

EXHIBIT J

SHYAM DAS, ARBITRATOR

In the Matter of Arbitration)	ARBITRATOR'S OPINION
Between)	AND AWARD
)	
)	
)	
THE NATIONAL FOOTBALL LEAGUE)	Article 3 Release Issue
PLAYERS ASSOCIATION)	
)	
and)	Case Heard:
)	May 16, 2012
)	
)	
THE NATIONAL FOOTBALL LEAGUE)	Award Issued:
MANAGEMENT COUNCIL)	June 8, 2012

Appearances

For the NFL Players Association:

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For the NFL Management Council:

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BACKGROUND

Article 3
Release Issue

On May 3, 2012, the National Football League Players Association (NFLPA) filed the following grievance with the National Football League Management Council (NFLMC).

Pursuant to Article 43 of the CBA, the NFL Players Association hereby commences a non-injury grievance seeking an order of compliance with Article 3, Section 3(b) of the CBA ("Releases and Covenants Not to Sue"), and an order that the Commissioner cease and desist from violating that provision. ...

Yesterday, Commissioner Goodell purported to suspend four players - Scott Fujita (Cleveland Browns), Anthony Hargrove (Green Bay Packers), Will Smith (New Orleans Saints), and Jonathan Vilma (New Orleans Saints) - for their alleged participation in a so-called "pay-for-performance/bounty" compensation system operated by the New Orleans Saints during the 2009-2011 seasons. The Commissioner claims that these players and certain current/former Saints coaches funded cash pools from which players received cash payments for, among other things, violent hits on opposing players. The gravamen of the conduct at issue is alleged to have occurred in 2009 and 2010.

In connection with entering into the 2011 CBA, however, the NFL released all players from conduct engaged in prior to execution of the CBA, on August 4, 2011:

The NFL, on behalf of itself, the NFL, and the NFL Clubs and their respective heirs, executors, administrators, representatives, agents, successors and assigns, releases and covenants not to sue, or to support financially or

administratively, or voluntarily provide testimony of any kind, including by declaration or affidavit in, any suit (including any Special Master proceeding brought pursuant to the *White SSA* and/or the Prior Agreement) against the NFLPA or any of its members, or agents acting on its behalf, or any member of its bargaining unit, with respect to conduct occurring prior to the execution of this Agreement.

CBA, Art. 3, § 3(b). Thus, even assuming for the sake of argument that the Commissioner had the authority to punish players for conduct detrimental under the alleged facts and circumstances of this particular situation - he does not - he nevertheless would be prohibited from punishing NFL players for any aspect of the alleged "pay-for-performance/bounty" conduct occurring before August 4, 2011.

Under the CBA, the Non-Injury Grievance Arbitrators have jurisdiction over the interpretation and scope of the NFL's release in Article 3, Section 3(b). This grievance seeks an order of compliance with that provision, prohibiting punishment for any player conduct occurring prior to August 4, 2011 (and likewise ordering the Commissioner to cease and desist from the imposition or enforcement of any player punishment for conduct before that date).

We note that the NFLPA has commenced a proceeding before the System Arbitrator in which it contends, and will establish, that only the System Arbitrator - and not the Commissioner - has authority under the CBA to punish players for their alleged

participation in the "pay-for-performance/bounty" pool. [Footnote omitted.] ... Any such determination by the System Arbitrator would, however, be confined to consideration of conduct - if any - that has not been released.

Finally, even in the event that the release does not cover all of the alleged conduct at issue, and even in the event that the System Arbitrator does not find Commissioner discipline to be foreclosed with respect to the pay-for-performance/bounty compensation system, the only other conduct theoretically at issue is the "on the playing field" conduct of players allegedly attempting to deliver violent hits on other players. Such conduct is governed by Article 46, Section 1(b) - "[f]ines or suspensions imposed upon players for unnecessary roughness or unsportsmanlike conduct on the playing field with respect to an opposing player or players" - and "shall be" determined initially by the Commissioner's designee (not the Commissioner), and then appealable to Hearing Officers Ted Cottrell and Art Shell (again, not the Commissioner). CBA, Art 46 §§ 1(b), 2(a). It would be for the Non-Injury Grievance Arbitrator to determine, under Article 46, whether this was a Section 1(b)-Shell/Cottrell situation, or a Section 1(a)-Commissioner discipline situation. But such a determination is not yet, and we believe should not become, necessary.¹

¹ At arbitration, the NFLPA reiterated its position that it is not now seeking any ruling on this particular issue.

The NFLMC responded to the grievance on May 14, 2012, denying the grievance in its entirety. The response states:

Specifically, the Arbitrator does not have jurisdiction under Article 43 to resolve the claims you assert in your grievance. To the contrary, under Article 46, the Commissioner has "exclusive" authority to determine discipline for conduct detrimental, which he properly exercised here. Article 46 is clear that any disputes about the discipline issued by the Commissioner must be resolved by appealing to the Commissioner.

Further, we deny that either CBA provision cited in the grievance either supports your assertion of jurisdiction or has any merit.

In addition to the NFLPA filing this grievance and commencing a proceeding with the System Arbitrator, scheduled to be heard on May 30, 2012, all four of the affected players filed appeals of their discipline to the Commissioner pursuant to Article 46, Section 1(a) of the CBA, which are pending.

Relevant provisions of the August 4, 2011 Collective Bargaining Agreement include the following:

ARTICLE 3
NO STRIKE/LOCKOUT/SUIT

* * *

Section 3. Releases and Covenants Not to Sue:

(a) The NFLPA on behalf of itself, its members, and their respective heirs, executors, administrators, representatives, agents, successors and assigns, releases and covenants not to sue, or to support financially or administratively, or voluntarily provide testimony of any kind, including by declaration or affidavit in, any suit or proceeding (including any Special Master proceeding brought pursuant to the *White SSA* and/or the Prior Agreement) against the NFL or any NFL Club or any NFL Affiliate with respect to any antitrust or other claim asserted in *White v. NFL* or *Brady v. NFL*, including, without limitation, any claim relating to the 2011 lockout, any restrictions on free agency, any franchise player designations, any transition player designations, the Draft, the Entering Player Pool, the Rookie Compensation Pool, Total Revenues ("TR") or television rights fees with respect to any League Year prior to 2011, collusion with respect to any League Year prior to 2011, or any claim that could have been asserted in *White* or *Brady* related to any other term or condition of employment with respect to conduct occurring prior to the execution of this Agreement. For purposes of clarity, this release does not cover any claim of any retired player.

(b) The NFL, on behalf of itself, the NFL, and the NFL Clubs and their respective heirs, executors, administrators, representatives, agents, successors and assigns, releases and covenants not to sue, or to support financially or administratively, or voluntarily provide testimony of any kind, including by declaration or affidavit in, any suit (including any Special Master proceeding brought pursuant to the *White SSA* and/or the

Prior Agreement) against the NFLPA or any of its members, or agents acting on its behalf, or any member of its bargaining unit, with respect to conduct occurring prior to the execution of this Agreement.

(c) Other than as provided in the Settlement Agreement, the releases and covenants not to sue in Subsections (b) and (c) above shall not apply to any Injury or Non-Injury Grievance asserted under the Prior Agreement, or to any proceeding to confirm an Injury or Non-Injury Grievance award under the Prior Agreement.

(d) The parties shall take prompt and immediate steps to dismiss the litigation, grievances, and arbitration referenced in Paragraph 4 of the Settlement Agreement and the NLRB proceeding referenced in the side letter to the Settlement Agreement dated July 26, 2011.

* * *

ARTICLE 43
NON-INJURY GRIEVANCE

Section 1. Definition: Any dispute (hereinafter referred to as a "grievance") arising after the execution of this Agreement and involving the interpretation of, application of, or compliance with, any provision of this Agreement, the NFL Player Contract, the Practice Squad Player Contract, or any applicable provision of the NFL Constitution and Bylaws or NFL Rules pertaining to the terms and conditions of employment of NFL players, will be resolved exclusively in accordance with the procedure set forth in this Article, except wherever

another method of dispute resolution is set forth elsewhere in this Agreement.

* * *

ARTICLE 46
COMMISSIONER DISCIPLINE

Section 1. League Discipline:
Notwithstanding anything stated in Article 43:

(a) All disputes involving a fine or suspension imposed upon a player for conduct on the playing field (other than as described in Subsection (b) below) or involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed exclusively as follows: the Commissioner will promptly send written notice of his action to the player, with a copy to the NFLPA. Within three (3) business days following such written notification, the player affected thereby, or the NFLPA with the player's approval, may appeal in writing to the Commissioner.

(b) Fines or suspensions imposed upon players for unnecessary roughness or unsportsmanlike conduct on the playing field with respect to an opposing player or players shall be determined initially by a person appointed by the Commissioner after consultation concerning the person being appointed with the Executive Director of the NFLPA, as promptly as possible after the event(s) in question. Such person will send written notice of his action to the player, with a copy to the NFLPA. Within three (3) business days following such notification,

the player, or the NFLPA with his approval,
may appeal in writing to the Commissioner.

* * *

Section 2. Hearings:

(a) Hearing Officers. For appeals under Section 1(a) above, the Commissioner shall, after consultation with the Executive Director of the NFLPA, appoint one or more designees to serve as hearing officers. For appeals under Section 1(b) above, the parties shall, on an annual basis, jointly select two (2) or more designees to serve as hearing officers. The salary and reasonable expenses for the designees' services shall be shared equally by the NFL and the NFLPA. Notwithstanding the foregoing, the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion

* * *

NFLPA POSITION

The NFLPA contends that the Non-Injury Grievance Arbitrator has jurisdiction to determine the scope of the NFL's release in Article 3, as the applicability of that release here directly pertains to its effect on the terms and conditions of employment of certain NFL players under the current CBA. Article 43, Section 1 of the CBA broadly provides that any such dispute involving interpretation of the CBA will be arbitrated before the Non-Injury Grievance Arbitrator, unless another method of dispute resolution is specified. And, with respect to

Article 3, no such alternative method of dispute resolution is specified.

The NFLPA argues that there is nothing in Article 46 that gives the Commissioner -- who for these purposes is simply another arbitrator -- any authority over Article 3. The mere fact that the Commissioner said he was invoking his "conduct detrimental" authority does not give him authority to override the provisions of the CBA over which he has no jurisdiction or authority. The NFLPA also rejects the NFLMC's contention that the ruling in Benson v. NFL (Townley 2011) is dispositive on this issue.

The NFLPA maintains that Article 3, Section 3(b), in unambiguous terms, bars discipline against players for any conduct that occurred prior to August 4, 2011. In Section 3(b), the NFL "releases ... [players] ... with respect to conduct occurring prior to the execution of this Agreement." The "conduct" referred to in Section 3(b) is not qualified or limited other than it must have been engaged in before August 4, 2011 in order to be released. The NFLPA points out that this release is much more expansive than the limited release granted by the NFLPA in Section 3(a). It also stresses that the CBA contains no language reserving any purported authority of the Commissioner to punish player conduct occurring before August 4, 2011 -- even though the NFL was aware of the alleged "pay-for-performance/bounty" conduct prior to that date -- whereas the parties "carved out" other matters in Section 3(c).

The NFLPA rejects the NFLMC's argument that the NFLPA waived its right -- or is estopped -- to assert the release granted in Section 3(b) in this case by not raising it in other cases where the Commissioner has imposed discipline after August 4, 2011 for player conduct occurring before that date. The NFLPA notes that most of those instances were drug program cases and some of the remaining cases involved players who no longer are in the League. More importantly, the NFLPA insists that the terms of the CBA on which it relies in this case are controlling, regardless of what the NFLPA may or may not have asserted in different proceedings.

As relief, the NFLPA seeks an order of compliance with the release language in Article 3, Section 3(b) and a cease and desist order against the NFL imposing any discipline on these four players for conduct occurring before August 4, 2011.²

NFLMC POSITION

The NFLMC contends that the Non-Injury Grievance Arbitrator lacks jurisdiction over this dispute. Article 43

² The NFLPA notes that two of the players, Hargrove and Fujita, no longer were on the New Orleans Saints team after the new CBA took effect, so that the release as to them should be 100% effective. If the NFL wishes to discipline Smith and Vilma solely for conduct occurring on or after August 4, 2011, it has the ability to do so by initiating the appropriate proceeding, which -- in the NFLPA's view -- would be before the System Arbitrator, pursuant to Article 15, Section 1 of the CBA.

limits the Non-Injury Grievance Arbitrator's jurisdiction "wherever another method of dispute resolution is set forth elsewhere in this Agreement." Article 46, Section 1 provides that: "Notwithstanding anything stated in Article 43: (a) All disputes involving ... action taken against a player by the Commissioner for conduct detrimental ... will be processed exclusively [under the procedures set forth in Article 46, Section 1(a).]" The Commissioner's exclusive jurisdiction to hear all disputes arising out of discipline for conduct detrimental is consistent with his sole authority to impose such discipline. The NFL Constitution and Bylaws, expressly incorporated in the CBA, states that the Commissioner has "complete authority" to "decide" when a player "has been or is guilty of conduct detrimental to the welfare of the League or professional football." The Commissioner's authority in this regard also is recognized in the NFL Player Contract, incorporated into the CBA in Appendix A.

The NFLMC maintains that this case plainly involves a "dispute" over Commissioner discipline for conduct detrimental that is outside the jurisdiction of the Non-Injury Grievance Arbitrator. The NFLMC asserts that this was the precise holding in the 2011 Benson decision, and that holding constitutes the "law of the shop" under NFL arbitration precedent, including Denver Broncos v. Lelie (Das 2007).

The NFLMC also insists that Article 3 in no way limits the Commissioner's authority to impose the discipline at issue

here. Article 3, Section 3(b) states that the NFL "releases and covenants not to sue...[or maintain] any suit" against the Union or its members. Section 3(b) constitutes an agreement not to bring "suit", that is, a proceeding in a court of law, against players based on conduct occurring prior to August 2011. That also is made clear when Article 3 is read as a whole. Subsection 3(c) explains that "the releases and covenants not to sue ... above shall not apply to" injury or non-injury grievances asserted under the prior CBA or actions to confirm awards arising out of those cases. Subsection 3(d) further states that the parties will take steps to "dismiss the litigation, grievances, and arbitration" which they had agreed to dismiss in a separate settlement agreement. Read in this context, Section 3(b) can only be interpreted as an agreement by the NFL not to bring suit against the players for conduct occurring prior to August 4, 2011.

Moreover, the NFLMC stresses, Section 3(b) notably says nothing about any limit on the Commissioner's authority to impose discipline. As sophisticated parties with a long-standing collective bargaining relationship, had the NFLMC and NFLPA intended this provision to serve as a limitation on the Commissioner's authority under Article 46, they would have done so explicitly. This is confirmed by the parties' conduct since the CBA was executed. In Benson, the player and the NFLPA disputed the Commissioner's authority to suspend the player during the 2011 season for conduct that took place during the lockout -- obviously before August 4, 2011 -- but never argued

that the NFL "released" the player from any conduct that occurred prior to that date, which would have been dispositive of that case. Similarly, the NFLPA never asserted that Article 3, Section 3(b) released any of the at least 12 other players who have been disciplined since August 4, 2011 for conduct that occurred prior to that date. For that reason, the NFLMC argues, the NFLPA should be estopped from raising that assertion here.

Accordingly, the NFLMC contends that this grievance should be dismissed for lack of jurisdiction.

FINDINGS

This is a "dispute involving ... action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football...." The Commissioner imposed suspensions on the players in issue for conduct he deemed to be "conduct detrimental." Consistent with the controlling language in Article 46, Section 1 "[n]otwithstanding anything stated in Article 43," all such disputes "will be processed exclusively" under the procedures set forth in Article 46, Section 1.³ Article 43, Section 1, correspondingly carves out an exception from the broad authority granted to a Non-Injury Grievance

³ The present decision does not encompass or purport to decide the issue of whether the discipline imposed in this case constituted discipline subject to the procedure in Section 1(b), rather than Section 1(a) of Article 46. In either case, the procedures in Article 46, rather than Article 43, apply.

Arbitrator "wherever another method of dispute resolution is set forth elsewhere in this Agreement."

As the NFLMC concedes, the Commissioner does not have unlimited authority to arbitrarily designate any action he takes as action taken against a player for conduct detrimental and thereby shield that action from any independent scrutiny. But, without prejudice to any arguments that may be raised in an Article 46 or other proceeding, the present record does not establish a justifiable basis for concluding that the Commissioner's action in this case was *ultra vires*.

It is reasonable to question, however, whether the parties to the CBA contemplated that Article 46 decision makers would be called upon to interpret the parties' respective undertakings in Article 3.⁴ In any event, the NFLPA has not made a compelling case for finding that Article 3 limits the authority of the Commissioner to impose discipline for conduct of a player occurring before August 4, 2011.

Article 3, Section 3(b) contains a release and covenant not to sue by the NFL. As indicated in the court cases cited by the NFLPA, releases are to be narrowly construed. There is no express reference in Section 3(b) to action taken by the Commissioner to discipline a player for conduct detrimental

⁴ Benson presented a somewhat different case in that it involved interpretation of a side letter specifically related to discipline.

or, more generally, to discipline. Although the grammar and wording of the release and covenant not to sue are obtuse, removal of certain non-essential explanatory clauses and punctuation yields the following:

The NFL ... releases and covenants not to sue ... or to support financially or administratively ... any suit against the NFLPA or any of its members ... or any member of its bargaining unit ... with respect to conduct occurring prior to the execution of this Agreement.

This provision, particularly in the overall context of Article 3, addresses legal claims and suits or similar actions. It does not, as I read it, constitute an agreement by the NFL that the Commissioner relinquishes authority to impose discipline for conduct detrimental occurring prior to the execution of the CBA on August 4, 2011.

Accordingly, this grievance is dismissed.

AWARD

The grievance is dismissed as set forth in the above Findings.



Shyam Das, Arbitrator