The basketball lockout of 2011

The lockout resulted in the cancellation of 16 out of 82 regular-season games; the players came out of the negotiations with the percent share of their revenue substantially reduced, but they avoided a hard salary cap

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Labor–management relations did not play a dominant role in professional sports until the early 1970s. Growing fan interest in the games, heightened by network television, transformed leagues and teams into valuable business enterprises. Players' unions, previously weak and ineffectual, emerged under new leadership to seek a greater share of the expanding wealth through collective bargaining. Ever since, labor–management relations in sports have been characterized by conflict over money and power.

The bargaining model in professional team sports has many commonalities with other American industries. A key difference is that individual players' salaries are determined in negotiations between the player—usually represented by an agent—and his team. Collective bargaining between the league and the union affects the individual negotiations, because it involves issues such as free agency, team salary caps, and pensions, which together play a role in determining the overall share of league revenues that players receive. Noncompensation issues, such as drug testing, disciplinary action for off-field behavior, and the length of the season, are also determined collectively.

Another difference is that collective bargaining outside of professional sports typically has been less adversarial, in part because of the declining influence of organized labor in the workforce over the last 40 years or so. Also, unlike most other businesses, sports do not face outside competition, because various leagues have granted owners a monopoly to present their teams' games in the geographic areas in which those teams are located. This monopoly power could be altered by the formation of a new league with competing teams in major league cities, as has occasionally happened over the years, but not recently.

In recent years, lengthy lockouts have become commonplace in professional sports. The most dramatic was the National Hockey League (NHL) lockout in 2004–2005, resulting in the cancellation of an entire season.[1] In 2011, the National Football League (NFL) sustained a 136-day lockout but no loss of games.[2] This article concerns the National Basketball Association (NBA), which shut its doors on July 1, 2011, for a 149-day lockout that reduced the regular season from 82 to 66 games.

Why are these lockouts occurring? When players' unions and leagues negotiate collective bargaining agreements, large amounts of money are at stake. A limited number of owners and players are contesting the distribution of a few billion dollars in annual revenue. In the NBA, some of the owners are billionaires and the average player salary of about $5.8 million a year is the highest in sports (or any occupation, for that matter).[3]

Each side strives to maximize its power at the bargaining table, and work stoppages

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are one way to maximize power. Strikes are the weapon of choice for sports unions, while owners use lockouts. If there is to be a strike, it usually occurs late in the season, when players have received most of their pay and when owners are vulnerable to the loss of bounteous postseason television revenues. A players' strike in major league baseball in 1994–1995 resulted in cancellation of the playoffs and World Series.

If little progress is being made in negotiations, owners may take the preemptive step of a lockout before the season begins and before players have collected paychecks. A lockout can motivate the players to make concessions and often leads to a better deal for the owners. According to one study, lockouts and strikes in sports are happening with increasing frequency because they have no permanent impact upon attendance, which typically rebounds the year following the work stoppage.[4]

Background

The National Basketball Players Association (NBPA) was formed in 1954 by Bob Cousy, a star player for the Boston Celtics.[5] Following recognition by the owners in 1957, the NBPA languished from lack of both interest and organization. In 1962, however, the union hired Larry Fleisher as general counsel. Confronting owners in an adversarial relationship, Fleisher negotiated the first collective bargaining agreement in all of professional sports in 1967.

The NBA was the first professional sports league to negotiate a salary cap, beginning with the 1984–1985 season. A limit was placed on team payrolls, with the idea that richer teams in large markets would be less able to entice free-agent players from small-market teams by paying hefty salaries. However, the salary cap was soft because there were numerous ways to circumvent it, such as allowing a team to sign its own free-agent player without his salary counting against the cap. This loophole became known as the Larry Bird rule, named for the Celtic player who took advantage of the exception.

Following negotiation of the 1988 agreement, Fleisher retired. He was succeeded by Charles Grantham, who wanted to eliminate the salary cap, the college draft, and the right of first refusal—a right that allows a team to match a salary offered its free agent by another club—in 1994 negotiations. Grantham was unable to reach agreement with the league, and the 1994–1995 season was played without a replacement contract. The NBPA filed an antitrust suit seeking the elimination of labor market restrictions, but a U.S. district court ruled against the players. The court determined that the "nonstatutory labor exemption" applied, meaning that the league had legal immunity from antitrust law so long as the parties had a collective bargaining relationship.

At this juncture, dissident players were persuaded by their agents to have the union decertified, a move that would allow an antitrust suit to be brought against the league. A petition for decertification was filed with the National Labor Relations Board, and an election was scheduled. Meanwhile, the league declared a lockout on June 30, 1995, and proceeded to restructure some of its objectionable contractual proposals in the players' favor. These tactics proved successful, and the 1995–1996 season began on time.

Despite strike threats by the NBPA and brief lockouts in 1995 and 1996, there were no lengthy work stoppages in basketball until 1998, a remarkable achievement given the frequent shutdowns in baseball, football, and hockey. By this time, the owners were represented by Commissioner (since 1983) David Stern and the players by Billy Hunter, a former U.S. attorney. The owners decided to reopen the 1995 collective bargaining agreement, because, by the 1997–1998 season, players were receiving about 57 percent of league revenue and the league claimed that half of its teams were losing money.[6]

A major issue in the 1998 negotiations was that the league wanted to have a hard salary cap while the union wanted to maintain the status quo. The settlement reached in 1999, following a 202-day lockout that canceled about half the season, maintained the soft salary cap. However, the owners won a cap on individual player salaries and a limit of 12 percent on maximum annual raises for Larry Bird–type free agents who re-sign with their old team and 10 percent for players who sign with other teams. This arrangement was meant to encourage free agents to remain with their clubs rather than signing with another team. Players were guaranteed 55 percent of league revenue in years 4 through 6 of the agreement and 57 percent in year 7.

A replacement agreement was reached in 2005 without a work stoppage. Relatively few changes were made to the previous contract regarding free agency rules and the salary cap, which continued to rise in accordance with league income. The new agreement barred U.S. players from joining the NBA until a year after their high school class graduated. The agreement also raised the minimum age from 18 to 19.[7]

Causes and issues

In January 2010, the league made its proposals for a new collective bargaining agreement. Among these were a

38-percent reduction (estimated at between $750 million and $800 million) in player pay, a rollback of existing salaries, a hard salary cap, and shorter contracts.[8] The union wanted none of it.

Despite taking in $4 billion in annual revenue, the league claimed that 22 of its 30 teams were losing money and that overall losses in the 2010–2011 season were about $370 million.[9] These figures made cutting the players' share of revenue a top priority. (NFL owners similarly sought to cut the players' share of revenue in their 2011 negotiations, even though none of the league's teams were losing money.)

A focal point of the NBA negotiations was how to divide basketball-related income (BRI), which includes most of the revenue received by NBA teams, from sources such as ticket sales, television, and concessions. The owners wanted to drastically reduce the players' share of BRI.

Another major issue was the control by players of the choice of team they would play for. An example of this issue involved star players LeBron James, Chris Bosh, and Dwayne Wade. In 2006, James persuaded Bosh and Wade to sign 3-year contract extensions that would make them free agents at the same time, to maximize their power in the labor market. When they became free agents in 2010, James left the Cleveland Cavaliers and Bosh left the Toronto Raptors to join Wade with the Miami Heat, thus forming a basketball powerhouse. In 2011, other star players forced their teams to trade them to rich clubs: Carmelo Anthony went from the Denver Nuggets to the New York Knicks, and Deron Williams left the Utah Jazz for the New Jersey Nets.

The soft salary cap did not do enough to dissuade wealthier teams from signing another star player or two. The problem was that although there was also a luxury tax on payrolls that exceeded the salary cap, rich teams with bigger ticket sales and better local television revenues were more able to pay that tax. The teams that won the last four NBA championships—the Dallas Mavericks (2011), Los Angeles Lakers (2009 and 2010), and Boston Celtics (2008)—were in large markets and so had no trouble paying luxury taxes. In the 2010–2011 season, the top 10 spending teams averaged 50 wins while the bottom 10 spenders averaged 32 wins.[10] Narrowing this gap would create more competitive balance between clubs, a key objective of the league.

Negotiations

After about a year and a half of fruitless bargaining, in late June 2011 the union offered to take a pay cut of about $500 million over 5 years. The slice would have reduced the players' share of BRI from 57 percent to 54.3 percent.[11] However, given the owners' insistence on a 50–50 split of revenue, there was still a sizable gap between the money proposals, and the players were adamantly opposed to a hard salary cap. With the collective bargaining agreement due to expire on July 1, there was scant hope of reaching agreement before then.

The owners' subsequent lockout on July 1 caused the positions of the parties to harden, and no negotiations were scheduled for a month. When talks resumed in August, no discernible progress was made during the next several weeks, and it began to look like training camps would not open on time and that the start of the regular season was in jeopardy. Consequently, the pace of negotiations quickened, with small-group sessions held in addition to the main talks. More owners, including Peter Holt, owner of the San Antonio Spurs and chair of the league's labor relations committee, and Paul Allen, owner of the Portland Trail Blazers, appeared at the table, as did more players, including James, Wade, Anthony, Kobe Bryant from the Lakers, and Kevin Durant from the Oklahoma City Thunder.

The leading player representative was the Lakers' Derek Fisher, who was president of the NBPA. Fisher was an important part of the union's negotiating team, along with player representative Hunter and attorney Jeffrey Kessler. Although Stern led the owners, much of the face-to-face negotiation at the bargaining table was handled by deputy commissioner Adam Silver.

Stern quickly took control of the situation. In 2010, he punished owners who made statements on their own to the media, fining Ted Leonsis, owner of the Washington Wizards and the NHL's Washington Capitals, $100,000 for advocating a hard salary cap like that in the NFL.[12] In 2011, Stern fined Michael Jordan, part owner of the small-market Charlotte Bobcats, $100,000 for advocating a hard line against the union, and Micky Arison, owner of the Miami Heat, a whopping $500,000 for publicly urging an end to the lockout.[13] Seeing Jordan as a hawk owner was ironic because the former Chicago Bulls superstar was a strong advocate for the players in the 1990s.

With plenty of sports celebrities on both sides of the dispute, an outside neutral was called upon to stimulate compromise. George Cohen, director of the Federal Mediation and Conciliation Service, had served as a mediator during the 2011 NFL lockout. As he did then, Cohen insisted on a media blackout during his efforts to broker an agreement. He was credited with keeping the basketball negotiations focused, and he made progress on minor issues.[14] Because mediation is voluntary, a mediator cannot facilitate a resolution of a dispute if the parties do not wish to accept the resolution proposed. This was the case with both the NBA and NFL disputes that Cohen mediated.

As in the 1994–1995 NBA negotiations, a group of agents urged their clients to reject a deal that would cut the players' share below 52 percent and advocated that the players decertify the union so that they could bargain independently with the owners.[15] This stratagem, however, was counterproductive to negotiations because it undermined the authority of the union and raised the question of who was in charge. Still, the agents' interference did not create as many obstacles as it did in the 1990s. Agents assume an important role in representing players in individual contract negotiations with their teams. However, bargaining on behalf of all players is the exclusive province of the union.

In early October, the negotiations progressed as the loss of regular-season games loomed large. The union indicated that it might accept less than 53 percent of BRI, and the owners dropped their insistence on a hard salary cap. However, Stern maintained that the 50–50 split was no longer negotiable, a tactic that antagonized the union.

On October 10, Stern canceled the first 2 weeks of the regular season, prompting the players to lower their demand to 52.5 percent. Some owners of small-market teams that were losing money under the old system wanted to take an even harder line than Stern preferred, seeking to reduce the players' share of BRI to 47 percent.[16] By contrast, some owners of large-market clubs wanted the lockout ended so that they could get on with collecting large revenues. Rifts also developed in the union as Hunter, Kessler, and Fisher had different views on making concessions.[17] But these disagreements were rapidly patched over to maintain solidarity.

As the lockout dragged on, more players began to experience financial difficulties and wanted to get back to playing basketball.[18] Several players, but few stars, signed with teams in China, Spain, Italy, Greece, and Turkey in order to recoup at least some income.

While the sides continued to hold out, Stern kept slicing weeks off the season and issued an ultimatum that unless a deal was reached by November 9, he would drop the offer from 50 percent to 47 percent. The union's response was that it would take the 50 percent, provided that the league lightened up on free-agency issues. This offer shifted the onus to the owners, and Stern did not try to enforce his ultimatum.

Legal tactics

On November 14, 2011, frustrated by the owners' resistance at the bargaining table, the union disbanded, declaring that it was finished negotiating and would seek redress from the courts. The NBPA issued a "disclaimer of interest," which the players had authorized the previous season. The disclaimer obviated the need for a decertification vote. Because the union was no longer the formal representative of the players, it could legally file an antitrust suit against the owners.

Stern called the decertification a charade and ominously warned, "We're about to go into the nuclear winter of the NBA."[19] In response to the decertification, the league filed an unfair labor practice charge with the National Labor Relations Board, contending that the union was not bargaining in good faith.

The rationale for the union's maneuver was the U.S. Supreme Court's ruling that the nonstatutory labor exemption precludes an antitrust suit when a sports union has a bargaining relationship with a league.[20] The antitrust suit, filed by five NBA players in U.S. District Court in Oakland, California, on November 15, 2011, alleged that the owners terminated the bargaining process when Stern issued his ultimatum and that the purpose of the lockout was to reduce players' salaries. Under the Sherman Antitrust Act of 1890, a decision in favor of the players would provide for treble damages.

David Boies, the union's attorney, had switched sides, having represented the NFL in its earlier lockout. Attorney Jonathan Schiller and several players filed a separate, simultaneous antitrust suit in U.S. District Court in Minneapolis. A few days later, the suits were merged and slated to be heard in Minneapolis. Although the union sought a prompt response from the court in the form of a summary judgment, the problem was that it could take months, even years, before a final decision was made.[21]

Notwithstanding the decertification and shift of attention to the courts, the parties continued to negotiate in a last-ditch attempt to save the season. The sides coalesced around the notion that, were agreement to occur, a 66-game season was possible if it started on Christmas Day, a traditionally big day on the NBA schedule.

Settlement

On November 26, 2011, the nearly 5 month lockout ended after 50 negotiating sessions that took place over 2 years. Had agreement not been reached at this 11th hour, the season may well have been lost. Even so, a significant price was paid, with 16 regular-season games lost and with owners and players forfeiting about $400 million each.[22] The compressed season began on December 25, 2011.

The NBA achieved its main objective: players relinquished nearly $300 million per year in salary, roughly the same amount owners claimed they lost in recent years.[23] Also, BRI will be split about 50–50, with the players' share dropping from 57 percent under the old agreement.[24] By way of comparison, the bottom line in the 2011 NFL lockout was that the football players' share of total revenue fell from 51 percent under the old agreement to 47 percent under the new one. Both leagues' agreements are for 10 years, but the basketball players have an opt-out provision after 6 years.

Small-market teams will have more money to spend on players because of the increased share of the revenue pie won by the owners. They will also be the beneficiaries of a new revenue-sharing package among the owners, which is expected to create 3 to 4 times more cash flow than previously.[25] Owners are required to spend at least 85 percent of the salary cap, and 90 percent by year 3 of the agreement. The penalty for teams subject to the luxury tax will escalate the more money they spend on payroll. In the third year of the agreement, the luxury tax will rise by 50 percent. The result of all these changes should be improved competitive balance among the teams.

Although the overall financial implications of the new agreement are fairly recognizable, it is less clear what the changes in the systemic structure will bring. The players did not come away emptyhanded. An important objective of the owners was a hard salary cap. They might have achieved this had they canceled the season, as happened in the NHL in 2004–2005. However, the Larry Bird rule remains essentially intact. Contracts will be shorter, 5 years for Bird players who re-sign with their own teams and 4 years for free agents who sign with other teams. The raises allowed—7.5 percent for Bird players who re-sign with their own teams, 4.5 percent for free agents who sign with other teams—provide an incentive for players to remain with their teams.

It is not uncommon for a team to sign a pricey free agent with great expectations, only to see that player underperform during a multiyear contract. According to the new agreement, each team gets an "amnesty" waiver, which allows it to exercise a one-time (over 10 years) opportunity to jettison an unproductive player. The player can be waived without his salary counting against the salary cap. The team still has to pay what it owes the player, but it can use the cap space to sign another player. If a team signs an amnesty player off waivers as the highest bidder, it would have to pay only the amount bid, with the balance paid by the team that waived the player. When the new agreement was reached, the Orlando Magic waived Gilbert Arenas, who was owed $62 million over the next three seasons.[26]

The agreement also opens the door to blood testing for human growth hormone (HGH).[27] But the test must first be validated by a neutral committee of experts. HGH testing was recently provided for in the NFL and major league baseball agreements.

THE NBA OWNERS CLEARLY WON THE BUSINESS SIDE of the lockout, ensuring the league's financial viability for years to come. With the continuation of exceptions to the salary cap, the agreement does little to address domination by big-spending teams in large markets.[28] Small-market teams get some relief: they should be more competitive in the free-agency market and more likely to retain their own star players.

Also, the majority of the season was saved; it would have been very costly to owners and players had the season been lost entirely. In fact, it was this realization that caused the sides to some together. Compared with the 1998–1999 lockout, which lost about half the regular season, this one had a better outcome, because only 16 games were lost out of the 82-game schedule.

Even if the 2011–2012 season had been canceled, it likely would have had little, if any, effect on the economic health of the cities that host NBA teams. A 2001 study of past work stoppages found that, in 37 metropolitan area economies with professional sports franchises, there was no overall financial impact.[29] Indeed, the cities appeared to perform better financially in years that games were canceled. There were other options that people spent their entertainment dollars on, in a substitution effect, while security needed for public safety at sporting events cost less because games were not played. □

Notes

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1 Paul D. Staudohar, "The hockey lockout of 2004–05," *Monthly Labor Review*, December 2005, pp. 23–29.

2 Paul D. Staudohar, "The football lockout of 2011," *Monthly Labor Review*, August 2012, pp. 29–34.

[3] Among the billionaire owners are Paul Allen of the Portland Trail Blazers, Micky Arison of the Miami Heat, Mark Cuban of the Dallas Mavericks, and Mikhail Prokhorov of the Brooklyn (formerly New Jersey) Nets. The average player salary is reported in Howard Beck, "Few N.B.A. Stars Have Gone Overseas to Play," *New York Times*, Oct. 13, 2011, p. B17.

[4] Martin B. Schmidt and David J. Berri, "The Impact of Labor Strikes on Consumer Demand: An Application to Professional Sports," *American Economic Review*, March 2004, pp. 344–357.

[5] The origins of the NBA and early negotiations are discussed in Paul D. Staudohar, *Playing for Dollars: Labor Relations and the Sports Business* (Ithaca, NY, Cornell University Press, 1996), pp. 104–106.

[6] Portions of this section are based on Paul D. Staudohar, "Labor relations in basketball: the lockout of 1998–1999," *Monthly Labor Review*, April 1999, pp. 3–9.

[7] Stephen Canella, "Cleaning House," *Sports Illustrated*, July 11, 2005, p. 28.

[8] Chris Mannix, "Money Ball," *Sports Illustrated*, Dec. 20, 2010, p. 35.

[9] Scott Cacciola and Sam Schechner, "NBA Owners Set Lockout," *Wall Street Journal*, July 1, 2011, p. B1; and Ian Thomsen, "NBA's Future: Star-crossed," *Sports Illustrated*, Mar. 7, 2011, p. 12.

[10] Howard Beck, "Owners and Players Divided by Push to Restructure the N.B.A.," *New York Times*, Oct. 12, 2011, p. B14.

[11] Howard Beck, "Sides Remain Far Apart in N.B.A. Labor Talks," *New York Times*, June 22, 2011, p. B13.

[12] Richard Sandomir, "Players Show Solidarity with Lockout Looming," *New York Times*, June 24, 2011, p. B13.

[13] See "Infighting hurts settlement odds," *Contra Costa Times*, Nov. 5, 2011, p. c7; Phil Taylor, "He Can Still Be Like Mike," *Sports Illustrated*, Nov. 21, 2011, p. 84; and Howard Beck, "United They Stand, That Huge Fine Notwithstanding," *New York Times*, Nov. 2, 2011, pp. B12, 15.

[14] Brian Mahoney, "A–B–C's of dispute over millions of dollars," *San Francisco Chronicle*, Oct. 23, 2011, p. B9.

[15] Howard Beck, "Two Sides to Meet with Regular-Season Games at Stake," *New York Times*, Oct. 4, 2011, p. B16.

[16] Howard Beck and Ken Belson, "N.B.A. Owners' Mutual Dependence Outweighs Divisions," *New York Times*, Oct. 25, 2011, p. B14.

[17] Howard Beck, "High-Tension N.B.A. Talks Resume, but They're Between Union Officials," *New York Times*, Nov. 3, 2011, p. B15.

[18] Paul Shirley, "Why NBA Players Shoot Labor Bricks," *Wall Street Journal*, Oct. 27, 2011, p. D5.

[19] Kevin Clark, "NBA Talks Collapse, Head to Court," *Wall Street Journal*, Nov. 15, 2011, p. B11; and Howard Beck, "N.B.A. Season in Peril as Players Reject Offer and Disband Union," *New York Times*, Nov. 15, 2011, p. A1.

[20] The primary legal precedent is the Court's decision in *Brown v. Pro Football, Inc.*, 116 S. Ct. 2116 (1996).

[21] Mike Bresnahan, "Players File Antitrust Lawsuits," *Los Angeles Times*, Nov. 16, 2011, p. C1.

[22] Howard Beck, "League Gets Financial Concessions It Wanted," *San Francisco Chronicle*, Nov. 27, 2011, p. B2.

[23] Lee Jenkins, "'Tis the Season," *Sports Illustrated*, Dec. 5, 2011, p. 46.

[24] The players' share could go as low as 49 percent or as high as 51 percent, depending on how well the league does over the years. (See Marcus Thompson II, "NBA set for labor peace," *San Francisco Chronicle*, Nov. 27, 2011, p. 4.)

[25] Jenkins, "'Tis the Season."

[26] "Magic uses amnesty to cut Arenas," *Contra Costa Times*, Dec. 10, 2011, p. C4.

[27] HGH is widely considered to be a performance-enhancing drug. Its effects are not known precisely, but they include increased stamina and a greater ability to recover from injury.

[28] Kevin Clark, "NBA's Owners Win Big," *Wall Street Journal*, Nov. 28, 2011, p. B3.

[29] Dennis Coates and Brad R. Humphreys, "The Economic Consequences of Professional Sports Strikes and Lockouts," *Southern Economic Journal*, January 2001, pp. 737–747; Sean Gregory commented on Coates and Humphrey's article in "No Foul," *Time Magazine*, Nov. 21, 2011, p. 18.