

## NFL Learned From Its District Court Fumbles In Deflategate

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Oral argument on the NFL's appeal in the "Deflategate" case was heard by the Second Circuit Court of Appeals on Thursday. It was a hot bench for both sides, but particularly for the Players Association. The three-judge panel consisted of Chief Judge Robert A. Katzmann, Judge Denny Chin and Senior Judge Barrington D. Parker. Tea-leaf reading of oral arguments is more art than science, but several questions and comments from the panel suggests that at least two of the judges on the panel favor the NFL and may ultimately overturn the lower court opinion vacating the arbitration award.

For example, Judge Parker called Brady's attorney's argument that Brady had not received adequate notice of his rules violation "hypertechnical." Judge Parker also focused on evidence that Brady had destroyed his cell phone during the NFL's investigation, commenting that "Brady's explanation of that made no sense whatsoever."

The panel took note of the facts uncovered in the investigation — something that the NFL's briefing in the district court failed to highlight. Judge Chin observed that the "evidence of ball tampering is compelling if not overwhelming." And the NFL's attorney, Paul D. Clement, pushed the panel to look at the facts as presented to the arbitrators, characterizing Brady as not credible.

As noted in our discussion below of the NFL's advocacy (and lack thereof at the trial court), its counsel Paul Clement and Akin Gump Strauss Hauer & Feld LLP did a much better job on appeal of framing the league's position and urging for deference to the arbitrator's award. The panel likely will issue its decision in three to six months; in the event of a reversal, Brady may have to get used to a sideline role during part of the 2016 season.

As we await a decision, it is worth taking a closer look at U.S. District Judge Richard Berman's surprising decision in September to vacate NFL Commissioner Roger Goodell's Arbitration Award confirming the

NFL's four-game suspension of Tom Brady for his role in the Patriots' use of underinflated game balls during the 2015 AFC Championship Game.

Federal law provides for very few narrow bases on which courts can review arbitration awards, and courts rarely vacate them. Judicial deference to private arbitration is particularly strong in the context of labor disputes — though the NFL's response to the Patriots' use of underinflated game balls does not immediately evoke the phrase "labor dispute." So what happened?

Two aspects of the NFL's approach to the case before the district court could provide the answers. First, the NFL failed to recognize that it was dealing not just with the Brady case, but with judicial skepticism stemming from two recent, high-profile decisions reversing arbitration awards confirming NFL disciplinary rulings, as well as with increasing public scrutiny of the process. Second, the NFL failed to craft a compelling counternarrative in its pleadings and briefs, or indeed to tell its side of the story at all.

In its appeal, the NFL seems to have recognized these shortcomings and shifted gears accordingly. Its briefing paints a narrative of the NFL's broad efforts to protect the integrity of the game from conduct like Brady's and highlights Brady's efforts to obstruct the investigation of his conduct — themes and facts conspicuously lacking in the district court briefing.

### **The NFL in the Courts**

The NFL has a sordid recent history in the courts. The organization's lengthy, failed efforts to collect workers' compensation payments from injured players even after the player had stopped receiving an NFL salary, for example, just finally came to an end a couple years ago. *National Football League Players Ass'n v. National Football League Management Council*, 523 Fed.Appx. 756, 758 (2d Cir. 2013).

More recently, the Ray Rice and Adrian Peterson cases, both of which resulted in vacated arbitration awards, inspired the spilling of gallons of ink criticizing the NFL's disciplinary procedures in general and NFL Commissioner Roger Goodell in specific. The cases were discussed at length in Judge Berman's decision, though the legal parallels appear thin. Both cases dealt with specific NFL guidelines regarding the off-field violations at issue — not the NFL's interpretation of Article 46 of the collective bargaining agreement, the provision at issue in the Brady case. Article 46 allows for discipline, including suspension, for conduct that is "detrimental to the integrity of, or public confidence in, the game of professional football."

But the NFL's judicial track record does not fully explain Judge Berman's willingness to second-guess the arbitrator's factual determinations and vacate Brady's suspension. Neither does the fact that either side was in any way taken advantage of — the CBA at issue was obviously negotiated and executed by sophisticated parties with comparable resources. And, as shown below and in the NFL's appellate briefing, the law heavily favors confirmation of labor-related arbitration awards. There had to be something else at play.

### **The Law In This Context Heavily Favors NFL Management**

Confirmation of an arbitration award is like a conventional extra point after a touchdown — rarely missed. Under the Labor Management Relations Act, an arbitration award should be upheld as long as it simply "draws its essence from the collective bargaining agreement." *United Steelworkers of America v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Even where a court is convinced that the "[the arbitrator] committed serious error," the award should not be vacated so long as the arbitrator is "even

arguably construing or applying the contract and acting within the scope of his authority.” *United Paperworkers Int’l v. Misco*, 484 U.S. 29, 38–39, (1987). The arbitrator’s discretion is particularly broad with respect to the formulation of a remedy. *United Steelworkers*, 363 U.S. at 596-97. This all makes sense, as in the labor context “it is the arbitrator’s construction which was bargained for; and so far as the arbitrator’s decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.” *Id.* at 599.

Although the Second Circuit historically deviated to some extent from the nationwide norm of extreme deference to arbitration awards, it has reversed course over the past decade. The circuit now applies an “affirmative misconduct” standard to procedural aberrations such as those listed in 9 U.S.C. § 10(a)(3), for example, which was the section relied on by Judge Berman.

The court has also admonished that “a motion to vacate ... is not an occasion for de novo review of an arbitral award.” *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004). In other words, in the Second Circuit, to vacate an arbitral award a district court must find that the award “falls within a very narrow set of circumstances,” all of which “involve corruption, fraud, or some other impropriety on the part of the arbitrators.” *Wallace*, 378 F.3d at 189. Indeed, the court has recently upheld an arbitration award where the arbitrators only allowed one witness to testify, and only for 30 minutes, and where there was direct independent testimony of arbitrator bias. *Kolel Beth Yechiel Mechil of Tartikov Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 103, 107 (2d Cir. 2013).

Judge Berman’s 40-page decision nevertheless ultimately ruled for NFL Players Association on three grounds: (1) Brady lacked notice of the possibility of suspension for tampering with game balls, (2) it was fundamentally unfair for the arbitrator to refuse to require one of the lead investigators to testify during the arbitration, and (3) it was fundamentally unfair for the arbitrator to deny Brady’s motion to compel production of certain documents, despite CBA terms to the contrary. Notably, despite initial atmospheric about the “evident partiality” prong of the Federal Arbitration Act, there is no mention of bias or other impropriety in the use of Commissioner Goodell as arbitrator in the court’s legal analysis.

### **The NFL Punts on Telling Its Story**

The parties’ trial court filings were strikingly different from the start. The NFL’s complaint is barely two pages, just one-half page of which relates the “facts” by dryly listing the dispute’s procedural history. In contrast, the Players Association’s amended answer is 59 pages of compelling narrative, starting immediately with Goodell’s purported bias, and attaching over 200 exhibits. More specifically, the first sentence of the fact section of the NFL’s complaint reads:

The parties are bound by a Collective Bargaining Agreement (“CBA”) negotiated between the NFL Management Council (on behalf of the NFL member clubs) and the NFLPA (on behalf of all NFL players).

Contrast that with the first sentence of the Players Association’s introduction in its answer:

Commissioner Goodell’s Award denied the Union and Brady’s arbitration appeal of an unprecedented four-game suspension for Tom Brady’s purported ‘general awareness’ that two New England Patriots equipment personnel allegedly deflated Patriots footballs prior to the 2015 AFC Championship Game.

The parties clearly decided on diametrically opposed strategies from the start.

It is difficult to overstate the importance of utilizing your first opportunity to tell a court your side of the story. Not only did the NFL fail to do so in its complaint, it continued to shy away from presenting its

strongest facts throughout its pleadings and briefs in the district court — facts heavily relied upon in the arbitration award. Sure, in terms of judicial review it is the CBA's terms that govern, but context always matters. When there is nationwide clamor for transparency, and article after article accuses you of corruption, you need to do everything possible to level the playing field.

The NFL had plenty of “good facts” at its disposal. There is no question that Brady arranged for the destruction of the cellphone he used during the relevant time period, and that he did so on the very day that he was questioned by investigators regarding the game ball deflation scheme. There was also a suspicious spike in communications between Brady and equipment personnel during the relevant time period, and one Patriots equipment manager referred to himself as the “deflator” and to the use of a “needle.”

There is also no dispute Brady still had an intact cellphone from before that time period, making the arbitrator's decision to dismiss his assertion that he routinely destroys his cellphones reasonable. And there was plenty of room to argue that deflating game balls can lead to a distinct advantage, e.g., such conduct goes to the integrity of the game well beyond a mere equipment or uniform violation. Finally, the arbitrator expressly held, in a detailed and exhaustive arbitration award, that Brady was a knowing participant in the scheme, not just “generally aware” as the investigative report found. Award at 8, 10. None of these facts are used effectively in the NFL's trial court filings.

Nor, surprisingly, is the argument that Brady's evidence spoliation is independently sanctionable in litigation. Ample case law in the Second Circuit supports the imposition of harsh sanctions for spoliation, including adverse inferences, attorneys' fees, and even default judgment. See, e.g., *Southern New England Telephone Co. v. Global NAPs Inc.*, 624 F.3d 123, 147 (2d Cir. 2010) (upholding default judgment and attorneys' fee award where defendants had deleted potentially relevant computer files); *DeCastro v. Kavadia*, 309 F.R.D. 167 (S.D.N.Y. 2015) (ordering adverse inference instruction, attorneys' fees and holding defense counsel subject to discovery sanctions where defendant deleted potentially relevant emails). From a commercial trial attorneys' perspective, the NFL's failure to capitalize on the independently sanctionable aspects of evidence spoliation makes no sense.

Meanwhile, the Players Association hammered home its main theme — that a biased and corrupt process led to Brady's suspension — in every document. Former Jets kicker Jay Feely even attended a settlement conference with Judge Berman, during which he explained that he did not get “in trouble” when the Jets' equipment staff used an extra sponge to prepare the kicking balls prior to a Jets game, even though he would have been the one to benefit. Feely even reportedly told the court that Brady did nothing wrong and that the NFL suspended the Jets kicking staff responsible for that error without investigating Feely.

The district court's decision vacating the arbitration award did not, of course, ultimately rest on the Players Association's themes, no more than it could have rested wholly on Brady's apparent spoliation of evidence. But briefing emphasizing that narrative would have set a different tone before the court. As it stands, the legal basis for the decision is lost to the public. You'd be hard-pressed to find anyone who thinks the decision was anything less than a condemnation of the NFL's procedures allowing for the commissioner to take the role of the arbitrator. Few know, or care, that the law clearly allows for such an arrangement, and that it was not one of the bases for the court's order vacating the award.

We can only speculate as to why the NFL decided not to feature its best facts or tell the district court its side of the story, but it should come as no surprise that the Players Association is still continuing its narrative of it being all about Goodell. It remains to be seen whether that narrative holds sway before the Second Circuit as well.

The NFL's failure to effectively tell its story is an object lesson for others facing arbitration disputes: Don't stop playing offense just because you are up a couple of scores. In its case against Tom Brady, the NFL took its eyes off the ball, didn't watch the legal game film and fumbled on the end zone. The question remains whether the NFL can rally from behind before the Second Circuit. It brought in heavyweights to present the argument — including former Solicitor General Paul Clement — to sway the three-judge panel that will decide how the Deflategate fiasco ends and whether the NFL's district court fumble sealed a defeat.

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