sup>63</sup>

The strike did not officially conclude until December 11, 1982 when the union and the league signed the 1982 Collective Bargaining Agreement.<sup>64</sup> The financial losses during this 57-day period were staggering. Estimates indicated owners lost \$38 million for each week of the strike.<sup>65</sup> The league attempted to salvage the season after the end of the strike by reducing the regular season to nine games and significantly expanding the playoffs to include 16 teams (eight from each conference), and re-marketing the playoffs to fans as a “Super Bowl Tournament.”<sup>66</sup> When all was said and done, the NFL owners ended up giving their broadcasters a \$40 million “rebate check” for lost advertising revenue.<sup>67</sup> Even worse, fan interest in the form of spectators and television viewers waned for a number of years after the strike, further reducing owner income.<sup>68</sup> All told, the clubs collectively lost \$200 million as a result of the strike.<sup>69</sup>

Meanwhile, players collectively lost \$7 million for each week of the strike.<sup>70</sup> To help stem some of the losses, the players union organized and played two “all star games”: one at RFK Stadium in Washington, D.C. on October 17 and one the following day at the Los Angeles Memorial Coliseum.<sup>71</sup> The D.C. game featured east coast players broken down by conference, whereas the L.A. game featured the west coast players. However, these games failed to draw key players, and thereby much of a paying audience. The primary reason players cited in deciding not to participate was that they feared any potential injury they would suffer would not be covered by their league insurance.<sup>72</sup>

In the end, the union achieved somewhat fruitful bumps in salaries, severance, and pre-season pay.<sup>73</sup> However, the union’s biggest progress was employee benefits where it secured over \$1.2 billion in financial commitments over the five seasons covered by the agreement.<sup>74</sup> In

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<sup>61</sup> Id.

<sup>62</sup> NFL Players Association History, available at [http://www.nflpa.org/AboutUs/NFLPA\\_History.aspx](http://www.nflpa.org/AboutUs/NFLPA_History.aspx) (last visited Feb. 7, 2008).

<sup>63</sup> Id.

<sup>64</sup> Tom Callahan, *Stop-Action in the N.F.L.*, TIME, Oct. 4, 1982, <http://www.time.com/time/printout/0,8816,925802,00.html>.

<sup>65</sup> Id.

<sup>66</sup> Wikipedia, *National Football League Players Association*, [http://en.wikipedia.org/wiki/National\\_Football\\_League\\_Players\\_Association](http://en.wikipedia.org/wiki/National_Football_League_Players_Association) (as of Apr. 13, 2008, 10:00pm GMT).

<sup>67</sup> Nat’l Football League, 309 N.L.R.B. 78, 103 (1992).

<sup>68</sup> 309 N.L.R.B. at 92.

<sup>69</sup> 309 N.L.R.B. at 78.

<sup>70</sup> Tom Callahan, *Stop-Action in the N.F.L.*, TIME, Oct. 4, 1982, <http://www.time.com/time/printout/0,8816,925802,00.html>.

<sup>71</sup> Wikipedia, *National Football League Players Association*, [http://en.wikipedia.org/wiki/National\\_Football\\_League\\_Players\\_Association](http://en.wikipedia.org/wiki/National_Football_League_Players_Association) (as of Apr. 13, 2008, 10:00pm GMT).

<sup>72</sup> Id.

<sup>73</sup> NFL Players Association History, available at [http://www.nflpa.org/AboutUs/NFLPA\\_History.aspx](http://www.nflpa.org/AboutUs/NFLPA_History.aspx) (last visited Feb. 7, 2008).

<sup>74</sup> Powell, 678 F. Supp at 780.



addition, the agreement addressed the free agency problems by modifying the valuation numbers that had resulted in cripplingly overvalued players.<sup>75</sup>

### *1987 Pre-Season Grumblings and Planning by the Key Individuals*

Union members had a lot to look forward to in the next round of negotiations in 1987 when the 1982 Collective Bargaining Agreement (CBA) would expire. From 1982 to 1987, the average NFL player's salary rose from \$90,000 to \$230,000.<sup>76</sup> However, this increase is not entirely attributable to the 1982 CBA. Rather, the emergence of a new competitor, the United States Football League (USFL), once again spurred an increase in player salaries.<sup>77</sup>

Well-funded and reminiscent of the AFL of the 1960s at its launch, the USFL would fold two years before the beginning of the 1987 season after only three seasons of play.<sup>78</sup> The loss of the USFL meant players could no longer rely on seeing continued growth in their salaries anymore. Other issues such as pensions, severance pay, and artificial turf remained in dispute from 1982, as the haste of rescuing the dying season was of greater importance to the players' bottom line.<sup>79</sup> Meanwhile, free agency was an even bigger mess. By nearly all accounts, the 1982 CBA failed as impressively within the realm of free agency as had the 1977 CBA.<sup>80</sup> As players saw with the 1977 CBA, the USFL-induced player salary increases of the 1980s again resulted in players who were significantly over-valued under the compensation draft selection rubric. When the five-year period of the 1982 CBA expired on August 31, 1987, not a single veteran player had moved from one NFL team to another under the Compensation System.<sup>81</sup>

The respective union and league representatives in 1987 provided tales of two very different backgrounds. The new union director and principal negotiator Gene Upshaw had been Garvey's chief assistant in the 1982 talks.<sup>82</sup> However, Upshaw was known best for his role as a hall of fame guard for the Oakland Raiders. But, as a player, Upshaw had long been involved at top levels of union leadership.<sup>83</sup> Jack Donlan, meanwhile, had remained the representative for the league since 1980.<sup>84</sup> His career was built around negotiating opposite unions, tracing back to his prior employment at National Airlines.<sup>85</sup> However, Donlan grew up in a household with parents sympathetic to unions. His mother helped organize nurses where she worked and his father was a blue-collar man who spent most of his working life working for a hardware store.<sup>86</sup>

The relationship between these very distinct adversaries was, to be put mildly, unique. The 1982 negotiations had been a significant strain on the relationship between the owners and the union, as the protracted battle resulted in bitter losses on both sides.<sup>87</sup> Yet Donlan and Upshaw shared an unusual friendship. For instance, when Upshaw got married, Donlan had been separated from his wife. Donlan attended Upshaw's wedding with his daughter as his

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<sup>75</sup> Id.

<sup>76</sup> Staudohar, 111 Monthly Lab. Rev. 26.

<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> Powell, 678 F. Supp at 780.

<sup>81</sup> Id.

<sup>82</sup> Staudohar, 111 Monthly Lab. Rev. 26.

<sup>83</sup> Gerald Eskenazi, *N.F.L.'s Friendly Enemies*, THE NEW YORK TIMES, Sep. 20, 1987.

<sup>84</sup> Id.

<sup>85</sup> Id.

<sup>86</sup> Id.

<sup>87</sup> Id.

date.<sup>88</sup> At another time, when Donlan was too busy during a trip to Hawaii to buy his daughter a souvenir, Upshaw went out and bought a gold whale figurine and gave it to Donlan, saying, “Here, I guess you don’t have time to buy this for Heather.”<sup>89</sup> No matter the strangeness, anything would have been better than the relationship Garvey had perpetuated before his departure into public office in 1983. And, with that, there existed a collective hope that the bitter outcome of 1982 could be prevented from happening again.

Upshaw did his best in December of 1986 to be the one to set the agenda when he released the union’s negotiating plan for the new agreement. Unlike in 1982 where the primary issue was money, the “prime aim” for the 1987 CBA would be free agency.<sup>90</sup> The union stated without reservation that “if free agency was not agreed to at the bargaining table, it would be attained with a strike.”<sup>91</sup> Free agency became important to the union in 1987 because Upshaw thought the richer broadcasting agreements should mean more money for his players, and free agency is particularly adept at ensuring owners pay top dollar for their talent.<sup>92</sup>

Donlan and the owners responded to Upshaw’s December demands “with shock.”<sup>93</sup> A strike in 1987 threatened to produce even greater losses than ever before. In 1982, the networks paid the owners in advance of a season.<sup>94</sup> However, the broadcast contracts in 1987 were structured so that the only way the owners would receive any television revenue was to ensure the games were played.<sup>95</sup> With the league’s new record \$1.4 billion television deal at stake, the NFL owners would need to find a way to provide sufficient revenue to withstand another protracted strike.<sup>96</sup>

As we have seen, the idea for using the threat of replacement players to counter a union strike could be traced all the way back to the 1956 preseason game between the Baltimore Colts and the Washington Redskins. This time around the idea to use replacements was revived by Dallas owner Tex Schramm during the 1982 strike.<sup>97</sup> Although never acted upon, Schramm felt that a replacement scheme had serious promise of succeeding. As evidence, he pointed to “scores” of players in 1982 that had reportedly expressed a desire to break ranks and return to work.<sup>98</sup> Schramm, a member of the NFL’s Council Executive Committee in time to prepare for the 1987 strike, would ensure that the lessons of 1982 would not be lost on the committee. He led owners to respond by declaring an intention to continue the season without striking players by using replacement players to supplement the players who refused to strike.<sup>99</sup>

Despite an early start and each side’s threat of nuclear labor war, the union and the league saw little progress to negotiations.<sup>100</sup> Free agency simply did not work under the existing plan of setting valuation numbers for draft compensation in the CBA. By the opening of summer training camp, the stalemate appeared to be a deadlock. But to keep negotiations appear that

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<sup>88</sup> Id.

<sup>89</sup> Id.

<sup>90</sup> Nat’l Football League, 309 N.L.R.B. 78, 92 (1992).

<sup>91</sup> Id.

<sup>92</sup> Michael Janofsky, *N.F.L. Free Agency At Issue*, THE NEW YORK TIMES, Jan. 6, 1987, at B11.

<sup>93</sup> 309 N.L.R.B. 78, 92.

<sup>94</sup> NFL Players Association History, available at [http://www.nflpa.org/AboutUs/NFLPA\\_History.aspx](http://www.nflpa.org/AboutUs/NFLPA_History.aspx) (last visited Feb. 7, 2008).

<sup>95</sup> Id.

<sup>96</sup> Brian Murphy, *Send In The Clowns?*, SAINT PAUL PIONEER PRESS, Feb. 27, 2005, at D1.

<sup>97</sup> Chris Harry, *NFL Strike of 1987 Created Bizarre Season*, ORLANDO SENTINEL, October 6, 2002, at D1.

<sup>98</sup> Id.

<sup>99</sup> 309 N.L.R.B. 78, 92.

<sup>100</sup> Id at 93.

they were moving, Donlan and Upshaw discussed pension and welfare benefits, and per diem meal payments.<sup>101</sup> Meanwhile, both sides knew a strike was looking to be unavoidable.

Upshaw responded to the almost certain strike by traveling to each training camp to drum up support among union members. On September 8, Upshaw announced that the union would strike at midnight on Monday, September 21 – a point designed to begin when the second week’s Monday night game would end.<sup>102</sup>

Meanwhile, the league responded to the imminent strike by pursuing its replacement strategy. Donlan had selected Edward LeBaron as consultant for the negotiations, a former football star and executive of the Atlanta Falcons turned attorney.<sup>103</sup> However, LeBaron’s role as a consultant would not involve a lot of boardroom activity. Rather, LeBaron became the baron of the replacement effort for the league. LeBaron worked to develop options agreements for players who would later be cut in training camp. Throughout preseason, LeBaron met with team officials and encouraged them to adopt contingency rosters for a replacement squad.<sup>104</sup>

Upon Upshaw’s announcement that the strike would begin on September 21, the owners officially decided that the NFL would become the first North American sports league to use replacements to counter a strike. Kansas City Chiefs owner Lamar Hunt would say, “it wasn’t unanimous, but there was a consensus among the owners that we were weren’t going to shut the league down for nine weeks like [1982] again.”<sup>105</sup>

### ***The USA in the 1980s: A Nation of Scabs***

The NFL owners’ decision in 1987 to embark upon a replacement strategy came near the end of a very tumultuous decade for organized labor – a tone set by Ronald Reagan himself.

The use of replacements had long been a tool for management to counter a striking union. Workers ranging from oil refinery techs to paper mill operators could be replaced by “scab” labor with little to no training required. Output and efficiency may decrease as a result, but ultimately the goal is twofold: (1) to minimize losses by keeping operations running and customers happy; and, (2) putting pressure and causing additional suffering to strikers who are not being paid by the company while they are on strike (although some wealthy and powerful unions manage to build up “strike accounts” to pay strikers at least some money to get by while they are on strike).

Although once a union man, Reagan’s labor record is defined by his decidedly anti-labor way of handling the air traffic controller strike. To combat the problem of gridlock in the nation’s skies, Reagan’s administration imposed a hard deadline for strikers to return to work. Not one to bluff, Reagan fired each and every one of the 11,000 members of the union who chose not to return to work by the deadline.<sup>106</sup>

The mass firing was significant because, unlike mill operators, air traffic controllers represented an educated workforce with specialized skills. The somewhat cavalier decision to eliminate and replace the entire nation’s staff of air traffic controllers sent a very strong statement to unions: you are not special and nobody is above being replaced. To make things

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<sup>101</sup> Id.

<sup>102</sup> Id.

<sup>103</sup> Id.

<sup>104</sup> Id.

<sup>105</sup> Brian Murphy, *Send In The Clowns?*, SAINT PAUL PIONEER PRESS, Feb. 27, 2005, at D1.

<sup>106</sup> Peter Perl, *Scabs on the Gridiron; Once a Disgrace, Strikebreaking Has Become Commonplace*, THE WASHINGTON POST, Oct. 4, 1987, C5.

worse, the nation would see minimal impact to air travel because many of the union's stunned members decided to defy their membership responsibilities and ask to be re-hired.<sup>107</sup>

In fact, Reagan's tenure would see the use of replacements of everyone from machinists to meat cutters, airline pilots to bus drivers. Continental Airlines, TWA, Greyhound, Iowa Beef Processors, AT&T, and even *The Washington Post* would each turn to replacements in their labor disputes during the 1980s.<sup>108</sup> People even saw this trend from their home living room as NBC replaced hold-out Valerie Harper on her own show. The solution? Broadcast executives killed off her character, renamed the show to "Valerie's Family," and introduced a less-demanding Sandy Duncan as Valerie's sister.<sup>109</sup>

The successful string of uses of replacement labor in negotiations had a chilling effect on the number of unions who declared a strike. In 1976 there were 231 new strikes, but by 1986 there were only 69.<sup>110</sup> One explanation for dramatic increase in the use of replacements to counter strikes was that, before Reagan's firing of the air traffic controllers, companies had considered public opinion in deciding how far to push the law.<sup>111</sup> With a strong anti-labor example set by the nation's President himself, public opinion became less of an obstacle.<sup>112</sup>

Yet despite the strong statement Reagan made by dismissing the highly-trained air traffic controllers, the majority of the union strikers who found themselves replaced were the less educated or less specialized. Not surprisingly, a study showed that the likelihood management would turn to replacements is inversely proportional to the degree of training and education required for the job.<sup>113</sup> The strong correlation made it all the more surprising to labor experts and the public alike when the NFL owners sought replacement labor in America's favorite professional sport. Thomas Kochan, professor of industrial relations from the Massachusetts Institute of Technology, would later respond to the NFL owners' decision to use replacements by saying, "That owners are willing to engage in this kind of risky strategy says something about where they think the public has moved, that the public would accept this kind of tactic... It's another sign of the erosion of the strike, and the sanctity of the picket line in the eyes of the public."<sup>114</sup>

### ***Labor Law for Use of Replacements***

President Franklin Delano Roosevelt signed the National Labor Relations Act into law in 1935 as part of his broader plans for labor reform. The Act sets forth a set of rules that protect workers who engage in labor organizing activities. The Act further establishes the federal agency known as the National Labor Relations Board (NLRB) to investigate and decide charges of unfair labor practices.

Section 7 of the Act enables the NLRB to protect workers who engage in "protected and concerted activities" defined in Section 8 and in case law. Section 8(a)(1) protects the workers'

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<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> Eric Gershon, *Pratt's Union: How Powerful?; Would the Machinists Dare Strike? Few Unions Now Do*, HARTFORD COURANT, Aug. 12, 2007, D1.

<sup>111</sup> Viveca Novak, *Why Workers Can't Win*, COMMON CAUSE MAGAZINE, Summer 1991.

<sup>112</sup> Id.

<sup>113</sup> Peter C. Cramton and Joseph S. Tracy, *Use of Replacement Workers in Union Contract Negotiations: The U.S. Experience, 1980-1989*, Journal of Labor Economics, 16, forthcoming, 1998.

<sup>114</sup> Peter Perl, *Scabs on the Gridiron; Once a Disgrace, Strikebreaking Has Become Commonplace*, THE WASHINGTON POST, Oct. 4, 1987, C5.

right to activities such as an organized strike. Section 8(a)(3) specifically makes it unlawful for an employer to discourage their membership in a labor organization by discriminating against its union employees.

The Supreme Court has also read into the Act reciprocal rights for employers. Employers can choose to lock out their employees, suspending both their own operations as well as employee salaries, and thereby force the union compromise.<sup>115</sup> Employers may also choose to continue operations during the strike by hiring replacement workers. In fact, employers can even use replacement workers when the employer is the one to initiate the lockout.<sup>116</sup> Since 1938, the Supreme Court has empowered employers with the right to give replacements priority over strikers in the jobs available at the conclusion of the strike.<sup>117</sup> This power can successfully be used as a tool by instilling fear among strikers for their own job security.

An employer's right to these labor weapons is not absolute. If the NLRB finds that an employer engaged in unfair labor practices, it can issue an injunction and prevent (or immediately halt) an employer's attempt to use replacement players or conduct a lockout.<sup>118</sup> Employers may face NLRB injunctions for a number of reasons, as an "unfair labor practice" results when any policy or official act can be construed as discriminating against a worker because of his or her concerted activities under Section 7 (such as participating in the strike itself).<sup>119</sup> One example of an unfair labor practice is if an employer targets union stewards by withholding their benefits. Another example is if the employer improperly decides to declare an impasse to negotiations so it may impose unilateral changes to player policies under the CBA.

Any decision by management to flirt with the boundaries of labor law requires a thorough understanding of the potential consequences. The process of handling potential violations begins when a complaint is brought to the attention of a NLRB regional office.<sup>120</sup> If the NLRB investigator feels there are sufficient grounds for a claim, the investigator files official charges on behalf of the complaining party and works to set a date before an administrative law judge.<sup>121</sup> The administrative law judge is then charged with the task of conducting an investigation, hearing testimony, and presenting a lengthy report with findings of fact and application of law.<sup>122</sup> Either party may appeal the judge's decision to the five-member board in Washington D.C..<sup>123</sup> Appeals of board decisions go directly to the U.S. Court of Appeals.<sup>124</sup>

For management, the NLRB structure often appears to provide very little downside to playing hardball with unions. The first reason is the tactic of delay. As stated, a charge could potentially be weighed upon at five different levels from the NLRB investigator up through the Supreme Court – providing a bountiful opportunity to engage in a battle of attrition with motions and appeals. The NFL owners in 1987 knew the tactic of delay well. In 1982, a union representative and Seattle Seahawk named Sam McCullum filed a complaint with the NLRB regarding a potential violation of his concerted activity as a union representative.<sup>125</sup> McCullum won his verdict before the NLRB judge only a year later.<sup>126</sup> However, the league still had his

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<sup>115</sup> *Am. Ship Bldg. Co v. N.L.R.B.*, 380 U.S. 300 (1965).

<sup>116</sup> *Local 825 Int'l Union of Operating Eng's v. N.L.R.B. (Harter Equip.)*, 829 F.2d 458 (3d Cir. 1987).

<sup>117</sup> *N.L.R.B. v. Mackay Radio and Telegraph*, 304 U.S. 333 (1938).

<sup>118</sup> *N.L.R.B. v. Great Dane Trailers*, 388 U.S. 26, 34 (1967).

<sup>119</sup> *Id* at 32; *Labor Board v. Erie Resistor Corp.*, 373 U.S. 221, 223 (1963).

<sup>120</sup> Viveca Novak, *Why Workers Can't Win*, COMMON CAUSE MAGAZINE, Summer 1991.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

verdict wrapped up in appeals in 1987, five full years after the alleged offense, and the issue had still yet to make it to the full board (let alone to the Circuit Court).<sup>127</sup> Meanwhile, McCullum was an athlete who was out of work and certainly not getting any younger.

The second reason for little management downside is the lack of a true deterrent of punishment. Most successful charging parties see offending companies struck with penalties that amount to little more than a slap on the wrist. In fact, the most common penalty awarded to a party found guilty by the NLRB is to post a notice at the workplace promising not to commit certain offenses in the future. Even repeat offenders could go on for years and not even have to admit guilt.<sup>128</sup>

In 1987, the NFL had not been oblivious to this aspect of the NLRB process either. Back pay may be expensive, but would be rare for the NLRB to award an amount that would be higher than the amount the NFL would have had to pay their union employees anyway. Reinstatement on a squad would not likely be a problem either. As the NFL would later see with the case of Sam McCullum, by the time the verdict was announced in 1989, the league having to reinstate a wide receiver after sitting idle for seven years does not seem to be much vindication for the elderly player at that point.<sup>129</sup>

### ***Execution of a Replacement Season***

The stars seemed to align behind the owners' decision to seek replacement players. First, history backed doings things differently compared to the 1982 season where the strike had not gone well for the owners. They gave up costly concessions to the union, nearly lost an entire season, and suffered a serious setback amongst their fan base and revenues. Most of all, the owners did not want to see this happen again. Second, the timing appeared right – the public had seen an unprecedented use of replacements over the preceding years and the current administration has rather explicitly called for an open season on union busting. Any negative publicity would hopefully be dampened by these other uses of replacement workers. Lastly, the labor laws had been tested to the point of breaking. The NFL owners would not be certain to face any liability in the first place. However, simply employing procedural delaying tactics could substantially mitigate any potential loss during the NLRB action. The upside would be to delay any binding judgment against them while they could beat the union into an irrecoverable submission. The downside would pale in comparison, as potential penalties are often limited to costs comparable to the amount they would likely lose through a strike anyway.

### ***A New Game. With New Talent. But They're The Same Teams?***

Edward LeBaron's duties as replacement game coordinator shifted into overdrive upon the union's strike date announcement. The team roster limit of 45 active players was eliminated, and LeBaron encouraged the clubs to make every use of the expanded roster size they could – sign anyone and everyone they could find with the intention of trying them out and seeing how they play.<sup>130</sup> The owners committee decided that the season's originally scheduled third week of play would not be made up later in the season, but instead would be used as an extra week for the squads to prepare their replacement teams.<sup>131</sup> Any striking player who rejoined his team by

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<sup>127</sup> Id.

<sup>128</sup> Id.

<sup>129</sup> Id.

<sup>130</sup> NLRB at 93.

<sup>131</sup> Michael Janofsky, *Outlook Gloomy For New Talks*, THE NEW YORK TIMES, Sep. 30, 1987, B7.

Friday of a game week would be eligible to play that Sunday and be paid.<sup>132</sup> To ensure the ability to broadcast these games, the owners would also lift the local blackouts for eight of the 14 games during the first weekend that would have otherwise been sold out.<sup>133</sup>

The main source of players for the league's replacement games would be from the August training camp cuts prior to the season.<sup>134</sup> By September 6, some teams had begun contacting non-union players on a contingency basis.<sup>135</sup> Nineteen teams, including the New York Giants, were giving these final camp cuts upwards of \$1,000 in exchange for a binding agreement that they return to that team in the event of a strike.<sup>136</sup> The Cowboys, Bengals, and Chargers were known as particularly aggressive in using this tactic.<sup>137</sup> However, the Chargers were also known as being particularly cheap as well, offering a mere \$100 for their cut players to commit.<sup>138</sup> The \$100 would not be enough to sign defensive end Pete Catan, who survived the Chargers' training camp until the final round of cuts.<sup>139</sup> Instead, he would end up playing during the strike for Houston.<sup>140</sup>

The rest of the players would come from all over. Some teams such as the Buccaneers looked to the recently defunct USFL, which had flooded the market a short 18 months prior to the strike with players seeking to continue their football careers.<sup>141</sup> Others, such as Minnesota, turned to the neighboring Canadian Football League, thus violating the non-binding "no-tampering" policy the NFL had arranged at the time.<sup>142</sup> The Arena Football League would also become a NFL feeding ground.<sup>143</sup> Jerry Angelo, who served in Tampa Bay's player personnel department, would recall, "It was like a free-for-all, it was like one of those five-minute shopping sprees in the grocery store. We had our carts going up and down the aisles, throwing in whatever players we could get our hands on."<sup>144</sup> There were boundaries, however, to where teams would find players. No team would accept high school players who were contacting teams for tryouts.<sup>145</sup>

Although all of the owners toed the management line, not all of the general managers and coaches pursued the replacement strategy with equal diligence.<sup>146</sup> The Giants had not heeded LeBaron's advice before the season began by signing players to option contracts and were one of the teams caught off guard when the demand for replacement players began. With many of the talent already snatched up by the more diligent teams, the Giants were left to filling their roster by signing an entire semipro team from New Jersey.<sup>147</sup> The team's scout noted at least some

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<sup>132</sup> Id.

<sup>133</sup> Id.

<sup>134</sup> Paul Weiler, *CASES AND MATERIALS ON SPORTS & LAW* 328 (West Publishing 4th ed.).

<sup>135</sup> Mike Tanier, *Year of the Scab*, available for purchase at

[http://www.footballoutsiders.com/store/index.php?main\\_page=product\\_info&products\\_id=8](http://www.footballoutsiders.com/store/index.php?main_page=product_info&products_id=8)

<sup>136</sup> Id.

<sup>137</sup> Id.

<sup>138</sup> Id.

<sup>139</sup> Id.

<sup>140</sup> History for Week 4, 1987, available at <http://www.sadera.com/ufl/league/log1987082429.html> (last visited Apr. 13, 2008).

<sup>141</sup> Chris Harry, *NFL Strike of 1987 Created Bizarre Season*, ORLANDO SENTINEL, October 6, 2002, at D1; Mike Tanier, *Year of the Scab*.

<sup>142</sup> Harry, *NFL Strike of 1987 Created Bizarre Season*; Mike Tanier, *Year of the Scab*.

<sup>143</sup> Mike Tanier, *Year of the Scab*.

<sup>144</sup> Harry, *NFL Strike of 1987 Created Bizarre Season*.

<sup>145</sup> Mike Tanier, *Year of the Scab*.

<sup>146</sup> Clare Farnsworth, *NFL crossed the line on Replacement Sunday*, SEATTLE POST-INTELLIGENCER REPORTER, Oct. 4, 2002, [http://seattlepi.nwsource.com/football/89817\\_replace04.shtml](http://seattlepi.nwsource.com/football/89817_replace04.shtml).

<sup>147</sup> Mike Tanier, *Year of the Scab*.

USFL experience among the players, but was skeptical about their talent level. When asked to predict how they would play, the team spokesman would say, “I dunno... we have a lot of 300-pound defensive tackles [though].”<sup>148</sup>

The teams had achieved vastly different levels of progression by the first day of the strike. The Washington Redskins had at least 50 commitments, giving them the ability to field a full team and actually make a few cuts.<sup>149</sup> Meanwhile, the Eagles and Colts had 40, the Steelers 35, and the Bears 21.<sup>150</sup> The Seahawks and Vikings did not even have enough players to start practice.<sup>151</sup> Seattle President and General Manager Mike McCormack now claims his devotion to the striking players put him at a disadvantage when it came time to fielding a replacement team. “We weren't sure what was going to happen, whether we were going to field a team or not. We weren't sure what the players were going to do. So we were just kind of on hold.”<sup>152</sup> Between the rigors of his job, and the frustration from loyalty to his union players, McCormack would later admit never watching any part of the replacement games that would follow.<sup>153</sup> He felt any action beyond the minimum he took would “jeopardize the attitude” of the Seahawks.<sup>154</sup>

Within a matter of a couple days teams had begun to take their pool of USFL hand-me-downs, college has-beens and semi-pro renegades and run them through a week of training camp. The first week of this “replacement season” would begin in what was technically the fourth week of the 1987 regular season.<sup>155</sup> Yet, when these players were presented to the world, the haphazard assemblages did not quite reflect the teams whose logos were their helmets. Hence, the replacement teams spawned a new list of NFL nicknames -- San Francisco Phoney Niners, New Orleans Saint Elsewheres, Los Angeles Shams, Miami Dol-Finks, Seattle Sea-Scabs, Chicago Spare Bears, and so on.<sup>156</sup> Many of these players had little more than high school, junior college, or college training and, as Dolphins Coach Don Shula would soon find out, required teaching of basic things such as how to properly stand in a huddle.<sup>157</sup>

The face to the media, however, would usually involve attempts by teams to oversell the talent they managed to acquire. Despite being one of the teams behind in the race to fill a full team, the Bears Vice President Bill Tobin tried convincing fans that the “Spare Bears” were a legitimate team. He clarified, “there’s not a player here who called us. We called every one of them. It was by invitation only. We did not plead with anyone. We had no tryouts. We have scouting reports on all but three, who were recommended to us by a minor-league coach. In my opinion, they are just a notch below the 1,600 players who walked out. These guys are the ‘B’ group who were an inch short, a step slow or maybe just plain overlooked.”<sup>158</sup>

At best, the league’s teams had a hard time keeping track of all of the new faces. Eagles Coach Buddy Ryan would never bother to learn names, and instead attempted to refer to his

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<sup>148</sup> Id.

<sup>149</sup> Id.

<sup>150</sup> Id.

<sup>151</sup> Id.

<sup>152</sup> Clare Farnsworth, *NFL crossed the line on Replacement Sunday*, SEATTLE POST-INTELLIGENCER REPORTER, Oct. 4, 2002, [http://seattlepi.nwsource.com/football/89817\\_replace04.shtml](http://seattlepi.nwsource.com/football/89817_replace04.shtml).

<sup>153</sup> Happy 20<sup>th</sup> Birthday, NFL Strike!, available at <http://www.thermocaster.com/2007/10/02/happy-20th-birthday-nfl-strike/> (last visited Apr. 13, 2008).

<sup>154</sup> Mike Tanier, *Year of the Scab*.

<sup>155</sup> Brian Murphy, *Send In The Clowns?*, SAINT PAUL PIONEER PRESS, Feb. 27, 2005, at D1.

<sup>156</sup> Clare Farnsworth, *NFL crossed the line on Replacement Sunday*, SEATTLE POST-INTELLIGENCER REPORTER, Oct. 4, 2002, [http://seattlepi.nwsource.com/football/89817\\_replace04.shtml](http://seattlepi.nwsource.com/football/89817_replace04.shtml).

<sup>157</sup> Happy 20<sup>th</sup> Birthday, NFL Strike!, available at <http://www.thermocaster.com/2007/10/02/happy-20th-birthday-nfl-strike/> (last visited Apr. 13, 2008).

<sup>158</sup> Mike Tanier, *Year of the Scab*.



players by numbers alone.<sup>159</sup> In one famous story, a random person tried to get onto the Giants' replacement squad without being asked. Instead, he randomly showed up at the team's hotel and got on the team bus heading to practice. The player ate the team meal and even took a physical evaluation as if he were a player. Surprisingly, the player passed all the team's tests and managed not to be discovered until he had to scour the locker room to try to come up with a uniform (because all of the prior selected players would have one already). The team would end up asking him to leave, but only after running him through a couple workouts to try him out.<sup>160</sup>

### *One Man's Scab is Another Man's Future*

The biggest shared characteristic among the sports league unions is countering the public perception that the unions are merely clubs for the already extremely wealthy. Today, average major league sports salaries top a million dollars. Yet, when people think of a union, they think of a blue-collar factory worker making far less and it becomes hard to feel sympathetic for the athletic millionaire. To the chagrin of the union, it also becomes a whole lot easier to feel sympathetic instead for the down-on-his-luck wannabe with the colorful story.

To these replacements, the scab season was more than an opportunity to take part in a dream. For many, the season could also be an opportunity to get another chance. "As much as people want to pretend the NFL union is like construction unions and teachers unions, they have to be honest with themselves because it's a different world," said Peter Najarian, an all-time leading tackler when at University of Minnesota who was among the final cuts at the Vikings' 1987 camp.<sup>161</sup> "You talk to every guy who has ever gotten cut, and he feels like he got ripped off... For me, it was the best decision I could have made. It gave me an opportunity when I thought my career was over, and I parlayed it into a few more years of playing."<sup>162</sup>

Cincinnati running back Marc Logan was also cut in the Bengals' training camp.<sup>163</sup> Logan would not regret his decision to cross the picket line. Instead, "if I don't make it here, maybe somebody else will see what I've done."<sup>164</sup> In fact, one could argue that for the first time it would not matter where players were playing, as long as they were simply playing. When signed to play defensive back for the Redskins, Charles Jackson, a former waiter, would rather famously and proudly state his pride with his chance to "represent the entire state of Washington."<sup>165</sup>

### *"We Will Haunt This Game"*

"Nobody loves a scab," yelled an angry demonstrator at 11:30 AM in front of Philadelphia's Veterans Stadium, "not even a mother."<sup>166</sup> "Look in the players' eyes, scabs!" yelled another, "you're taking away their money."<sup>167</sup> These protestors were joined by roughly three thousand other equally spirited protestors joined forces on Sunday October 4, 1987 in response to the first ever National Football League regular season game to be played with

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<sup>159</sup> Happy 20<sup>th</sup> Birthday, NFL Strike!, available at <http://www.thermocaster.com/2007/10/02/happy-20th-birthday-nfl-strike/> (last visited Apr. 13, 2008).

<sup>160</sup> Chris Harry, *NFL Strike of 1987 Created Bizarre Season*, ORLANDO SENTINEL, October 6, 2002, at D1.

<sup>161</sup> Brian Murphy, *Send In The Clowns?*, SAINT PAUL PIONEER PRESS, Feb. 27, 2005, at D1.

<sup>162</sup> Id.

<sup>163</sup> *Finally, Players All Agree: No One's Happy*, CHICAGO TRIBUNE, October 18, 1987, at C4.

<sup>164</sup> Id.

<sup>165</sup> Chris Harry, *NFL Strike of 1987 Created Bizarre Season*, ORLANDO SENTINEL, October 6, 2002, at D1.

<sup>166</sup> Jill Lieber, *'It's Our Strike'*, SPORTS ILLUSTRATED, October 12, 1987, at 46; Stephen Franklin, *Few Fans Fight Pickets to Watch Bears*, CHICAGO TRIBUNE, at C1.

<sup>167</sup> Stephen Franklin, *Few Fans Fight Pickets to Watch Bears*, CHICAGO TRIBUNE, at C1.

replacement players. "In my unit, we had all decided to come out to support the strike," said Carlton Simmons, a member of the city employees' union in Philadelphia. "I'm a union man and this is a union town, and we are all out here to support the players."<sup>168</sup>

Gene Upshaw, executive director of the NFL Players Association, set the tone earlier in the week by defiantly stating to the media "we will haunt this game."<sup>169</sup> And so they did - almost too successfully.

The result in Philadelphia was near mayhem, with sympathetic union members ranging from plumbers to teachers chanting "No Scabs, No Scabs."<sup>170</sup> A convoy of 36 union semis circled the stadium and honked to support protestors.<sup>171</sup> The demonstrators closer to the stadium entrances formed human walls to prevent ticket holders from finding their seats.<sup>172</sup> Those who dared cross the picket line became subject to insults, wads of paper and eggs, while protestors chanted, "scabs like scrambled eggs on Sundays!"<sup>173</sup>

Surely Philadelphia, a strongly pro-labor town, was not entirely representative of the reactions at every team across the nation. The 49ers at their training facility in Redwood City saw no physical picket to speak of.<sup>174</sup> Other venues saw demonstrations somewhere in the middle. In Foxboro, New England Patriots fans were divided amongst strike supporters and ticket holders. Picketers shouted "Shame, shame, shame" while the game attendees shouted "Game, game, game."<sup>175</sup> Violence, however, was notably absent in Massachusetts.

### "This Is Our Strike"

John Spagnola was the Philadelphia Eagles player representative during the 1987 season. At six foot four inches and weighing in at 242 pounds, Spagnola was every bit as intimidating in person as he was playing tight end on the field.<sup>176</sup> Spagnola, and friends such as Reggie White, would do everything they could do to get under the replacement players' skin.<sup>177</sup>

Starting on Thursday, September 25, Eagles veterans initiated every confrontation they could find their way into. Fifteen veterans formed a human chain across the hotel driveway to block the bus dropping off the visiting "Spare Bears."<sup>178</sup> Reggie White told the driver to let the 53 passengers out into the highway traffic.<sup>179</sup> It would take police to arrive to clear the situation, but not without a number of insults and obscenities let loose. Spagnola would tell the media, "we just want to be somewhere they can see us. The whole idea is to make them think about what they are doing."<sup>180</sup>

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<sup>168</sup> Michael Janofsky, *Sparse Crowds, Heavy Picketing at N.F.L. Games*, THE NEW YORK TIMES, Oct. 5, 1987, at A1.

<sup>169</sup> Jill Lieber, 'It's Our Strike', SPORTS ILLUSTRATED, October 12, 1987, at 46; Stephen Franklin, *Few Fans Fight Pickets to Watch Bears*, CHICAGO TRIBUNE, at C1.

<sup>170</sup> Id.

<sup>171</sup> Id.

<sup>172</sup> Id.

<sup>173</sup> Id.

<sup>174</sup> Paul Gutierrez, *Wednesday Audible: 1987 replacement players left a mark*, THE SACRAMENTO BEE, Oct. 31, 2007, <http://www.sacbee.com/100/story/463241.html>.

<sup>175</sup> Michael Janofsky, *Sparse Crowds, Heavy Picketing at N.F.L. Games*, THE NEW YORK TIMES, Oct. 5, 1987, at A1.

<sup>176</sup> Jill Lieber, 'It's Our Strike', SPORTS ILLUSTRATED, October 12, 1987, at 46.

<sup>177</sup> Mike Tanier, *Year of the Scab*.

<sup>178</sup> Id.

<sup>179</sup> Id.

<sup>180</sup> Id.

The problem, however, for Spagnola and crew was the wild events such as those that unfolded on October 4 and stories of their antics threatened to overshadow the purpose of the strike in the first place. Spagnola, as well as his compatriot team leaders in other cities, knew that the union members needed to maintain a positive public perception that could be used by Upshaw at the negotiating table.<sup>181</sup> Spagnola ended up being more worried during the October 4 game about toning down the protestors than trying to continue to cause a ruckus. “It’s our strike,” Spagnola screamed to the crowd. “Don’t make our strike your strike.”<sup>182</sup>

Owners expectedly did everything possible to try to use the events to further consolidate their stranglehold on public perception in the media. Eagles owner Norman Braman called the exhibition a “tragedy for the city of Philadelphia. The hooliganism we saw here today rivaled the types of behavior we had in the 1960s and 1970s... I’m embarrassed for Philadelphia.”<sup>183</sup>

Unfortunately for organizers such as Spagnola, some active roster players contributed to the ugliness despite strong pleas for restraint. Striking Kansas City Chiefs Dino Hackett, Paul Coffman, and Bill Maas arrived at replacement player practice to waive shotguns (which were later found out to be unloaded) and shouted, “We’re looking for scabs!”<sup>184</sup> Striking Washington Redskins Darryl Grant, Cliff Enson and Reggie Branch stood in front of the chartered bus carrying the replacement players into camp. Before finally being persuaded by authorities to allow the bus to pass, Grant shattered two windows of the bus with his fist, thereby spraying the bus riders with glass. Grant’s only justification was that replacement players are “guys who would steal shoes off a dead man.”<sup>185</sup>

To redirect public attention, Upshaw returned to the playbooks of 1982 and re-instituted the idea for union-sponsored all-star games. The benefits were obvious: money, attention, and competition for the NFL’s replacement games. Upshaw announced to the public, “Fox has given us a blank check to put on our own games.”<sup>186</sup> However, the idea never got off the ground for a multitude of reasons. First and foremost was the very concern that hindered 1982 – insurance for injuries of players.<sup>187</sup> Also, the individual contracts between NFL teams and their players in 1987 very likely forbid the activity.<sup>188</sup> The many legal troubles prompted Fox to clear the air: no blank check, and with negotiation terms and legal issues remaining in dispute, the games were a no-go.<sup>189</sup>

### *To Watch or Not-to-Watch: That Was the Multi-Million Dollar Question*

Approximately 60 percent of NFL income in 1987 was derived from television broadcast agreements.<sup>190</sup> Already having lost week three as never going to be made up, broadcasters (and thereby the NFL as well) had to worry about the ratings performance of the replacement games. With contracts already signed, the broadcasters were understandably not excited about having to fulfill their money commitments to a NFL not delivering on its usual caliber of product.

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<sup>181</sup> Jill Lieber, ‘It’s Our Strike’, SPORTS ILLUSTRATED, October 12, 1987, at 46.

<sup>182</sup> Stephen Franklin, *Few Fans Fight Pickets to Watch Bears*, CHICAGO TRIBUNE, at C1.

<sup>183</sup> Id.

<sup>184</sup> John Lutermoser, *Donlan: Next two days ‘critical’*, ST. PETERSBURG TIMES, Sep. 24, 1987, at 1C.

<sup>185</sup> Id.

<sup>186</sup> Gene Wojciechowski, *Upshaw Trying to Out-Fox Owners; League Counters by Saying Union Can’t Stage Games*, LOS ANGELES TIMES, Sep. 30, 1987, at 3-9.

<sup>187</sup> Id.

<sup>188</sup> Id.

<sup>189</sup> Id.

<sup>190</sup> Paul D. Staudohar, *The Football Strike of 1987: The Question of Free Agency*, 111 MONTHLY LAB. REV. 26 (Aug. 1988).

The networks would ultimately decide to air the games, thus providing at least some of the financial security that had motivated Schramm's desire to pursue the replacement strategy in the first place. The curiosity factor would keep at least a large segment of the football fans tuning in, and off the field events as seen in Philadelphia were sure to provide newsworthy events to filter throughout the networks' news coverage.<sup>191</sup> Not to mention, as seen in 1982, there was not much else for the networks to show.<sup>192</sup>

With NBC, CBS and ABC all on board, it became up to fans across the nation to see if people would still watch. The result, as expected, was decreased viewers overall. However, unlike 1982 where there were no games to broadcast and therefore total loss of viewers, the replacement games would average a 25% decline from a year earlier on all three networks.<sup>193</sup> To the owners, they knew from experience this was better than nothing.

Meanwhile, attendance dropped significantly for the first week of replacement games. The New York Jets estimated over 30,000 ticket refunds had been requested.<sup>194</sup> The New York Giants similarly saw roughly 25,000 refund requests.<sup>195</sup> Both New York teams traditionally played before sold out crowds. On top of refunds, however, many simply did not show up to the game. The largest crowd was 38,494 that only half-filled Mile High Stadium for Houston's victory over the Broncos.<sup>196</sup> A meager 12,370 turned out to watch the Cowboys beat the Jets in East Rutherford, New Jersey.<sup>197</sup> And the award for the smallest crowd, somewhat expectedly given the teams' pro-union home towns, went to the Eagles and Bears in Philadelphia, which only managed to fill 4,074 seats.<sup>198</sup>

#### *Compelled Strikebreaking: Dallas and New England*

Owners knew that the fact that the games counted toward the playoff race meant having their superstars cross would give them a huge leg up on the competition (not to mention further break the back of the union). Some owners attempted to do more than simply ask nicely.

For William Sullivan, Jr., the owner of the Patriots in 1987, the answer to his problems was to air his grievances directly by appealing to his quarterback Lin Dawson with a heart-felt letter. The relevant portion of the long rambling letter was its conclusion. Sullivan stated, "I might say that I am not as proud of the Patriots as I once was. Indeed, I am ashamed of them and cannot wait the conclusion of this event to see if I can get someone else to buy the contracts of people who have acted in such an unfair manner."<sup>199</sup> Dawson, in responding to this perceived threat of future action, got upset and filed a complaint with the NLRB.<sup>200</sup>

The Cowboys administration, however, proved that everything is a bit more direct in Texas. Rather than emotional heart-felt letters that implicitly threatened future action, the Cowboys went directly after the pocketbooks of Kevin Brooks, Tony Dorsett, Ed Jones, and Everson Walls. The Cowboys informed the players that they would interpret their contract

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<sup>191</sup> Mike Tanier, *Year of the Scab*.

<sup>192</sup> Mike Tanier, *Year of the Scab*.

<sup>193</sup> Michael Goodwin, *TV Sports; Not All Viewers Are Back From Strike*, THE NEW YORK TIMES, Nov. 17, 1987, at D32.

<sup>194</sup> Michael Janofsky, *N.F.L. Owners and Players Digging In*, THE NEW YORK TIMES, Oct. 1, 1987, at B11.

<sup>195</sup> *Id.*

<sup>196</sup> Michael Janofsky, *Sparse Crowds, Heavy Picketing at N.F.L. Games*, THE NEW YORK TIMES, Oct. 5, 1987, at A1.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Nat'l Football League, 309 N.L.R.B. 78, 136 (1992).

<sup>200</sup> *Id.*

language to withhold not only their salary, but also other payments due under the contract.<sup>201</sup> For these players, this would include a number of benefits such as forfeiture of deferred bonuses (amounting for Brooks to \$500,000) and real estate options contracts (amounting for Dorsett to \$350,000).<sup>202</sup> Each of the players except for Walls respond by crossing the picket line before the Friday deadline of the first game.<sup>203</sup>

### *Dragging On, Cracks Developing*

Eight days into the strike and the two sides were no closer to a deal.<sup>204</sup> From New York, Jack Donlan reaffirmed the league's position that unless the union's bargaining position on free agency changed, he was not even interested in returning to the bargaining table. "When we left Philadelphia [where talks had concluded the prior week], the whole point was there was no sense in going back to square one if everybody's position was the same," he said. "It was like we were stuck in the mud, and the more we spun our wheels, the further down we got. We need a new perspective, a new look."<sup>205</sup>

The league's position was only bolstered by the fact it appeared to be gaining favor with the public. The number of game attendees increased week over week during the strike. An average of 17,000 fans, or about 28 percent of the usual attendance, attended the first week of the games.<sup>206</sup> However, that number would rise to 25,000 by the next week.<sup>207</sup> Further, an ESPN commissioned a poll that found that fans favored the owners over the players by a three to one margin.<sup>208</sup>

While the owners stood strong behind Donlan and public support started shifting towards the league, Upshaw saw his union ranks begin to dismantle from within. The union saw player after player cross the picket lines, either because he was compelled forcibly (as seen with the Cowboys), he wanted his team to win in the games that counted, or he sought a shot at demonstrating skills he would not otherwise have the chance to demonstrate (and thereby secure a future higher paying contract). In addition, despite the prolonged strike of 1982, the union had taken little steps prior to the strike in regard to securing the finances of the strikers. No funding was saved for the union to have a strike fund to draw benefits or provide a line of credit for player loans.<sup>209</sup>

Some notable players were also disenchanted with the cause of the strike in the first place – instead feeling free agency was not worth the damage tolled on both sides. Notably, Dwight Clark, a veteran wide receiver for the 49ers, took his case public on his morning show.<sup>210</sup> His reason was simple: players would be losing too much money in a prolonged strike that would be targeted at achieving something that most feel is unachievable. Clark said, "I know we've got people who aren't ready to sit out a whole season."<sup>211</sup> In fact, not only would the union see

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<sup>201</sup> Id at 136-139.

<sup>202</sup> Id.

<sup>203</sup> Id.

<sup>204</sup> Michael Janofsky, *Outlook Gloomy For New Talks*, THE NEW YORK TIMES, Sep. 30, 1987, B7.

<sup>205</sup> Id.

<sup>206</sup> Paul D. Staudohar, *The Football Strike of 1987: The Question of Free Agency*, 111 MONTHLY LAB. REV. 26 (Aug. 1988)

<sup>207</sup> Id.

<sup>208</sup> Id.

<sup>209</sup> Id.

<sup>210</sup> Jerry Magee, *Some 49ers oppose free-agency stand*, THE SAN DIEGO UNION-TRIBUNE, Sep. 29, 1987, at D-1.

<sup>211</sup> Id.

Clark cross the picket line, but they would see fellow 49ers superstar Joe Montana cross as well.<sup>212</sup>

Crossing players would end up hurting the union more than losing public support. Often players who once were well loved by other players and fans alike would face criticism for crossing the picket line. The relationships between strikers and line crossers would turn toxic and very public. One notable example was Tim Green, a defense end on the Atlanta Falcons, who crossed the picket line because he, like Clark, did not believe in the strike as a tool for free agency.<sup>213</sup> Fans angrily isolated him for crossing and sent editorial letters to their newspapers denouncing him.<sup>214</sup> In another example, Buffalo Quarterback Jim Kelley would be quoted as saying, “Carl Byrum, our starting fullback, who crossed; some of our veteran guys might say, ‘Go ahead, Jim, hand him the ball and see what happens with the offensive line.’ Think about it.”<sup>215</sup> Kelly had reason to be upset. By the end of the strike, Kelly, the highest-paid player in the league in 1987, would lose more than \$200,000 for the three weeks he missed.<sup>216</sup> The average player who stayed out would lose \$45,000.<sup>217</sup> No dedicated striker would lose less than \$10,000.<sup>218</sup>

### *With Blood In The Water, Owners Look For The Kill*

By the first week of October, there was some agreement between the union and the league. The two sides could agree upon the language of the standard player contract, the number of days off a player is entitled during the season and allowances for moving and traveling.<sup>219</sup> However, the two sides were no closer to a deal on the issues that actually mattered (free agency being the primary one) than they had been the prior December.<sup>220</sup>

By the time the NFL’s Council Executive Committee would reconvene on October 5, things were looking progressively better for the owners, and increasingly worse for the union. The CEC decided to reevaluate how it would handle what it expected would soon be at, a minimum, an onslaught of line crossers, or, at best, the total dissolution of the strike. The deadline for signing “scabs” would be moved back to 4 p.m. EST on the day prior to the team’s scheduled week’s game.<sup>221</sup> However, the reporting deadline for line crossers would be moved up to 1 p.m. EST on Wednesdays prior to the scheduled week’s game from previously being on Friday.<sup>222</sup> Those who miss the deadline would not be eligible to be on a club’s active or inactive lists until after that week’s game, and could not be paid for that week.<sup>223</sup>

On top of the procedural changes made by the CEC, on October 9, Donlan would throw three new bargaining issues into the negotiation fray. First was an extension of the agreement terms to a full six years.<sup>224</sup> With labor strife now a regular occurrence, Donlan wanted to secure labor peace not seen in 1974, 1975, 1982 and now again in 1987 (especially since it looks like

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<sup>212</sup> Id.

<sup>213</sup> *Green’s Image Tarnished By Hasty Defection From Union*, THE POST-STANDARD (Syracuse, NY), Oct. 12, 1987, C10.

<sup>214</sup> Id.

<sup>215</sup> Chris Harry, *NFL Strike of 1987 Created Bizarre Season*, ORLANDO SENTINEL, October 6, 2002, at D1.

<sup>216</sup> *The Strike Aftermath: What Now, What Next?*, THE WASHINGTON POST, Oct. 17, 1987, at B4.

<sup>217</sup> Id.

<sup>218</sup> Id.

<sup>219</sup> Michael Janofsky, *Union Says Clubs Are Stalling Talks*, THE NEW YORK TIMES, Oct. 10, 1987, at 1-57.

<sup>220</sup> Id.

<sup>221</sup> Nat’l Football League, 309 N.L.R.B. 78 (1992).

<sup>222</sup> Id.

<sup>223</sup> Id.

<sup>224</sup> Michael Janofsky, *Union Says Clubs Are Stalling Talks*, THE NEW YORK TIMES, Oct. 10, 1987, at 1-57.

he'd be able to extract relatively good terms with a weakened union).<sup>225</sup> The second and third involved pension fund investments and the college draft. NFL owners wanted to keep any money made from the pension fund investments beyond the expected targeted amounts.<sup>226</sup>

By this point the union was backpedaling from repeated losses and continued attacks – from the league, from the public and media, and most painfully, from within. By the new 1 p.m. deadline on October 14, 109 more players would cross the picket line, including Lawrence Taylor of the Giants, Eric Dickerson of the Los Angeles Rams and 12 members of the Los Angeles Raiders.<sup>227</sup> The total number of union players who had already crossed was increasing, and had already amounted to 15 percent of the union's membership.<sup>228</sup> Fearing that the greatly accelerating trend may result in a complete destruction of the union, as many as 18 of the 28 team representatives favored returning to work without a collective bargaining agreement.<sup>229</sup> Only seven or eight teams by that point favored maintaining the strike.<sup>230</sup>

The wave of players crossing severely undercut the union's credibility and leadership on both sides saw the writing on the walls. Dan Marino, Miami's quarterback and another member of the union's executive board, was likely the first to publicly acknowledge both the union's frustration and the potential of taking free agency off of the table in order to restart negotiations.<sup>231</sup> "Whether we will discuss dropping free agency is hard to say. But the important thing for everybody there is to understand that free agency is just one of the important issues."<sup>232</sup>

### *Strike Called to End With No Compromise, Yet Players Get To Watch From Sidelines*

On the 20<sup>th</sup> day of the strike, Upshaw would appear on television during the Monday Night Football game to propose an end to the strike.<sup>233</sup> With only a few teams even favoring the continuation of the strike at that point, the move was less motivated by graciousness, and more out of sheer desperation. Upshaw's proposed terms would include three parts: (1) reinstatement of all strikers for the remainder of the season; (2) retaining the terms of the 1982 CBA; and (3) submitting to mediation any outstanding issue not resolved within six weeks of further negotiation.<sup>234</sup> Upshaw tried talking tough, and claimed that if the proposal was not accepted the players would remain out for "the duration" of the season.<sup>235</sup>

Donlan, while open to the first two parts, refused the third.<sup>236</sup> "We don't want any part of binding arbitration," he said. "We've told them that time and again when they have proposed it."<sup>237</sup> In addition, the union had asked that striking players be guaranteed their salaries for the remainder of the season. However, Donlan said he would only guarantee them two games.<sup>238</sup> With his response, Donlan effectively called Upshaw's bluff. But it was not too hard of a bluff

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<sup>225</sup> Id.

<sup>226</sup> Id.

<sup>227</sup> Michael Janofsky, *N.F.L. Negotiators Near Agreement*, THE NEW YORK TIMES, Oct. 15, 1987, at B15.

<sup>228</sup> NFL Players Association History, available at [http://www.nflpa.org/AboutUs/NFLPA\\_History.aspx](http://www.nflpa.org/AboutUs/NFLPA_History.aspx) (last visited Feb. 7, 2008).

<sup>229</sup> Michael Janofsky, *N.F.L. Negotiators Near Agreement*, THE NEW YORK TIMES, Oct. 15, 1987, at B15.

<sup>230</sup> Id.

<sup>231</sup> Michael Janofsky, *Key Strike Hurdle May Fall*, THE NEW YORK TIMES, Oct. 6, 1987, at D29.

<sup>232</sup> Id.

<sup>233</sup> Michael Janofsky, *Union is Rebuffed On Arbitration Bid*, THE NEW YORK TIMES, Oct. 14, 1987, at A25.

<sup>234</sup> Id.

<sup>235</sup> Id.

<sup>236</sup> Id.

<sup>237</sup> Id.

<sup>238</sup> Id.

to call, as over a hundred players crossed the final week of the strike, with many more (in fact, almost entire teams) strongly contemplating the idea of crossing soon thereafter.

When the league rejected its proposal, the union had nothing left it could effectively do and decided to end the strike on Thursday, October 15 and return to work.<sup>239</sup> The games scheduled October 18 and 19 were at least three days away and union members really did not want to lose a fourth week's salary. Upshaw was determined to seek progress without further harming the season, despite not having either a back-to-work agreement or a new collective bargaining contract.

However, to the union's dismay, the CEC decided to enforce its prior established return-to-work rule.<sup>240</sup> Any striker that had not reported to his team before that Wednesday at 1p.m. would have to sit out that week's game, even though the strike was in effect over. Not only would they not be allowed to play, but also they would not even receive their regular salaries. Instead, players would be offered pay at the preseason rate of \$750 a week.<sup>241</sup>

The one response the CEC did take was on October 16 to again expand the roster sizes to allow teams to retain up to 85 players.<sup>242</sup> This would allow the replacements to remain on the team and for clubs to evaluate who among them would be retained for the remainder of the season. Teams could only use the pre-strike roster limit of 45 players for the actual game the following weekend.<sup>243</sup> But they could carry a 40-man inactive roster, or "taxi squad," and activate any of those players up until five minutes before game time.<sup>244</sup> Only if the sides had agreed on a back-to-work agreement, management sources said, would the returning players have been reinstated with full pay and been eligible for the weekend's games.<sup>245</sup>

Raiders owner Al Davis justified the owners' decision to the media. "The owners are taking a bad rap on this one. The players were all told it was noon Wednesday. Every player on my team was told individually. They all understood it. Twelve came across the line on time. The others wanted to come across, but the union told them to stay out. I am told that (Brian) Holloway told them that even if the owners would not pay them, the union would. You don't see any of our players saying they didn't know what the score was. They knew. And it was clear that the deadline was noon on Wednesday all across the league."<sup>246</sup>

The union disagreed and immediately howled in protest to anyone who would listen. They would argue that the antitrust suit filed on the same day as the conclusion of the strike was impetus for owner retaliation.<sup>247</sup> The union also sought intervention from the NLRB to allow players to play in that weekend's games. True to form, the NLRB declined to act promptly enough to make a ruling in time for the game, claiming it would not have proper time to conduct

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<sup>239</sup> Michael Janofsky, *N.F.L. Players End Strike but Can't Play Sunday*, THE NEW YORK TIMES, Oct. 16, 1987, at A1.

<sup>240</sup> 309 N.L.R.B. 78, 79-80.

<sup>241</sup> Michael Janofsky, *N.F.L. Players End Strike but Can't Play Sunday*, THE NEW YORK TIMES, Oct. 16, 1987, at A1.

<sup>242</sup> 309 N.L.R.B. 78, 80.

<sup>243</sup> Mark Asher and Michael Wilbon, *NFL Enlarges Team Player Limit to 85 to Make Room For Returning Starters*, THE SUNDAY OREGONIAN, Oct. 18, 1987, at E07.

<sup>244</sup> Id.

<sup>245</sup> Michael Janofsky, *N.F.L. Players End Strike but Can't Play Sunday*, THE NEW YORK TIMES, Oct. 16, 1987, at A1.

<sup>246</sup> 'War Reparations' To TV Next on NFL's Agenda, CHICAGO TRIBUNE, Oct. 19, 1987, at C9.

<sup>247</sup> NFL Players Association History, available at [http://www.nflpa.org/AboutUs/NFLPA\\_History.aspx](http://www.nflpa.org/AboutUs/NFLPA_History.aspx) (last visited Feb. 7, 2008).



a complete investigation.<sup>248</sup> Instead, replacements would take to the field for the third straight week while the no longer striking union players would have to watch on television. The cost to the union, other than serving as a final blow to its pride, would total \$20 million in salaries.<sup>249</sup>

Having so profoundly been defeated, the union membership questioned its leadership. Minnesota Vikings linebacker Scott Studwell called for Upshaw's resignation, claiming, "I can't speak for the whole team, but I think I echo their sentiments when I say I'm bitter and angry about this. The whole thing was mishandled. Gene Upshaw should resign."<sup>250</sup> Others focused anger at management itself, with criticism largely coalescing around two points. The first point was of law. Union General Counsel Dick Berthelsen would say, "by waiting until (Thursday) to tell returning players they couldn't play, the owners made it impossible for the NLRB (National Labor Relations Board) to act quickly enough to go into federal court to seek relief."<sup>251</sup> The second point was more of principle. Houston's Jamie Williams said, "I can't say we've lost because the war isn't over yet. It's more like a cease-fire. Not being able to play Sunday is a slap in the face, another kick in the butt from management."<sup>252</sup>

### *The Fake Games That Counted, And The Players Who Played Them*

The replacement games would see a number of unusual personal stories emerge. Coach Bill Walsh of the 49ers said he felt as if he was fielding a college team.<sup>253</sup> The entire first week he watched as his replacements stood wide-eyed and taking pictures in front of the Super Bowl trophies at the training complex.<sup>254</sup> A garbage truck would end up hitting the bus carrying the Eagles' replacement players.<sup>255</sup> Peter Noga would sub for his brother at middle linebacker of the St. Louis Cardinals, complete with wearing his number on his uniform.<sup>256</sup>

Some teams certainly fared better than others regarding the league's firm position that the replacement games would count. San Diego, San Francisco and Washington won all three of their games, while Kansas City, Philadelphia, Minnesota and the Giants lost all three.<sup>257</sup> The Giants may have fared the worst of all, dropping to 0-5 and statistically all but out of the playoff race.<sup>258</sup> However, the Vikings would overcome their three losses during the replacement season and manage to make it to the NFC championship game against the Redskins.<sup>259</sup> Ozzie Newsome, tight end for the Cleveland Browns and now senior vice president for the Baltimore Ravens would recall, "We thought [that we, as the union players,] were the game, but the games went on without us. The product wasn't the same, but the games counted the same."<sup>260</sup>

It would be more than the team's wins and losses that would count – individual and team records would result from the replacement games as well. Indianapolis quarterback Gary Hogeboom would cross the picket line and end up tying Jonny Unitas' 22 year old team record

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<sup>248</sup> Mark Asher and Michael Wilbon, *NFL Enlarges Team Player Limit to 85 to Make Room For Returning Starters*, THE SUNDAY OREGONIAN, Oct. 18, 1987, at E07.

<sup>249</sup> Id.

<sup>250</sup> *Finally, Players All Agree: No One's Happy*, CHICAGO TRIBUNE, Oct. 18, 1987, at C4.

<sup>251</sup> Id.

<sup>252</sup> Id.

<sup>253</sup> Gerald Eskenazi, *N.F.L. Matchups*, THE NEW YORK TIMES, Oct. 2, 1987, at B16.

<sup>254</sup> Id.

<sup>255</sup> Id.

<sup>256</sup> Id.

<sup>257</sup> Michael Janofsky, *N.F.L. Matchups*, THE NEW YORK TIMES, Oct. 23, 1987, at A32.

<sup>258</sup> Michael Janofsky, *N.F.L. Matchups*, THE NEW YORK TIMES, Oct. 23, 1987, at A32.

<sup>259</sup> Brian Murphy, *Send In The Clowns?*, SAINT PAUL PIONEER PRESS, Feb. 27, 2005, at D1.

<sup>260</sup> Chris Harry, *NFL Strike of 1987 Created Bizarre Season*, ORLANDO SENTINEL, October 6, 2002, at D1.

for throwing five touchdown passes.<sup>261</sup> The Bears would amass 11 sacks against Philadelphia, more than the 1985 Super Bowl-winning Bears ever had.<sup>262</sup> The Giants' league MVP linebacker would play double duty and line up as tight end.<sup>263</sup> And San Diego replacement Rick Neuheisel broke Dan Fouts' team record for single-game completion percentage.<sup>264</sup>

For the replacement players, some would strike gold. 49ers replacement player Tracy Franz would recall, "After six weeks of double-days in training camp and the 49ers ask you to come back, you don't look at it like you're crossing some line. It was more like a tryout. A couple of guys stuck and won Super Bowl rings the next year."<sup>265</sup> The Redskins, who beat the veteran-laden Cowboys during their Monday Night Football game on national television, kept the most replacement players in the league – 17 – including a pair of wide receivers (Anthony Allen and Ted Wilson), a tight end (Craig McEwen) and a running back (Lionel Vital).<sup>266</sup> However, these stories were far more commonly the exception than the rule.

### *Aftermath – Legal and Otherwise*

In all, the 1987 strike would last 24 days, but cost the league only one missed week of game play. One newspaper would write, "Not since air traffic controllers were fired in 1981 has organized labor suffered such a visible defeat as when professional football players crawled back to their locker rooms on Oct. 15 after a 24-day strike. The league didn't just successfully reject every demand of the National Football League Players Assn. It humbled its megabuck stars when they reported back to work without a new contract by forcing them to sit out an extra week while strikebreakers played parodies of NFL games that not many fans bothered to watch."<sup>267</sup>

Everson Walls, the one holdout who did not submit to the financial threats of the Cowboys, expressed his frustration with the financial toll the strike would take on him individually. Just before the final announcement of the end of the strike, Walls said, "banks want to cut my behind loose. I kept telling them the strike would be over soon."<sup>268</sup> The problem for Walls, however, was that a quick resolution for the strike did little to help him money-wise. The third week would not be made up and the replacement games would count. Worse yet, they would receive no bonus or non-monetary assistance for ending the strike. "Financially, it killed us," Cowboys linebacker Jeff Rohrer would say. "It took one quarter of my salary that I'll never see again."<sup>269</sup>

With their eyes on their paychecks, the players could not ignore that the NFL's average salary of \$200,000-plus was only half of what free agency had brought baseball and basketball at the time. "You build long-term resentment and bitterness if one side kicks the other while it's down," said Gary Roberts, a former NFL lawyer. "The owners might win today, but if they extract too much blood, the players will win tomorrow." The league owners' position and tone would not be well taken. "Management didn't come up with a substitute for free agency," says Roberts. "Instead, they came at it with a macho perspective."<sup>270</sup>

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<sup>261</sup> Chris Harry, *NFL Strike of 1987 Created Bizarre Season*, ORLANDO SENTINEL, October 6, 2002, at D1.

<sup>262</sup> Id.

<sup>263</sup> Id.

<sup>264</sup> Id.

<sup>265</sup> Michael Janofsky, *N.F.L. Matchups*, THE NEW YORK TIMES, Oct. 23, 1987, at A32.

<sup>266</sup> Id.

<sup>267</sup> Aaron Bernstein, *NFL Owners May Have Fumbled Away Their Victory*, BUSINESS WEEK, Nov. 2, 1987, at 162.

<sup>268</sup> 'War Reparations' To TV Next on NFL's Agenda, CHICAGO TRIBUNE, Oct. 19, 1987, at C9.

<sup>269</sup> Id.

<sup>270</sup> Aaron Bernstein, *NFL Owners May Have Fumbled Away Their Victory*, BUSINESS WEEK, Nov. 2, 1987, at 162.

It is likely the macho perspective was indicative of the fact that the owners benefited from the status quo. Each owner had actually seen his or her per game profits rise from \$800,000 before the strike to \$921,000 during the strike.<sup>271</sup> The owners would end up having to pay some of that back when it would negotiate a \$60 million refund to networks to be paid over the next two seasons.<sup>272</sup> However, this refund would be partially offset by the fact the owners averaged 13% more a year in revenues compared to each prior year.<sup>273</sup> Steadily increasing profits indicated that the replacement strategy worked – owners did not see a repeat of 1982 with a television ratings drop of 16% that took years to recover.

Cleveland Browns owner Art Modell would proudly remind the media after the strike that, “when the smoke clears, it will be less damage than 1982. Then, we went dark completely and had seven long weeks with no football. The smartest thing we did was play these games, good or bad. At least we kept the game alive.”<sup>274</sup> The owners would even award bonuses to Eddie LeBaron and the Management Council staff for their efforts in putting the replacement games together.<sup>275</sup>

The union may have lost a very public and expensive round, but it was not going to give up without a fight. Instead, the union returned to where it last tasted success, the courtroom, with a two-prong approach: simultaneously pursue labor issues through the NLRB while seeking antitrust claims in federal court. Changing the venue could only benefit the weary union, as a powerful third party could compensate for the ineptitude the union displayed in trying to extract its demands with management on its own.

### *NLRB Labor Disputes*

The New York office of the NLRB would declare after the strike that it had received “a whole mess” of complaints from both sides, alleging bad-faith bargaining, among other things. The union filed a series of complaints “of attempts to interfere with the union’s right to picket in Miami, Atlanta, Kansas City and Hempstead, N.Y.,” where the New York Jets train.<sup>276</sup> Some of the complaints went the other way as well. The league submitted a complaint against the Jets “for picketing where they shouldn’t be picketing.”<sup>277</sup> Complaints would even come from the replacement players themselves. Former wide receiver Otis Taylor filed a complaint alleging he was assaulted by striking linebacker Jack Del Rio.<sup>278</sup> In light of the variety of complaints, NFL Management Council spokesman John Jones would warn the public and players alike “by all accounts, it will be quite a length of time before [these claims go] to court.”<sup>279</sup>

And so it would be: almost five years would pass until the full board saw the complaints. By this point, the NLRB would consolidate labor charges into one proceeding.<sup>280</sup> The full board sought to determine three pending questions: (1) whether the NFL’s report-by-Wednesday rule was lawful; (2) whether the NFL unlawfully refused to pay the salaries of certain injured players

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<sup>271</sup> Paul D. Staudohar, *The Football Strike of 1987: The Question of Free Agency*, 111 MONTHLY LAB. REV. 26 (Aug. 1988)

<sup>272</sup> *Id.*

<sup>273</sup> Aaron Bernstein, *NFL Owners May Have Fumbled Away Their Victory*, BUSINESS WEEK, Nov. 2, 1987, at 162.

<sup>274</sup> ‘War Reparations’ To TV Next on NFL’s Agenda, CHICAGO TRIBUNE, Oct. 19, 1987, at C9.

<sup>275</sup> NFL Players Association History, available at [http://www.nflpa.org/AboutUs/NFLPA\\_History.aspx](http://www.nflpa.org/AboutUs/NFLPA_History.aspx) (last visited Feb. 7, 2008).

<sup>276</sup> *Union to ‘Haunt’ Games*, LOS ANGELES TIMES, Sep. 30, 1987, at 3-1.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *NFL players suing over labor practices*, THE SAN DIEGO UNION-TRIBUNE, Oct. 17, 1987, at D-2.

<sup>280</sup> Nat’l Football League, 309 N.L.R.B. 78 (1992).

during the strike; and (3) whether the Cowboys and/or the Patriots unlawfully threatened players on account of their participation in the strike.<sup>281</sup>

#### Report-By-Wednesday Rule

When the strike began, the NFL Management Council Executive Committee (CEC) was unsure how to establish rules regarding team rosters. Squads had very little time to prepare their replacement teams, resulting in a number of players playing in positions incongruent with their talent. In addition, there would be the added complexity of how to deal with the union players who crossed the picket lines and returned to play.

The original method, as you may recall, for dealing with these wildly changing team rosters was set by the CEC prior to the first week of replacement games. Teams could sign replacements or accept returning strikers up until 2 p.m. on the Friday before the game. All team active rosters needed to be set no later than 4 p.m. the Saturday prior to the game.<sup>282</sup>

However, by the second week it appeared the replacement games were a success for the league – both in the sense that squads had gotten their replacement teams up and running in a short period of time, and more and more union players were crossing the picket lines to return to play. Thus, on October 5, the CEC modified the deadline for roster changes by establishing two different deadlines for players based upon whether the player was a union player or a newly signed replacement. The deadline for the union players was moved up to 1 p.m. EST on the Wednesday prior to the game. Meanwhile, the deadline for replacements would be pushed back further, allowing teams to sign new replacements (quite possibly those who may be cut from other teams when their union players returned to play) as late as 4 p.m. EST on Saturday for Sunday games and 4 p.m. EST on Monday for teams playing Monday night.<sup>283</sup>

The crux of the NLRB charge was that the difference in reporting times amounted to an illegal discrimination against union players, argued to be motivated as retribution for their concerted right to strike. Even though the union ended the strike on Thursday October 15, league officials decided to enforce the Wednesday report deadline and thereby prevent the vast majority of the union’s membership from playing in (or being paid for) the October 18-19 games.<sup>284</sup> The league’s choice to not accept returning strikers for immediate employment was despite well-established labor law that requires employers to reinstate employees following a union’s unconditional surrender and return to work promise.<sup>285</sup>

The NLRB reviewed the league’s action under the *Great Dane Trailers* standard to determine whether differential treatment amounted to prejudicial behavior.<sup>286</sup> If the union could demonstrate any harm to its players, even if “comparatively slight,” the burden would then shift to the NFL to provide “legitimate and substantial business justifications” for the rule in question.<sup>287</sup> Not surprisingly, the union did not have a hard time successfully demonstrating a sufficient harm to shift the burden to the league, as the rule in question led to a lost week of pay

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<sup>281</sup> Id.

<sup>282</sup> Id.

<sup>283</sup> Id.

<sup>284</sup> Id at 79-80.

<sup>285</sup> The NFL contended that the union’s offer was not unconditional because it sought the termination of the replacements and immediate reinstatement of all strikers. The NLRB, citing *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), found the league’s argument without merit: “where the striker replacements are only temporary, an offer to return to work which demands no more than the discharge of those replacements is perfectly appropriate.” 309 N.L.R.B. 78, 80 n11.

<sup>286</sup> Id at 80.

<sup>287</sup> Id at 81.

for the majority of the union players. Specifically, the NLRB held that the rule discriminated against strikers by applying a different and more stringent standard for player eligibility, thereby impeding the right of players to strike.<sup>288</sup>

The NFL was then responsible for providing proper business justifications for the discriminatory rule. The first justification provided was that clubs required sufficient time to prepare returning players for game conditions. Eddie LeBaron would testify that the players risked injury if thrown immediately into game play.<sup>289</sup> LeBaron felt that, despite evidence suggesting many players worked out on their own, NFL-caliber play required NFL-caliber training staff and facilities. The second justification was to preserve the competitive position of the teams in the league. LeBaron would testify that a bright line rule allowed teams to anticipate whom they would be playing against, as late returning players had a disproportionate impact on the game.<sup>290</sup> The third justification was the substantial administrative difficulties of how to handle players returning at different periods of time.<sup>291</sup>

The NLRB systematically shot down each of the proffered justifications and found the NFL liable on this charge. The NLRB looked at the 1982 strike and saw no need for an earlier deadline – either to ensure competitiveness (recall the 1982 strike was 57 days compared to only 25 days in 1987) or for administrative reasons.<sup>292</sup> In addition, there was no evidence presented to suggest an extra day of practice and training would decrease the chance of player injury. Again, the league’s handling of returning players from the 1982 strike did not require any training period, despite players unable to receive training for twice the duration compared to 1987.<sup>293</sup> The NLRB found the league’s competitiveness argument equally unpersuasive, as an unconditional return to work would substantially impact all of the teams in the league during the same week.<sup>294</sup>

#### Paying Players on Injured Reserve

The NLRB then shifted its attention to the choice of clubs to withhold pay to players on injured reserve during the strike. Prior to the strike, many players rehabilitated off site (such as at home) and would not be required to attend any team functions. When on disability leave, the teams would be responsible for the rehabilitation program and its costs.<sup>295</sup>

During the strike, some of these players chose to walk the picket lines. The NFL teams responded by requiring these players to declare that they were not strikers and/or to arrive at the team facility (thus crossing the picket lines).<sup>296</sup> Players who chose to ignore this policy would be treated as if they were also strikers and thus would not be allowed to enter team facilities for treatment or receive their standard pay. Twenty-six players in all would be refused their injured reserve status on the grounds that they were on strike.<sup>297</sup> At least some of these targeted players had even complied with their team’s staff regarding rehabilitation at outside facilities.<sup>298</sup>

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<sup>288</sup> Id at 80-81.

<sup>289</sup> Id at 81.

<sup>290</sup> Id.

<sup>291</sup> Id.

<sup>292</sup> Id at 82.

<sup>293</sup> Id.

<sup>294</sup> Id.

<sup>295</sup> Id at 85-86.

<sup>296</sup> Id.

<sup>297</sup> Id at 85-86.

<sup>298</sup> Id.

The NLRB would hold that the NFL failed to meet its burden of showing a legitimate and substantial business justification for withholding the benefits of these players. The NLRB came to this decision by applying *Texaco Inc.*, which restricts employers from withholding accrued benefits on the basis of a strike.<sup>299</sup> Because the players had accrued their right to injured reserve status with a prior injury, the withholding of their care and pay by imposing additional responsibilities and conditions upon them constituted a violation of Section 8(a)(3) and (1).<sup>300</sup>

#### Cowboy and Patriot Threats

The NLRB would also find in favor of the union regarding the threats by the Cowboys and the Patriots.

The NLRB would uphold the finding that the Cowboys' threats to player compensation directly harmed the players' right to strike under the Act. Players had not obtained alternate employment and had only acted to honor the picket line. Threatening forfeiture of more than 80 percent of a player's pay would be "Draconian" and unjustified by any reasonable reading of the players' contracts.<sup>301</sup>

Similarly, the NLRB held that the letter to striking Patriots quarterback Lin Dawson constituted a threat prompted by that player's choice to strike. A finding for liability under the Act requires only that a threat could reasonably be understood. The NLRB's interpretation of the disputed phrase "seeing if I can get someone else to buy the contracts of people who have acted in such an unfair manner," could be construed that Dawson would not be playing much longer for the Patriots because he chose to strike.<sup>302</sup>

#### Outcome

Despite a near total loss on almost all counts of the action, the NLRB's weak enforcement remedies arguably resulted in a win for the league.

As with most NLRB decisions that find management violations, the NLRB produced a cease and desist order regarding the type of behavior that had been outlined in the complaint. For example, the NFL was then barred from "discriminating against their employees on Injured Reserve or Physically Unable to Perform status by failing to pay them game checks during a strike because of their union and concerted and protected activities."<sup>303</sup> Largely, the cease and desist orders would only harm the NFL due to the value of precedent regarding these narrow behaviors. To ensure this, the NFL, as well as the Patriots and Cowboys, would have to post at their places of business a promise that it would not conduct such unlawful operations in the future.<sup>304</sup> At best, a requirement to post promises in the team locker rooms amounts to a slap on the wrist. The already unionized players are extremely wealthy and have easy access to legal advice as well as the fact that they play in an environment with intense media scrutiny. The last thing these players needed was a posting in their locker room to notify them of their rights.

The NFL would, however, have to cough up some money as a result of the NLRB's decision. The illegality of the Wednesday-by-1 rule would require the NFL to pay back all the players salaries for that one missed week of work, as well as the full salaries of the 26 injured reserve players.<sup>305</sup> However, despite finding discrimination by the Cowboys, the NLRB would

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<sup>299</sup> 285 N.L.R.B. 241 (1987).

<sup>300</sup> 309 N.L.R.B. 78, 85-86.

<sup>301</sup> Id at 138-39.

<sup>302</sup> Id at 136.

<sup>303</sup> Id at 87.

<sup>304</sup> Id at 88.

<sup>305</sup> Id at 87-88.

not uphold the award of attorney fees for Walls when he contacted an attorney for consultation. The NLRB would rule that, “even if we were to rule that the Cowboys’ actions violated Section 8(a)(1), we would not award attorneys fees. The record, so far as it goes, does not indicate that the Cowboys’ position, even if incorrect, was patently frivolous.”<sup>306</sup> Most management behaviors (including some frivolous ones) could, with the power of a high-priced attorney, find a colorable claim that they are not “patently frivolous.” With such a conservative standard, it is unlikely the league could ever be required by the NLRB to pay more than it would have had to pay these players in the first place.

### *Federal Court Antitrust Disputes*

Despite resoundingly losing the union’s NLRB claims, management had successfully broken the strike with replacements and escaped any meaningful liability. However, the NFLPA would eventually win the coveted free agency in the courts. The union filed *Powell v. NFL* the day after calling an end to the strike, claiming NFL restrictions (including first-refusal rights, compensation, the college draft and individual player contracts) are incompatible with antitrust law. Instead, players in a competitive market require unrestricted free agency.<sup>307</sup> Unlike the union, experts at the time were divided on which way the court would decide. However, the owners knew from their loss to the Oakland Raiders that an antitrust claim could go either way. The lawyer who represented the NFL in the Oakland case told newspapers at the time, “The union still has hope, though I think it’s a long shot.”<sup>308</sup>

At first, things went well for the owners. Judge Doty, hearing the case in U.S. District Court in Minneapolis, refused the union’s request for preliminary injunction and declared the 1982 agreement would remain in effect until the NLRB ruled on the owners’ charge that the union had failed to bargain in good faith. Judge Doty had no intention of casually deciding to dump 280 players immediately into free agency, potentially forever devastating the “competitive balance of the NFL.”<sup>309</sup> But luck would decidedly turn in the union’s favor by January 1988.<sup>310</sup>

To ensure both sides would have an incentive to bargain, Judge Doty warned both sides that the court would wield its power to make bargaining determinations if the two sides did not break out of their bargaining impasse. Rather than starting from scratch, Judge Doty determined he would apply a rule of reason analysis to the most recently mutually agreed-upon CBA from 1982.<sup>311</sup> Despite his warning, neither side budged. Locked in a bargaining impasse, each side decided instead to make their case in court and hope for the best. The league would be the side to ultimately lose the stare-down, as Judge Doty’s analysis concluded the NFL’s restrictions on free agency violated the rule of reason and would no longer apply.<sup>312</sup>

Following Judge Doty’s decision, the league took two steps. First, the league appealed the Judge’s ruling to the Eighth Circuit. Second, the league took immediate steps to alter its player policy. On February 1, 1989, the NFL unilaterally imposed alterations to its free agency

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<sup>306</sup> Id at 86.

<sup>307</sup> Michael Janofsky, *Changes Not on N.F.L. Owners’ Agenda*, THE NEW YORK TIMES, Oct. 27, 1987, at B11.

<sup>308</sup> Aaron Bernstein, *NFL Owners May Have Fumbled Away Their Victory*, BUSINESS WEEK, Nov. 2, 1987, at 162.

<sup>309</sup> Paul D. Staudohar, *The Football Strike of 1987: The Question of Free Agency*, 111 MONTHLY LAB. REV. 26 (Aug. 1988)

<sup>310</sup> NFL Players Association History, available at [http://www.nflpa.org/AboutUs/NFLPA\\_History.aspx](http://www.nflpa.org/AboutUs/NFLPA_History.aspx) (last visited Feb. 7, 2008).

<sup>311</sup> Peter N. Katz, Comment, *A History Of Free Agency in the United States and Great Britain: Who’s Leading the Charge?*, 15 Comp. Lab. L. 371, 390-91 (1994).

<sup>312</sup> NFL Players Association History, available at [http://www.nflpa.org/AboutUs/NFLPA\\_History.aspx](http://www.nflpa.org/AboutUs/NFLPA_History.aspx) (last visited Feb. 7, 2008).

system under the name “Plan B.”<sup>313</sup> The system allowed each team to protect 37 players on its roster, each of whom would be subject to the same form of compensation in the 1982 agreement as well as the right of first refusal.<sup>314</sup> Players who were not restricted could sign with other clubs between February 1 and April 1 without restrictions.<sup>315</sup> Shortly thereafter, the league would score a big victory in its Eighth Circuit appeal. Judge Gibson overturned Judge Doty’s decision in *Powell* and held that as long as there is a collective bargaining relationship between the union and the league, the labor relationship continues and the players’ exemption under *Mackey* applies.<sup>316</sup>

Essentially, the Circuit’s ruling required the players to choose between being represented by a union or having rights under antitrust laws to sue the owners. To the surprise of the owners, the NFLPA Executive Committee voted two days later to have the NFLPA stop acting as a labor union.<sup>317</sup> In its place, the union would reform as a professional association with the purpose of pursuing litigation on behalf of individual players. The vote would pass with 60 percent of the players voting in favor of the dissolution.<sup>318</sup>

The first action of the NFLPA as a professional association would be to file a new lawsuit against the league in the spring of 1990 with *McNeil v. NFL*. Now free of the union exemption according to *Powell*, the association challenged the NFL’s Plan B for free agency. At trial, owners sought to demonstrate that the restraints were reasonable. Having already run for a season, Plan B had produced 229 team changes between February 1 and April 1 among a total of 619 unconditional free agents.<sup>319</sup> However, the union pointed to the fact that very few conditional free agents and no protected free agents moved.<sup>320</sup>

Despite its drastic concession on free agency with Plan B, the *McNeil* jury would conclude that it was illegal under a rule of reason analysis. Importantly, the *McNeil* jury rejected the owners’ argument that players lacked standing because they had also prospered under the system. Instead, the plaintiff’s expert economist analyzed the financial information of the league and had shown the owners to be even more profitable than they had claimed.<sup>321</sup> Even under the somewhat less restrictive Plan B, the owners’ profits had increased at a rate that was vastly outpacing the increases seen among the player salaries. The widening gap during this period was found to be “significantly harmful” to players, despite the fact they also had seen increases. Although holding that some free agency restrictions could be legal, the jury determined that Plan B was not the least restrictive means necessary to ensure a competitive balance in the league.<sup>322</sup>

Without a nonstatutory labor exemption this time (due to the union’s choice to dissolve), the league was subject to damages. Despite relatively low damages amount –only four players of the eight would be awarded only \$543,000 total – the NFLPA had what it needed: a legal ruling

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<sup>313</sup> Katz, 15 Comp. Lab. L. 371, 391-92.

<sup>314</sup> Id.

<sup>315</sup> NFL Players Association History, available at [http://www.nflpa.org/AboutUs/NFLPA\\_History.aspx](http://www.nflpa.org/AboutUs/NFLPA_History.aspx) (last visited Feb. 7, 2008).

<sup>316</sup> 15 Comp. Lab. L. at 392.

<sup>317</sup> NFL Players Association History, available at [http://www.nflpa.org/AboutUs/NFLPA\\_History.aspx](http://www.nflpa.org/AboutUs/NFLPA_History.aspx) (last visited Feb. 7, 2008).

<sup>318</sup> 15 Comp. Lab. L. at 392.

<sup>319</sup> Id at 393.

<sup>320</sup> Id.

<sup>321</sup> Carol T. Rieger and Charles J. Lloyd, *The Effect of McNeil v. NFL on Contract Negotiation in the NFL – That was Then, This Is Now*, 3 Marq. Sports L.J. 45, 55-56 (1992).

<sup>322</sup> Katz, 15 Comp. Lab. L. at 392.



that resulted in Plan B being thrown out.<sup>323</sup> Essentially, the owners needed to find a different way to ensure a competitive balance in the league - one with less oppressive restrictions on competition between the teams in bidding for players, allowing players to reap salaries that would better reflect the improving market for their skill.<sup>324</sup> With *McNeil*, the NFLPA had its greatest legal victory in a century, and the NFL owners were sent back to the drawing board.

#### *A Tally of Battle Victories in a Half-Century Labor War*

By November 1992, the union had won big in the courts and had at least a nominal victory with the NLRB. Rather than face additional appeals and litigation, both sides agreed to compromise and seek a settlement. After the *McNeil* decision, Upshaw was quoted as saying, “If you want to say we lost the strike from the standpoint of getting a settlement, yes, we did, but in the long run, we may have lost the battle, but we didn’t lose the war.”<sup>325</sup> By March of 1993, the union would recertify and take over collective bargaining duties.<sup>326</sup> By May 1993, the two sides had entered into a collective bargaining agreement.

Not all the news with the CBA would be bad for the league. The NFL would get league-wide and individual team limits on the amount rookies could be paid – known as the “entering player pool.”<sup>327</sup> The league also was able to remove the option clause from the standard player contract (allowing individual teams to negotiate one if desired as a separate addendum) and was able to maintain its prized waiver system without any changes.<sup>328</sup>

Meanwhile, the new CBA would mean huge wins for the union. Most importantly the union finally got its free agency, even if it was not completely free. Despite having won a clear legal victory, the union still had reason to settle. Other than the obvious possibility of losing on appeal (as it had with nearly every victory it had secured in the past), the union would be able to negotiate with the league a lesser form of structured free agency in exchange for other tangible benefits. With this leverage, the union squeezed a settlement for any prior player claims at an up-front cost to the owners of \$195 million.<sup>329</sup> Owners would also capitulate to \$1 billion in guarantees regarding pensions, health and post-career benefits for current and retired players.<sup>330</sup>

The newly brokered free agency system would establish valuation and restrictions upon players depending upon the player’s number of accrued seasons in the league (rather than using salary numbers as had failed before). Veterans with less than three seasons could negotiate with any club without restrictions or compensation if their prior club had not tendered at least a one-year player contract with a specified minimum salary.<sup>331</sup> Veterans with three to five accrued seasons become a “restricted free agent” and free to negotiate with any club. The only restriction would be the right of first refusal for the prior club as well as the possibility of compensatory draft selections.<sup>332</sup> Veterans with five or more seasons were free to negotiate with any club

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<sup>323</sup> NFL Players Association History, available at [http://www.nflpa.org/AboutUs/NFLPA\\_History.aspx](http://www.nflpa.org/AboutUs/NFLPA_History.aspx) (last visited Feb. 7, 2008).

<sup>324</sup> Note: *McNeil* only affected unsigned players. Players under contract were still bound to their agreements, unlike the relative flexibility for some of these players under Plan B where they could move regardless of their contractual situation. 15 Comp. Lab. L. at n.127.

<sup>325</sup> Chris Harry, *NFL Strike of 1987 Created Bizarre Season*, ORLANDO SENTINEL, October 6, 2002, at D1.

<sup>326</sup> NFL Players Association History, available at [http://www.nflpa.org/AboutUs/NFLPA\\_History.aspx](http://www.nflpa.org/AboutUs/NFLPA_History.aspx) (last visited Feb. 7, 2008).

<sup>327</sup> 15 Comp. Lab. L. at 394-396.

<sup>328</sup> Id.

<sup>329</sup> Id at 393-96.

<sup>330</sup> Chris Harry, *NFL Strike of 1987 Created Bizarre Season*, ORLANDO SENTINEL, October 6, 2002, at D1.

<sup>331</sup> Katz, 15 Comp. Lab. L. 371, 394.

<sup>332</sup> Id.

without any penalty or compensation. The only restriction is that there are certain time periods when the player can only negotiate with his prior club if the team offered him 110% of his prior year's salary.<sup>333</sup>

The CBA would also introduce the concepts of a "franchise player" and a "transition player." A franchise player is a player that may only negotiate with his team for that season. To tag a player "franchise," the team must pay the player the greater amount of either 120% of the prior year salary or the average of the five largest prior year salaries for the players at his position.<sup>334</sup> A "transition player" could be used for any player. Such a player is free to negotiate with any club without penalty or restriction except that the team could maintain a right of first refusal. To tag a player "transition," the team must pay the player the greater amount of either 120% of the prior year salary or the average of the ten largest salaries at his position. Further, the top four teams in the league would be not allowed to sign any unrestricted free agent except from their own team. The next highest four teams would have the same restriction, with some exceptions.<sup>335</sup>

Due to extensions, the 1993 CBA is largely the system that governs today's players and has been the source of labor peace to this day. Although scheduled to terminate at the conclusion of the 2012 season, either side can opt out in November of 2008 and shorten the deal to terminate in 2010. If terminated, the salary cap would be eliminated after the 2009 season, allowing 2010 to start without a cap.<sup>336</sup>

#### *Antitrust Developments and Implications for Future Contract Bargaining*

Without a doubt, the union's success in the courtroom benefited its position in the boardroom when it negotiated with the league. Specifically, the union achieved its greatest success in 1993 when it extracted the long coveted free agency system from the league as a settlement for antitrust cases such as *McNeil*. However, the rules of the courtroom game have changed since *McNeil* and will likely be an important element in the future negotiations.

In *McNeil*, the court essentially gave the union a bargaining chip when the prolonged negotiations with the league hit a wall. Recall that by decertifying the union, individual players once blocked by the nonstatutory labor exemption could then sue under antitrust laws. These suits would be able to break down undesirable league policies that the court deemed unnecessarily restrictive to player movement among the league's teams.

In *Brown v. Pro Football*, a case dealing with pay and benefits of developmental squad players, the Supreme Court expanded the scope of the nonstatutory labor exemption.<sup>337</sup> The new rule significantly restricts the union's ability to use the three-part *Mackey* test. Now with *Brown*, the nonstatutory labor exemption applies to any matter that grew out of, or was directly related to, the bargaining process.<sup>338</sup> However, one problem with the *Brown* decision is that it lacks sufficient criteria to determine when a particular issue is sufficiently related to the bargaining process to fall under the exemption.<sup>339</sup> As a result, the union may turn to the courtroom at some point in the future regarding some issue that has yet to reach the bargaining table. However, it is

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<sup>333</sup> Id.

<sup>334</sup> Id.

<sup>335</sup> Id at 395.

<sup>336</sup> Larry Weisman, *NFL reflects on changes at anniversary of strikes*, USA TODAY, [http://www.usatoday.com/sports/football/nfl/2007-10-06-sw-labor-anniversary\\_N.htm](http://www.usatoday.com/sports/football/nfl/2007-10-06-sw-labor-anniversary_N.htm).

<sup>337</sup> 518 U.S. 231 (1996), *aff'g*, 50 F.3d 1041 (D.C. Cir. 1995).

<sup>338</sup> Pamela A. Clark, Note, *Brown V. Pro Football, Inc: The Supreme Court Benches A Player's Right to Negotiate Salary*, 35 HOUS. L. REV. 571 (Summer 1998).

<sup>339</sup> Clark, 35 HOUS. L. REV. 571.

now clear that the union has lost its ability to use antitrust litigation as a primary tool to for gains in key bargaining areas such as compensation or free agency.

Having lost *Brown*, the union has secured very little for its players since the 1987 replacement season. First, the union suffered a resounding and humiliating defeat in the strike. Then it won an empty and extremely delayed victory with the NLRB. But later it won a big victory with an antitrust judgment that, although yielding very little money, secured solid precedent for future labor battles. But with *Brown*, this treasured precedent has largely been taken away as well.

Due to re-extensions of the 1993 CBA, the effect of *Brown* on negotiations has yet to be fully tested. Should either side opt out of the CBA, the *Brown* decision likely provides the league with a significant advantage in how the new agreement will be designed, as it gives the league the power to unilaterally impose its last best effort offers. What is clear, however, is that the league is in a significantly better bargaining position compared with 1993, and the union likely faces a significantly more desperate need to secure a meaningful victory that actually lasts.

### *Survey of North American Sports League Player Disputes*

The NFL labor unrest in 1987 would serve as a lesson for other sports leagues. As labor disputes arose, each league would behave differently in response to its unique labor situation and needs.

#### *Major League Baseball*

The next league up to bat against organized labor after the 1987 NFL replacement season happened to be Major League Baseball in the mid 1990s. Public perception of replacement worker use had already begun to change. As a direct juxtaposition to Reagan's air traffic controller firings, newly elected Bill Clinton took a decidedly different approach. Instead, Clinton's position on the use of replacement labor was negative, and he took steps within his power to discourage the use. For example, he signed an executive order in 1995 that prevented companies that hired replacement workers from getting any federal work.<sup>340</sup> In fact, the fact that the MLB was even *potentially* going to use replacement players was sufficient for Clinton to refuse to throw the ceremonial first pitch of the season.<sup>341</sup> Teamsters piled on further by declaring that teamster-delivered beer would not make it to the stadiums on game days.<sup>342</sup>

Nonetheless, the markedly better terms NFL owners were able to secure by using replacements in the 1987 season proved quite tempting for the MLB owners. By 1995, the MLB standoff with the union had surpassed the 200-day mark and owners very much desired to see fans in the stadium again.<sup>343</sup> Plus, losing eight or ten million in 1995 to secure significant increases in profit over the next 20 to 30 years is a worthwhile trade. Besides, armed with an antitrust exemption, the MLB had even more weight upon union negotiations compared to the relatively legally vulnerable NFL.

The degree to which the use of replacements in baseball may differ from the 1987 NFL replacement season is a matter for debate. Football clearly requires a higher number of starting players to field a team. However, baseball arguably is more difficult to field replacements due to

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<sup>340</sup> Richard Alm, *In The Strike Zone; Hiring replacement baseball players illustrates management's ultimate tactic in union fights*, THE DALLAS MORNING NEWS, Mar. 16, 1995, at 1A.

<sup>341</sup> Id.

<sup>342</sup> Id.

<sup>343</sup> Id.

the particular importance the game places on individual player talent. Unlike football, baseball games are dominated by the interaction of a limited number of players at a time (pitcher and batter, with some degree the catcher or the targeted player in the field). As a result of focusing a greater degree of attention upon particular players, quality decreases in pitchers or batters may become very noticeable to the fan watching the game. However, at the same time, teamwork and timing – two areas most likely to be impacted by the number of team practices – are arguably less important in baseball compared to football.

But an analysis of teamwork and timing assumes that there is even sufficient existing talent to recruit replacement players. A major league pitcher is a very rare breed. Given that each of baseball's many teams are required to employ a number of these high caliber rare pitchers, it's unlikely that teams would be able to find enough outside of the system to sustain a long replacement season. Remember, the NFL only had to find one quarterback who could (barring injury) be used for every snap of the ball. Baseball requires pitcher rotations, as a pitcher's arm simply cannot pitch every inning of every game. This likely means that a lot of the success of a baseball replacement strategy would likely rest upon a very high number of lesser-known pitchers crossing the picket line with the hopes of getting noticed and landing a big contract. Given the number that did so in the NFL in 1987, the league could probably rest easy in knowing that there should at least be a healthy supply of such pitchers. Their talent level, however, is where the real question lies.

Another factor likely to arise in a replacement strategy for baseball is the quantity of games. A month-long strike in football may impact only 3 games - potentially even less depending upon whether the team has a bye. However, a month in baseball results in over two dozen games. One argument could be that the higher number of games may water down the importance of these players (thus their individual performances may not matter as much) or simply give them more opportunity to rise to a higher level of play. However, the more likely case is that more games could mean more opportunities for some random replacement player to do something foolish and have it splashed in the media. As seen from the NFL replacement season, which lasted for just three games, there were a number of stories that emerged from a very limited amount of playing time. Records were definitely broken – the good, and, to the embarrassment of the league, also the bad ones.

Despite these concerns, the MLB went so far as to take their case to the public in 1995 and hire replacement players for spring training that season. Owners did their best to make their case against the “greedy” millionaire ballplayers. To some degree it was working with the public. Polls at the time indicated that over 43 percent of fans still planned on attending the games despite the use of replacement labor.<sup>344</sup> Owners further attempted to sweeten the pot by dropping the announced ticket prices. The Oakland Athletics cut ticket prices by as much as 78 percent for April - whether there would be a replacement game or not.<sup>345</sup> The Los Angeles Dodgers ticket prices that included seats as low as 75 cents were amounts that had not been seen for professional seats since 1958.<sup>346</sup>

However, the MLB would see three primary obstacles arise to the use of replacement workers not seen by the NFL in 1987. The first obstacle was one that was unique to sports leagues with franchises in Canada (which notably does not include the NFL to date). Despite primarily an American operation and headquarters, Canadian labor law applies to any part of

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<sup>344</sup> Id.

<sup>345</sup> Id.

<sup>346</sup> Id.

operations conducted within its territorial borders.<sup>347</sup> Unlike the American approach under the National Labor Relations Act, Canada leaves labor law to be sorted out by its various provinces, meaning a franchise in Toronto would be guided by different law than Montreal. In the 1995 season, the Toronto Blue Jays would not have been able to play any game in the SkyDome with temporary or permanent replacements under Ontario law.<sup>348</sup> Meanwhile, a technicality under Quebec law meant that the yet-to-be government registered MLB Players Union meant that there would be no ban on the use of replacements for the Montreal Expos.<sup>349</sup> Had the union been registered (as would later be seen in the MLB Umpire strike), the use of replacements would have been barred as there as well.<sup>350</sup>

In response to the hiring of replacements in 1995, some American cities and states sought to model the Canadian approach and try to ward off the use of replacements for their home franchises. Both the City of Baltimore and the State of Maryland enacted legislation to bar the use of replacements in Camden Yards, home of the Baltimore Orioles. In order to avoid the precedent stating that the federal labor laws preempt state laws regarding replacement labor, the Maryland legislators structured the law as if the state was merely protecting its investments in the publicly owned stadium.<sup>351</sup> Because the league ultimately did not use replacement players, this theory remains untested. Given the widespread existence of publicly financed stadiums among North American sports leagues, the theory, if successful, could be an important challenge to future replacement player use (particularly in regions with very high union affiliation).

The second obstacle was quite simply that the ownership, unlike the NFL in 1987, was not unified in their desire to field replacements. Certainly, some franchises learned from NFL team failures and got on the replacement recruitment trail early. These franchises included the Texas Rangers, who had signed many stars of the Mexican League. Other franchises had a half-hearted approach, as Cincinnati Reds became the butt of jokes when they signed a 48-year-old, 238-pound pitcher who had been a former major leaguer in the 1970s.<sup>352</sup> Yet importantly, some franchises opted out of the replacement strategy entirely. This notably included the Baltimore Orioles, who was owned by Peter Angelos.<sup>353</sup> This decision may partly have had to do with the serious anti-replacement movement in Maryland and Baltimore as seen above. However, Angelos publicly declared he did not want be responsible for breaking Cal Ripken's historic pursuit of Lou Gehrig's record for consecutive games played.<sup>354</sup>

The third and most powerful obstacle was a nagging NLRB charge. Recall, replacement labor is only allowed as long as the employer does not engage in unfair labor practices. The union would sue, and ultimately prevail, in *Silverman v. Major League Baseball Player Relations Committee*.<sup>355</sup> The judge found that the owners violated Sections 8(a)(1) and 8(a)(3) because they had unilaterally eliminated before an impasse had been reached the salary arbitration for certain reserve players, competitive bargaining for certain free agents, and the anti-collusion provision of the collective bargaining agreement.<sup>356</sup> The result was to restore the

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<sup>347</sup> Paul Weiler, *CASES AND MATERIALS ON SPORTS & LAW* 333 (West Publishing 4th ed.).

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> Richard Alm, *In The Strike Zone; Hiring replacement baseball players illustrates management's ultimate tactic in union fights*, *THE DALLAS MORNING NEWS*, Mar. 16, 1995, at 1A.

<sup>353</sup> Weiler, *CASES AND MATERIALS ON SPORTS & LAW* 335.

<sup>354</sup> *Id.*

<sup>355</sup> 880 F. Supp. 246 (1995).

<sup>356</sup> *Id.*

old work rules and to eliminate the unilaterally imposed salary cap and other restrictions. The re-institution of the old work rules sent the regular players back to the field and barred the usage of replacement players before they had the chance to play their first game of the regular season.<sup>357</sup> The union and the league would not come to terms on an agreement until 1997 – two years after the players had returned to work.<sup>358</sup>

### *National Hockey League*

Meanwhile, the National Hockey League also experienced labor unrest throughout the 1990s. Owners initiated a player lockout in October 1995 at the start of the season, and again faced labor pressure in 1998.<sup>359</sup> When the league sought to provide pressure upon the union for the new bargaining agreement in 2004, the owners again turned to their well-tested lockout strategy. However, this time the lockout continued for much longer than anticipated, and by February 2005 it became clear that the owners significantly underestimated the resolve of the players. Nowhere close to an agreement and with little else left to do, the Commissioner announced that the entire season would be lost – making the NHL the first North American sports league to lose a season to a labor dispute.<sup>360</sup>

The owners certainly had been successful in inflicting harm upon the players with the lockout. By the end of the 2004 season, locked-out players had already lost \$1.2 billion in salary.<sup>361</sup> But players knew the pain went the other way as well. Much like the NFL owners from 1982, the NHL owners feared permanent damage that may be caused from depriving fans of hockey on television and in their local ice arenas. To address this problem, owners took a page from the 1987 NFL playbook and declared its intention to use replacement players to restart hockey again for the 2005 season. And unlike baseball from 1995, NHL owners were united in their desire to replenish their coffers and break the stalemated discussions. "Our first option is to have our players," said San Jose Sharks President Greg Jamison. "(However) if the NHL as a group decides that to bring about a new collective bargaining agreement we have to utilize replacement players, we will be very supportive of what the league needs to do."<sup>362</sup>

Like baseball, it is unclear how the structure of either the hockey team or the frequency of the league's games would impact how a replacement strategy would compare with the 1987 NFL replacement season. It takes even fewer players to field a hockey team compared with baseball, but the fast-paced nature of the game requires teamwork more akin to football. But hockey differs from baseball, allowing it to better parallel the 1987 NFL season, in that there exist a number of other hockey leagues in America. Since baseball relies upon its own internal farm system, hockey uniquely could rely upon the competing (albeit lesser) leagues for an infusion of replacement players, akin to how the NFL relied upon the recently defunct USFL, Arena Football, and the Canadian Football League.

As NHL owners moved closer to employing a replacement strategy, the issue sparked a number of NLRB charges each direction. To stop the use of replacements, the NHLPA fought hard to find a Section 8 violation that would stick. The best shot was to argue that the league had not bargained in good faith during the collective bargaining process. But the most interesting

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<sup>357</sup> Id.

<sup>358</sup> Id.

<sup>359</sup> *Sides will have to ratify new CBA*, ESPN.COM, Jul.13, 2005, <http://sports.espn.go.com/nhl/news/story?id=2106776>.

<sup>360</sup> Id.

<sup>361</sup> Id.

<sup>362</sup> Kevin Allen, *NHL replacement issue raised again*, USA TODAY, Apr. 18, 2005, [http://www.usatoday.com/sports/hockey/nhl/2005-04-18-replacements-possibility\\_x.htm](http://www.usatoday.com/sports/hockey/nhl/2005-04-18-replacements-possibility_x.htm).

NLRB issue would be a charge in the other direction – from the league against the union. Having learned from the NFLPA’s failures in 1987, the NHLPA sought to minimize the number of their star veterans crossing the picket lines. Throughout the strike, the union paid its members between \$5,000 and \$10,000 per month out of a union account to cover the players’ expenses and keep them happy.<sup>363</sup> But the NHLPA announced that they would force strike line crossers to repay the full amount of strike pay they had received if they choose to play with the replacements.<sup>364</sup> The strategy, clever and indisputably bold, would not get fully tested because the league and the union instead decided it would be in both of their interests to deescalate the conflict and agree in July of 2005 to a new collective bargaining agreement. And with the agreement, the public lost yet another potential opportunity to witness the use of replacement players (or the need for further NLRB action).

Another interesting footnote to the NHL controversy in 2005 was the implications for Canadian labor law. Had the NHLPA sought union certification under the appropriate Canadian province authorities, the NHL would have faced very similar problems as the MLB in using replacements amongst its Canadian franchises. Of the four teams in Canada, the Montreal Canadiens and Vancouver Canucks would be implicated by the laws restricting replacement labor in Quebec and British Columbia, respectively. Had the provinces sought to challenge the use of replacement workers, the NHL prepared itself to argue in court that the players in Canada were not in fact employees, but instead “independent contractors” who would not be covered by the Canadian labor codes.<sup>365</sup> Because the strike ended and replacement labor was not used, this theory remains untested in Canadian courts.

### *National Basketball League*

With the NHL and the MLB slugging it out with their respective unions in the court of public opinion, the National Basketball League in the mid-1990s was slugging it out with its union in the court of law. Only at the expiration of the collective bargaining agreement in July would the battleground for the NBA shift into a lockout of all players, initiated by Commissioner David Stern on July 1, 1998.<sup>366</sup> Up until that point the NBA had been unique in that it was the only major sports league in existence at the time that had not yet been subject to a major lockout.<sup>367</sup> Staying true to the model adopted by the other leagues, Stern at one point said it would be “more likely than not” that the season may be cancelled and replacement players used.<sup>368</sup>

The structure of the NBA likely draws its best parallel with the NHL. The number of players required to field a team, the scheduling, and the number of teams map pretty well - even down to the fact that each league includes franchises subject to labor laws in Canada. However, the NBA, like the NHL, would ultimately (and relatively easily given the stories from the other leagues) agree upon a collective bargaining agreement with the players by January of 1999.<sup>369</sup>

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<sup>363</sup> *League dislikes NHLPA’s replacement player stance*, ESPN.COM, Mar. 27, 2005, <http://sports.espn.go.com/nhl/news/story?id=2022161>.

<sup>364</sup> Id.

<sup>365</sup> *The road to impasse*, CBC SPORTS, Mar. 4, 2005, <http://www.cbc.ca/sports/indepth/cba/features/impasse.html>.

<sup>366</sup> Adrian Dater, *Long and winding road to recovery – Other Leagues have rebounded – at a cost*, THE DENVER POST, Feb. 17, 2005, at D-07.

<sup>367</sup> Id.

<sup>368</sup> Id.

<sup>369</sup> Id.

## *Survey of North American Sports League Officiating Disputes*

The best parallel to the NFL's use of replacement in 1987 came not from another league's dispute with its players, but with the MLB and NHL disputes with their respective officiating unions.

### *Major League Baseball*

The MLB's first officiating labor dispute had occurred in 1979 when the umpires "missed" the first seven weeks of the season. The league responded by turning to AAA minor league and college umpires as replacements. In fact, eight minor league umpires were retained after the strike, further fueling bitterness that would persist through future disputes.<sup>370</sup> The next dispute would appear in 1984 when the umpires would skip the first seven games of the postseason. The league turned to former umpires, as well as AAA and college umpires again. However, unlike 1979, all umpires would retain their jobs upon returning to work.<sup>371</sup>

In July 1999, the whole situation would again come to a head when the league sought the power to terminate umpires it felt were not properly defining the strike zone. A building number of umpires had begun to base calls upon their own individualized definitions of the strike zone, essentially obliterating the benefits derived from a commonly defined strike zone and requiring players to alter batting decisions based upon which umpire was calling the game. Meanwhile, umpires sought to assert control over both the game rulemaking and their schedules. In one particular example, an umpire crew forced the league to bring in two minor league umpires when the umpires refused to work both ends of a day-night doubleheader.<sup>372</sup>

Umpires would respond near the end of the 1999 baseball season (an important period for MLB teams in light of the pennant races) with 57 of baseball's 68 umpires sending a letter to their league president stating that they resigned effective September 2, 1999.<sup>373</sup> The union was forced to act by mass resignations because the bargaining agreement included a no-strike clause, necessitating creative methods such as mass resignations to flex their union muscle. In response, the MLB decided it would not negotiate and instead hired replacement officials. The result, much like in 1987 with the NFL's choice to use replacements, was union-crippling defection among the umpires. However, because of new hires, not all of the umpires who sought to rescind their resignations would find an open position.<sup>374</sup>

Instead, the league would turn to their own minor leagues as well as college to find replacements. The existence of a developed minor league system with similar rules provided a built-in advantage in negotiations compared to the NFL's position in replacing its players. However, much like the NFL needing to teach replacements basic concepts such as how to huddle, so too would the replacement officials bring their own challenges. For example, the strike zones differ between professional and college rulebooks, a difference further exasperated by the fact that big-league umpires usually call much lower strikes than even their rulebook suggests.<sup>375</sup>

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<sup>370</sup> Mike Dodd, *College replacements would bring slightly inflated strike zone*, USA TODAY, Jul. 16, 1999, at 2C.

<sup>371</sup> Id.

<sup>372</sup> George Will, *And They're OUT! Conflict Between Major League Baseball and Umpires About Status, Respect and Recognition*, CALGARY SUN, Aug. 8, 1999, at C2.

<sup>373</sup> Wade R. Swanson, *Arbitrator to Major League Baseball: You're out!*, 10 ARIZONA EMPLOYMENT LAW LETTER 3 (Apr. 2004).

<sup>374</sup> Id.

<sup>375</sup> Mike Dodd, *College replacements would bring slightly inflated strike zone*, USA TODAY, Jul. 16, 1999, at 2C.



As had become customary among sports labor disputes, both sides would ultimately seek legal action. True to form, the matter would not be settled until an appellate court issued a ruling on February 17, 2004, a full four and a half years after the dispute arose.<sup>376</sup> The Court ruled that the officials' resignations counted, but nine umpires would be reinstated (though notably 13 would not).<sup>377</sup> Importantly, the Court upheld the right of the league to hire permanent replacements for future disputes.<sup>378</sup> Today, a new union, the World Umpires Association, was created to represent the umpires.<sup>379</sup>

### *National Hockey League*

The most successful union to thwart a league's replacement strategy is also likely the least well known. In 1993, the NHL responded to the NHL Officials Association strike by seeking replacement officials. However, unlike what had been seen among replacement efforts in the past, the league would find all likely sources of replacement talent dry up. Officials from the Capital Amateur Hockey Association (CAHA), USA Hockey, Major Junior Hockey, college hockey and numerous minor professional hockey leagues decided to stand with the union and refuse to break the picket line. As a result, the strike was resolved with a new bargaining agreement in a mere 17 days.<sup>380</sup>

### *Analysis of Officiating Replacement Seasons*

The MLB and the NHL each used regular season replacements to counter their striking union officiating crews. Each league had also gone into advanced stage planning as far as conducting a replacement season with their player strikes as well – yet neither actually went through with it. To begin to explain why would be an exercise in educated guessing. However, the best guess likely has to do with the quality of replacements and how that may have an impact upon the game. Clearly sub-par players would result in sub-par games. Sub-par officials may not have such a clear cause and effect. Instead, sub-par officials could probably get along fine by defaulting to not intruding except where especially appropriate. But the most likely factor as to why officials were considered by the leagues as more “replaceable” had less to do with the quality of the replacement employee and much more to do with ticket sales and broadcasting agreements. The fan likely goes to games to see his or her favorite stars perform, and to a lesser degree to see his or her team win the game. Replacement players have a significant impact upon this thought experiment. Replacement officials are comparatively less likely to impact either scenario (unless there's a particularly egregious call at a particularly inopportune time – but it is equally clear existing officials can be subject to the same mistakes).

Given the difference in importance between officials and players, could the lessons from the officials' labor disputes be applied to future player disputes? The unusual structure of the MLB officiating contract with respect to a no-strike clause makes it difficult to draw parallels.

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<sup>376</sup> Wade R. Swanson, *Arbitrator to Major League Baseball: You're out!*, 10 ARIZONA EMPLOYMENT LAW LETTER 3 (Apr. 2004).

<sup>377</sup> *Id.*

<sup>378</sup> Jack O'Connell, *Nine Up, Nine Down; Rehired Umps Still Not Pleased*, HARTFORD COURANT, May 12, 2001, at C1.

<sup>379</sup> Wikipedia, *Replacement Player*, [http://en.wikipedia.org/wiki/Replacement\\_player](http://en.wikipedia.org/wiki/Replacement_player) (as of Apr. 13, 2008, 10:00pm GMT).

<sup>380</sup> National Hockey League Officials Association History, *available at* [http://www.nhlofficials.com/about\\_nhloa.asp](http://www.nhlofficials.com/about_nhloa.asp) (last visited Apr. 13, 2008).

The more interesting question likely then arises in the context of the 1993 NHL officiating replacement strategy, especially given the clear dominating win by the union. The win is even more impressive when put in the context of the fact that hockey provides more parallel leagues (whether CAHA, USA Hockey, etc) from which to draw replacement workers. Further, there was even less media attention to the strikers, thus making it much easier for an enterprising official to seek a “scab” position with the NHL without having to face too much public scrutiny. Unfortunately, the relatively little media attention given to the matter makes it hard to analyze where the union went right. Should a sports union in the future find itself facing a management replacement strategy, it may do itself a favor by finding out.

### *Conclusion on the Use of Replacement Players*

The NFL’s use of replacements to counter the 1987 strike has largely been considered one of the more successful anti-union stands conducted by a sports league in the modern era. However, as was seen through the NFL’s litigation following the strike, the use of replacements to shut down a strike is not going to shut down the underlying legal causes of action as well. Yet by all measures the NFL did very well following the 1987 season – as far as enjoying an expanding fan base (which was noticeably different compared with 1982 when the league saw a shrunken fan base in years following the strike) and drastically increasing broadcasting contracts and merchandise revenues. Success for the league has continued to this day.

But all is not necessarily well for the sustained labor peace between the union and the league. Small market teams are feeling the pinch as the salary cap for each team has risen from \$85.5 million in March of 2006 before the new CBA kicked in to \$116 million in 2008 – a \$30 million increase in just two years.<sup>381</sup> Yet Upshaw maintains a tough stance. “We’re not going to agree to a deal that’s not fair. We’re not going to agree to a deal that rolls back the economics. We are not hockey players. And they’re not hockey owners. So this is what they have to understand. And if they believe that there’s a chance that we’re the hockey players, that curved stick in the ice, that ain’t us. The economics in this league are good and getting better. I can tell you, we’re getting 60 percent of the revenues, when it’s all said and done, we’re not giving any of it back.”<sup>382</sup>

The above stated posturing may indicate that one of the two sides will opt out of the current CBA, setting up 2010 as potentially the first year without a salary cap in decades. The owners almost certainly will not want this to happen. Meanwhile, Upshaw has declared, “We didn’t want a cap in the first place.”<sup>383</sup> Yet still Upshaw believes the owners will opt out, and if they do, Upshaw sees the end to any NFL salary cap in the future. Owners, meanwhile, argue that the players make too much money and the owners are in too much debt.<sup>384</sup> Whether the two sides are simply posturing or are serious remains to be seen.

No matter the issue in contention, it is important to recall that the Court’s decision in *Brown* is a huge shift in power towards the sports leagues. Important decisions such as *Powell*, if tried again under today’s standard, would likely result in a holding opposite of that enjoyed by the union in the past. Without antitrust as a potential bargaining strength, future union conflicts will almost certainly have a stronger emphasis on the use of a strike. Should a strike occur, the

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<sup>381</sup> Tom Curran, *Upshaw to Owners: ‘No Santa Claus’*, NBC SPORTS, Mar. 30, 2008, <http://blogs.nbcsports.com/home/archives/2008/03/note-of-cba-caution-for-owners.html>.

<sup>382</sup> Id.

<sup>383</sup> Larry Weisman, *NFL reflects on changes at anniversary of strikes*, USA TODAY, [http://www.usatoday.com/sports/football/nfl/2007-10-06-sw-labor-anniversary\\_N.htm](http://www.usatoday.com/sports/football/nfl/2007-10-06-sw-labor-anniversary_N.htm).

<sup>384</sup> Id.

owners would be left to look back upon history and compare how they fared in 1982 (a the prolonged strike and loss of revenues) with how they fared in 1987 (the use of replacement players and the destruction of the union's morale and strength). In doing so, the owners may come to the conclusion that scheduling replacement games would be their own best weapon yet again.

However, although replacement players were certainly necessary to the league's strategy in 1987, the use of replacements again may not be sufficient to generate equal success for the league. Changes have occurred beyond those seen in antitrust law. For instance, the presidential and congressional elections in 2008 will determine the policy direction of the appointed members of the NLRB. The NLRB process, although seen friendly to the league in prior instances (and even among decisions going against the league), may become more aggressive and prudent in responding to NLRB charges against the sports leagues. In addition, the league in 1987 significantly benefited from a 1980s public sentiment that was very accepting of the use of replacement workers. Sports labor negotiations have yet to test modern sentiment. Certainly if replacement games all end up with a similar public outcry as to that seen in Philadelphia in 1987, a prolonged replacement season would be disastrous to a league's short and long term financial success. But public sentiment would also require a unified stand by the players themselves – which is also unclear. Union membership has declined since the 1980s, and how union identity and cohesion has changed (if any) since 1987 remains untested as well. Consistent waves of high profile players crossing the picket lines to return to play in 1987 broke the union's back. Today's professional sports players are arguably even more selfish and self-aggrandizing. Who would be the modern Dan Marino or Jim Kelly and give up millions in order to support the cause of those behind them?

Given the lack of certainty regarding a wide range of factors, even an excellent understanding of history and relevant law would leave one hard-pressed to conjecture with any certainty how a replacement season would play out in 2010. But one thing is certain: like the replacement season of 1987, it will definitely be interesting to see it play out.