No. 15-2801(L)

15-2805 (Con)

United States Court of Appeals for the Second Circuit

NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,
PLAINTIFF-COUNTER-DEFENDANT-APPELLANT

AND

NATIONAL FOOTBALL LEAGUE, DEFENDANT-APPELLANT

v.

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION,
ON ITS OWN BEHALF AND ON BEHALF OF TOM BRADY,
DEFENDANT-COUNTER-CLAIMANT-APPELLEE

AND

TOM BRADY, COUNTER-CLAIMANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, NOS. 15-5916, 15-5982

BRIEF OF U.S. LABOR LAW AND INDUSTRIAL RELATIONS PROFESSORS AS AMICUS IN SUPPORT OF PETITION FOR PANEL REHEARING AND REHEARING EN BANC

[*cover continued on next page*]

MATTHEW D. BAKER
Rees Broome, P.C.
1900 Gallows Rd., Suite 700
Tysons Corner, VA 22182
Phone: 703-790-1911
Fax: 703-848-2530
E-mail: mbaker@reesbroome.com
Counsel for Amici Scholars of Labor Law and Industrial Relations

ANNE MARIE LOFASO
Arthur B. Hodges Prof. of Law
West Virginia Univ College of Law
101 Law Center Drive
Morgantown, WV 26506-6130
(304) 293-7356
anne.lofaso@mail.wvu.edu
Of Counsel

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amici Scholars of Labor Law and Industrial Relations are prominent academic experts in labor law, grievance-arbitration, and industrial relations, and have joined to share their considerable expertise concerning the workplace, in general and in the context of professional sport:

Lee H. Adler, is a lecturer at Cornell University's School of Industrial and Labor Relations;

Kate Bronfenbrenner, Director of Labor Education Research and a Senior Lecturer at Cornell University's School of Industrial and Labor Relations;

Kenneth G. Dau-Schmidt, Willard and Margaret Carr Professor of Labor and Employment, Indiana University Maurer School of Law;

Elizabeth Ford, Associate Director of the Externship Program at Seattle University School of Law;

Richard B. Freeman, Herbert Ascherman Professor of Economics and Co-Director of the Labor and Worklife Program, Harvard College;

Julian G. Getman, Earl E. Sheffield Regents Chair Emeritus, University of Texas at Austin School of Law;

Anne Marie Lofaso, Arthur B. Hodges Professor of Law, West Virginia University College of Law;

Marcia L. McCormick, Director of the William C. Wefel Center for Employment Law and Professor, St. Louis University School of Law;

Michael Reich, Professor of Economics and Co-Chair of the Center on Wage and Employment Dynamics at the Institute for Research on Labor and Employment, University of California at Berkeley;

Christopher Tilly, Director of the Institute for Research on Labor and Employment and Professor of Urban Planning and Sociology, University of California Los Angeles;

Andrew Zimbalist, Robert A. Woods Professor of Economics, Smith College.

These scholars have written extensively about US labor law, grievance-arbitration, and industrial relations and in the context of professional sport arbitration. Based on their research of labor-dispute resolution, *amici* believe that the panel's decision runs contrary to fundamental principles long settled by the Supreme Court.[1]

[1] No party's counsel authored this brief in whole or in part. No party, no counsel for any party, and no person other than amici curiae or their counsel contributed money that was intended to fund preparation or submission of this brief. Fed. R. App. P. 29(c)(5)(A)-(C).

THE PANEL'S DECISION CONFLICTS WITH DUE PROCESS PRINCIPLES EXPLAINED IN THE *STEELWORKERS* TRILOGY

A. An Agreement To Arbitrate Is Not an Agreement to An Unfair Process

NFL Commissioner Roger Goodell improperly exercised his authority as an arbitrator here when he upheld on appeal his own suspension of Tom Brady on grounds different from the ones justifying the original decision, failed to explain how that decision fit into generally accepted principles for industrial due process, and ignored NFLPA arguments that were grounded in the parties' agreement. The panel opinion upheld Goodell's arbitral decision, notwithstanding these infirmities.

This case presents a significant question of national labor law: When parties agree to arbitrate, do they also agree to an arbitrary process where that arbitrator may transform an appellate proceeding into a trial de novo, ignore generally accepted principles of industrial due process, and ignore arguments grounded in the collective-bargaining agreement ("CBA")? If courts allow arbitrators to ignore the CBA's "appellate" limitations or the parties' arguments (and the probative CBA language cited in support of those arguments), parties will no longer be able to trust arbitration as a fundamentally fair process, thereby discouraging its use as a dispute-resolution method that protects industrial peace. If left uncorrected, this decision may destroy the very process that the Court wishes to protect – the peaceful resolution of labor disputes through a non-arbitrary and fair proceeding.

B. Courts Must Vacate Arbitral Awards That Do Not Draw Their Essence From the CBA

1. To promote industrial peace, the Supreme Court upheld labor and management agreements to arbitrate their disputes as part of a non-arbitrary and fair process in return for unions surrendering their right to strike

Over half a century ago, the Supreme Court, in the *Steelworkers* Trilogy, three decisions penned by Justice Douglas and issued on the same day, outlined the importance of labor arbitration in avoiding industrial strife and promoting industrial peace.[2] Indeed, by the time the Court drafted the Trilogy, it had already explained that "the agreement to arbitrate grievance disputes [wa]s the quid pro quo for an agreement not to strike." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957). The Court further described, in *Enterprise Wheel & Car*, that in return for surrendering the right to strike, unions were entitled to a certain standard for labor arbitration. That vision for labor arbitration, a process that should inure to the benefit of both labor and management, is largely based on the description of a non-arbitrary and fair process contained in the famous Holmes lecture by Yale Law School Dean Harry Shulman. *See* Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

2. Arbitrators are forbidden from dispensing their own brand of industrial justice

[2] *Steelworkers v. American Manufacturing Co.,* 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

The decisional authority granted arbitrators by the Steelworkers Trilogy has a significant limitation. The arbitrator's award "is legitimate only so long as it draws its *essence* from the collective bargaining agreement." *Enterprise Wheel & Car Corp.,* 363 U.S. at 597. The Court added that, "[w]hen the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *Id.* The purpose of this requirement is to ensure that the arbitrator understands that "he does not sit to dispense his own brand of industrial justice." *Id.* This is especially true in cases where the conditions for deference to the arbitrator – neutrality, expertise, or trust – do not hold.

3. To avoid having a reviewing court vacate the arbitral award, an arbitrator should show how his or her decision fits within well-established standards for justice

"Few things are more significant to employees than limitations on their employer's power to discipline or discharge them." Roger Abrams & Dennis Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 594 (1985). For discipline to be just, there must be a good reason for discipline; a legitimate managerial interest that is furthered; and procedural fairness. *Id.* The just cause standard has developed meaning over the years through its application in specific cases. Arbitrators faced with applying its general language have access to a rich body of decisional law supported by arbitral opinions.

By now much of the well-recognized jurisprudence of just cause pertains to the procedures that management, seeking to discipline workers, must apply. To a large

extent the practical significance of the essence standard in discipline cases has been to require arbitrators to determine the meaning of contractual language by reference to the established jurisprudence of penalties and infractions as applied in previous cases. An opinion that follows precedent and is based on the established jurisprudence of arbitration, in fact draws its essence from the agreement. This standard is consistent with the basic policy behind the essence standard. So long as the arbitrator is seeking to be consistent with the decisions of other arbitrators or judges he or she is not attempting to "dispense his own brand of industrial justice." There is little reason to conclude that Commissioner Goodell was operating under a different or more lenient procedural standard. His opinion contains no such claim. Indeed he stated that "I am very much aware of, and believe in, the need for consistency in discipline for similarly situated players."

4. Commissioner Goodell's Award Does Not Constitute Just Cause Because It Fails To Meet Standards for Industrial Due Process

Goodell's award falls far short of the mark with regard to procedural justice. As Abrams and Nolan explain, "[t]he concept of just cause includes certain employee protections that reflect the union's interest in guaranteeing 'fairness' in disciplinary situations." Most importantly, employees are entitled to industrial due process. Here, this means that employees, such as Brady, are entitled to:

> [1] a. actual or constructive notice of expected standards of conduct and penalties for wrongful conduct;
>
> b. a decision based on facts, determined after an investigation that provides the employee an opportunity to state his case, with union

assistance if he desires it;

c. the imposition of discipline in gradually increasing degrees, . . .

2. The employee is entitled to *industrial equal protection*, which requires like treatment of like cases. . . .

It is a critical error that the opinion by Commissioner Goodell, a non-expert, non-experienced and non-neutral arbitrator, makes no effort to follow or apply the established rules of fair and consistent process. He never adverts to the decision of established labor arbitrators or judges as to the disciplinary process under a collective-bargaining relationship. It is difficult to avoid the conclusion that his failure to do comprises the fatal arbitration error of seeking to impose his own brand of industrial justice.

Goodell's decision bears all the hallmarks of an arbitrator dispensing his own brand of industrial justice. He quickly, with little discussion and no citation, rejected the remedial precedents offered by the NFLPA. He concluded, without reference to outside sources, that Brady's dereliction should be analogized to taking a performance-enhancing drug in violation of league rules. *See* Special Appendix 57.

No authority is cited for the conclusion that deflating footballs should be treated like taking performance-enhancing drugs. A key difference between the two situations is that the NFLPA agreed to the penalty for steroid use as part of the collective-bargaining process; the NFLPA had no voice in establishing this particular penalty for deflating footballs. The Union did, however, have a voice in establishing the penalty schedule, which Goodell ignored. There are other significant differences between taking

drugs and deflating balls. Taking performance-enhancing drugs often involves criminal law violations, which is not true of deflating footballs. *See NFL Mgmt. Council v. NFLPA*, ___ F.3d ___, 2016 WL 1619883, *19 (2d Cir. 2016). By equating the two situations without reference to any authority and without discussion as to why the bargained-for remedies did not apply, the Commissioner applied his own brand of industrial justice.

Not only did the Commissioner, as arbitrator, take action without precedent but he also ignored existing rules of arbitration generally recognized in the jurisprudence of just cause as necessary to justify penalties. For example it is a staple of arbitral jurisprudence that a disciplined employee is entitled to know precisely what he is charged with and the employer may not seek to justify punishment by altering the initial charge. In Brady's case the arbitrator on his own expanded the charge and used the expanded finding as a basis for justifying the penalty. *See NFL Mgmt. Council v. NFLPA*, 129 F. Supp.3d. 449, 461 (S.D.N.Y. 2016); *see also NFL Mgmt. Council v. NFLPA*, ___ F.3d ___, 2016 WL 1619883, *21 (2d Cir. 2016) (C.J. Katzmann, dissenting) (pointing out how the Commissioner failed to treat like cases alike).

CONCLUSION

The panel's decision empowers arbitrators to ignore the parties' arguments and CBA-imposed limitations on their power, and denies recourse to parties that have suffered even the most egregious violations of industrial due process. In so doing, the panel distorts labor arbitration into an unfair and arbitrary process of dispute resolution that will force both workers and management to think twice before agreeing to arbitrate

a dispute. The full court should grant rehearing to correct the panel's errors and ensure that labor arbitration remains one of the greatest accomplishments of modern industrial relations.

May 31, 2016

Respectfully submitted,

/s/ Matthew D. Baker
Matthew D. Baker
REES BROOME, P.C.
1900 Gallows Road, Suite 700
Tysons Corner, VA 22182
Phone: (703) 790-1911
Fax: (703) 848-2530
mbaker@reesbroome.com
Counsel for Scholars of Labor Law and Industrial Relations

Of Counsel:

ANNE MARIE LOFASO
Arthur B. Hodges Prof. of Law
West Virginia Univ College of Law
101 Law Center Drive
Morgantown, WV 26506-6130
(304) 293-7356
anne.lofaso@mail.wvu.edu

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND TYPE STYLE REQUIREMENTS

I hereby certify that this *amicus* brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font. In addition, this brief complies with the limitation on length set by Federal Rule of Appellate Procedure 29(d) and 35(b)(2).

Dated: May 31, 2016

/s/ Matthew D. Baker
Matthew D. Baker
REES BROOME, P.C.
1900 Gallows Road, Suite 700
Tysons Corner, VA 22182
Phone: (703) 790-1911
Fax: (703) 848-2530
mbaker@reesbroome.com
Counsel for Scholars of Labor Law and Industrial Relations

ADDENDUM

LIST OF *AMICI*

Lee H. Adler is a lecturer at Cornell University's School of Industrial and Labor Relations, where he teaches labor and employment law courses. He received his A.B. from the University of California at Berkeley, and his J.D. from Golden Gate University. He recently published a book comparing trade unions' efforts to advance migrant workers' economic and political status.

Kate Bronfenbrenner is the Director of Labor Education Research and a Senior Lecturer at Cornell University's School of Industrial and Labor Relations. She received her B.S. and Ph.D. from Cornell University. Dr. Bronfenbrenner has written several books on union strategies, and is frequently brought in to testify as an expert witness at Labor Department and Congressional hearings.

Kenneth G. Dau-Schmidt is the Willard and Margaret Carr Professor of Labor and Employment Law at the Indiana University Maurer School of Law. He holds his B.A. from University of Wisconsin and his M.A., J.D., and Ph.D. from the University of Michigan. Dr. Dau-Schmidt has authored seven books and numerous articles on labor and employment law and has been active in law school administration, most recently serving as the Associate Dean of Faculty Research.

Elizabeth Ford is the Associate Director of the Externship Program at Seattle University School of Law. She previously served as the Assistant Dean at the University of Washington School of Law and the Director of Labor Relations for King County. Professor Ford received her B.A. from Mount Holyoke College and her J.D. from Northeastern University School of Law.

Richard B. Freeman is the Herbert Ascherman Professor of Economics at Harvard College and Co-Director of the Labor and Worklife Program at Harvard Law School. He is also a Research Fellow in Labour Markets at the London School of Economics' Centre for Economic Performance. Dr. Freeman holds his B.A. from Dartmouth College and Ph.D. from Harvard University.

Julius G. Getman is the Earl E. Sheffield Regents Chair Emeritus at the University of Texas at Austin School of Law. He holds his B.A. from City College of New York and his LLM and LLB from Harvard University. He previously taught at Yale Law School, where he was the William K. Townsend Professor of Law, as well as Stanford Law School, University of Chicago Law School, and Georgetown University Law Center. Professor Getman is considered a preeminent scholar in the field of labor law, where he has pioneered empirical studies and continues to perform extensive field work.

Anne Marie Lofaso is the Arthur B. Hodges Professor of Law at West Virginia University College of Law, where she is Director of the Labor and Employment Certificate Program. She received her A.B. from Harvard University, magna cum laude, her J.D. from the University of Pennsylvania, and her D.Phil. from the University of Oxford. Dr. Lofaso previously spent ten years as an attorney with the National Labor Relations Board's Appellate and Supreme Court Branches. She has also taught at American University Washington College of Law and Oxford University.

Marcia L. McCormick is the Director of the William C. Wefel Center for Employment Law, as well as a Professor at St. Louis University School of Law. She holds her B.A. from Grinnell College and J.D. from University of Iowa College of Law. Professor McCormick is a prolific blogger, where she serves as co-editor and contributor to the Workplace Prof Blog, which provides daily information on developments in the law of the workplace and scholarship regarding the same.

Michael Reich is a Professor of Economics and Co-Chair of the Center on Wage and Employment Dynamics at the Institute for Research on Labor and Employment (IRLE) at the University of California at Berkeley. He holds his B.A. in Mathematics, with honors, from Swarthmore College and a Ph.D. in Economics from Harvard University. Dr. Reich previously served as Director of IRLE from 2004-2015.

Christopher Tilly is the Director of University of California Los Angeles' (UCLA) Institute for Research on Labor and Employment and Professor of Urban Planning and Sociology. He holds his B.A. in Biochemistry from Harvard College and his Ph.D. in Economics and Urban Studies and Planning from the Massachusetts Institute of Technology (MIT). Prior to becoming an academic, Dr. Tilly has served as an editor of *Dollars and Sense*, a popular economics magazine. He has also served on the Program Committee and Board of Directors of Grassroots International.

Andrew Zimbalist is the Robert A. Woods Professor of Economics at Smith College. Professor Zimbalist received his B.A. from the University of Wisconsin, Madison and both his M.A. and Ph.D. from Harvard University. He has taught at Smith College since his graduation from Harvard University in 1974 and maintains an extensive list of visiting professorships. Dr. Zimbalist is also a member of the Five College Graduate Faculty.