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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

PETITION FOR PANEL REHEARING AND REHEARING EN BANC OF APPELLEES NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION AND TOM BRADY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee National Football League Players Association hereby certifies that it is a non-profit corporation organized under the laws of the Commonwealth of Virginia, that it has no parent corporation, and that no publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

RULE 35(B) STATEMENT 1

BACKGROUND 3

REASONS FOR GRANTING REHEARING 7

I. The Panel Opinion Conflicts With *Stolt-Nielsen* And Bedrock Principles Of Labor Law By Approving An Award That Exceeded The CBA's Grant Of "Appellate" Authority Over Disciplinary Decisions.. 8

II. The Panel Opinion Conflicts With *Boise Cascade* And Other Decisions Holding That Vacatur Is Warranted Where An Arbitrator Fails To Address Critical Provisions In The CBA. 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

RULE 35(B) STATEMENT

This case arises from an arbitration ruling by NFL Commissioner Roger Goodell that defies the rule of law. After orchestrating a multi-million dollar investigation into purported football deflation during the 2015 AFC Championship Game, Goodell imposed a severe and unprecedented punishment on Patriots quarterback Tom Brady. When Brady exercised his right under the collective bargaining agreement to appeal the punishment to an arbitrator, Goodell appointed himself as the arbitrator and "affirmed" the punishment he had just imposed.

Goodell's self-affirming "appeal" ruling must be reversed. Even though his arbitral authority was limited to hearing *appeals* of disciplinary decisions, Goodell "affirmed" Brady's punishment based on *different* grounds that were *not* the basis for his original disciplinary decision. Nor did Goodell *mention or discuss* the collectively bargained penalties for equipment-related violations—the core of Brady's defense. A divided panel of this Court nonetheless affirmed in a decision that repudiates long-standing labor law principles and that, if undisturbed, will fuel unpredictability in labor arbitrations everywhere and make labor arbitration increasingly arbitrary and undesirable for employers and employees alike.

Rehearing is warranted because the panel opinion conflicts in two key respects with decisions of the Supreme Court and other courts of appeals.

First, the panel held that the Commissioner acted within his authority when

he affirmed Brady's suspension based on new grounds that were *not* part of the disciplinary decision on appeal. It concluded that "[n]othing in [the CBA] limits the authority of the arbitrator to . . . reassess the factual basis for a suspension." Slip op. 20. That holding conflicts with *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*., 559 U.S. 662, 684 (2010), which holds that an arbitrator's authority depends on an *affirmative grant* of authority by the parties—not, as the panel majority held, the agreement's "silence" or an absence of express limits on the arbitrator's power. Chief Judge Katzmann had it exactly right when he explained that when the Commissioner "changes the factual basis for the disciplinary action after the appeal hearing concludes," he "exceeds his limited authority under the CBA to decide 'appeals' of disciplinary decisions." Slip op. 1 (dissent). The majority's holding also conflicts with the bedrock labor-law principle that "the correctness of a [sanction] must stand or fall upon the reason given at the time of [the sanction]," *United Paperworkers v. Misco, Inc*., 484 U.S. 29, 40 n.8 (1987) (quotation omitted), rather than an after-the-fact "reassess[ment]," slip op. 20, by an arbitrator on appeal.

Second, it is undisputed that the Commissioner completely *ignored* the collectively-bargained schedule of penalties for equipment-related violations—key provisions that the NFL has conceded are "potentially applicable" (NFL Br. 43), and, as Chief Judge Katzmann observed, would have limited the discipline or

provided highly relevant benchmarks requiring a reduced sanction. Yet the majority refused to vacate the award, concluding that requiring the Commissioner to at least *consider* these collectively-bargained penalties would not be "consistent with our obligation to afford arbitrators substantial deference." Slip op. 18. That holding squarely conflicts with *Boise Cascade Corp. v. Paper Allied-Industries*, 309 F.3d 1075, 1084 (8th Cir. 2002), which holds that vacatur is warranted where, as here, "an arbitrator fails to discuss a probative contract term, and at the same time offers no clear basis for how he construed the contract to reach his decision without such consideration." *Id*. at 1084 & n.9 (collecting cases).

The panel decision will harm not just NFL players, but all unionized workers who have bargained for appeal rights as a *protection*—not as an opportunity for management to salvage a deficient disciplinary action by conjuring up new grounds for the punishment. The panel decision will also harm management by freeing labor arbitrators from collectively-bargained limitations on their authority, enabling them to dole out their own brand of industrial justice. Because the panel has adopted rules for reviewing labor arbitrations that conflict with those applied by the Supreme Court and the Eighth Circuit, this Court should grant rehearing.

BACKGROUND

1. On January 18, 2015, the New England Patriots defeated the Indianapolis Colts 45-7 in the AFC Championship. During the game, the Colts

complained that the Patriots were using underinflated footballs. When the balls were measured at halftime, they were below the 12.5 pounds-per-square-inch minimum. JA103. However, as NFL officials later admitted, no one involved understood that environmental factors alone—such as the cold and rainy weather during the game—could cause significant deflation. JA1007-08. Nor did any NFL official claim that the underinflated balls affected the game's outcome, particularly since "Brady's performance in the second half of the AFC Championship Game—after the Patriots game balls were re-inflated—improved." JA217 n.73.

Commissioner Goodell nonetheless launched a so-called "independent" investigation into alleged ball tampering co-led by the NFL's General Counsel Jeff Pash and Ted Wells of the Paul Weiss law firm. JA1198. The investigation was obviously not "independent": the General Counsel of the NFL helped prepare the final report, and the Paul Weiss firm served as arbitration counsel for the NFL during the "appeal" before Goodell. JA1016, 1203.

Although the NFL conceded there was no direct evidence linking Brady to any ball tampering, JA1421, and Brady has consistently proclaimed his innocence, the Wells Report found it "more probable than not" that two Patriots equipment employees "participated in a deliberate effort to release air from Patriots game balls" before the Championship Game. JA97. The Report also found it "more probable than not that Brady was at least generally aware of the inappropriate

activities" of the two employees. JA112, 97. The Report did *not* find that Brady himself participated in or directed any ball deflation, JA112, and the work of the consultants Paul Weiss hired to deny that environmental factors accounted for the pressure levels has been derided by independent physicists as junk science.

Goodell disciplined Brady through a subordinate, Troy Vincent. JA1207. As Vincent later testified, Goodell based the discipline exclusively on the Wells Report. JA1010. Vincent's letter to Brady stated: "the [Wells Report] established that there is substantial and credible evidence to conclude you were at least generally aware of the actions of the Patriots' employees involved in the deflation of the footballs and that it was unlikely that their actions were done without your knowledge." JA329. The letter also cited Brady's decision not to "cooperate" by declining to produce his private electronic communications. *Id.* Goodell imposed a four-game suspension for "conduct detrimental" to the league. *Id.*; JA353-54.

2. The NFLPA appealed on Brady's behalf. Article 46, Section 1(a) of the CBA allows a disciplined player, or the NFLPA, to "appeal in writing to the Commissioner." JA345. It further provides that "the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion." *Id.* Goodell appointed himself to serve as the appellate arbitrator.

Following a hearing, Goodell issued a decision affirming the discipline. In what the district court called a "quantum leap," JA1458, and Chief Judge

Katzmann called a "strained," "murky" and "shifting" explanation "found for the first time in the Commissioner's decision," slip op. 6, 9 (dissent), Goodell upheld the suspension based on Brady's supposedly having "participated" in a conspiratorial "scheme," his having given gifts to the employees who allegedly deflated the footballs, and his ostensible obstruction of the investigation. SPA48-49, 51, 54-56. Neither the Wells Report nor the disciplinary order on appeal made *any* of these findings or purported to impose discipline on these grounds.

Moreover, although Brady's defense had specifically cited and relied heavily on the collectively-bargained penalty provisions for equipment-related violations, Goodell's decision ignored them. *See* JA345, 366-503. In fact, rather than cite these provisions or discuss them, Goodell stated that his decision was based "principally" on the penalty for violating the NFL's steroid policy. SPA57 & n.17.

3. The district court vacated Goodell's arbitral award. It held that the arbitration was fundamentally unfair, and that Brady lacked notice that his conduct was punishable by suspension rather than fines. The court concluded that the collectively-bargained penalty schedule—including the critical provision that "***[f]irst offenses will result in fines***"—put Brady "on notice [only] that equipment violations . . . could result in fines." SPA28, 30.

4. A divided panel of this Court reinstated the arbitral award. The majority held that Goodell did not exceed his authority as an appellate arbitrator by

upholding the suspension on new grounds because "[n]othing in Article 46 [of the CBA] limits the authority of the arbitrator to examine or reassess the factual basis for a suspension." Slip op. 20. The majority also held that Goodell's failure even to mention the collectively-bargained penalty provisions for equipment-related violations was excusable because it was within his discretion to do so, and because they did not specifically mention ball deflation. *Id*. at 16, 18.

Chief Judge Katzmann dissented. He stated that "[w]hen the Commissioner, acting in his capacity as an arbitrator, changes the factual basis for the disciplinary action after the appeal hearing concludes, he undermines the fair notice for which the [NFLPA] bargained, deprives the player of an opportunity to confront the case against him, and, it follows, exceeds his limited authority under the CBA to decide 'appeals' of disciplinary decisions." Slip op. 1 (dissent). He noted that "[t]he Commissioner failed to even consider a highly relevant alternative penalty"—a "deficiency [that], especially when viewed in combination with the shifting rationale for Brady's discipline, leaves me to conclude that the Commissioner's decision reflected his own brand of industrial justice." *Id*. (quotation omitted). "It is ironic," Judge Katzmann observed, "that a process designed to ensure fairness has been unused unfairly against one player." Slip op. 9 (dissent).

REASONS FOR GRANTING REHEARING

Arbitration under the Labor Management Relations Act "is strictly a matter

of consent." *Granite Rock Co. v. Int'l Bh'd of Teamsters*, 561 U.S. 287, 299 (2010) (quotation omitted). "[P]arties are generally free to structure their arbitration agreements as they see fit," including the "rules under which any arbitration will proceed." *Stolt-Nielsen*, 559 U.S. at 683 (quotation omitted). The panel majority deviated from these fundamental principles, creating conflicts with other courts and erasing collectively-bargained rights. Rehearing is warranted.

I. The Panel Opinion Conflicts With *Stolt-Nielsen* And Bedrock Principles Of Labor Law By Approving An Award That Exceeded The CBA's Grant Of "Appellate" Authority Over Disciplinary Decisions.

In *Stolt-Nielsen*, the Supreme Court reaffirmed that an arbitration award must be vacated "when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice." 559 U.S. at 671 (brackets and quotation omitted). In that case, the arbitrators permitted class arbitration even though the parties' agreement did not authorize it. The Court vacated the arbitration award, holding that it was error to treat "the agreement's silence on the question of class arbitration as dispositive." *Id*. at 684. The Court rejected the dissent's view that the dispute merely involved the "'procedural mode'" of resolving the claims, explaining that the relevant question was "whether the parties *agreed to authorize* class arbitration." *Id*. at 687. Declining to infer authorization from the absence of language *prohibiting* class arbitration, the Court held that because the agreement did not *affirmatively authorize* the "procedural

mode" of dispute resolution the arbitrators used, they exceeded their authority. *Id*.

Following *Stolt-Nielsen*, many courts of appeals have held that an arbitrator must exercise only those powers expressly delegated to him by the parties. For example, in *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 597 (6th Cir. 2013), the court held that silence or ambiguity in the arbitration agreement does *not* give the arbitrator authority to resolve issues that "are fundamental to the manner in which the parties will resolve their disputes." *See also, e.g.*, *Opalinski v. Robert Half Intern. Inc*., 761 F.3d 326, 331 (3d Cir. 2014) ("an arbitrator has the power to decide an issue only if the parties have authorized the arbitrator to do so"). These courts recognize that arbitrators may only exercise "contractually delegated authority," *Eastern Assoc. Coal Corp. v. United Mine Workers*, 531 U.S. 57, 62 (2000), and do not have discretion to exercise powers the parties did not give them.

The panel majority took a conflicting approach, holding that "[n]othing in Article 46 *limits* the authority of the arbitrator to examine or reassess the factual basis for a suspension." Slip op. 20 (emphasis added). That gets it exactly backward. Under *Stolt-Nielsen*, the question is whether the parties *affirmatively authorized* the arbitrator to do more than decide an appeal from a disciplinary decision. The plain language of the CBA answers that question. *See* JA345. As Chief Judge Katzmann correctly explained, the *only* authority the CBA granted the arbitrator was "to decide 'appeals' of disciplinary decisions." Slip op. 1 (dissent).

The panel majority's ruling also conflicts with the fundamental labor-law principle that an employer sanction "must stand or fall upon the reason given at the time of" the sanction. ELKOURI & ELKOURI, HOW ARBITRATION WORKS 8-83 (7th ed. 2012); *see also Misco*, 484 U.S. at 40 n.8. Indeed, this Court has recognized, in the context of arbitrations governed by CBAs, that "the word 'appeal' ordinarily indicat[es] a review of proceedings already had, not a trial de novo." *Int'l Union v. Nat'l Elevator Indus.*, 772 F.2d 10, 13 (2d Cir. 1985).

Here, Goodell did far more than *review* the stated grounds for the disciplinary decision that was appealed to him. He identified *new* grounds for the discipline—and affirmed Brady's suspension based on those new grounds. Although the majority acknowledged these shifting grounds, it upheld Goodell's ruling on the theory that his "reassessment of the facts" was "within his discretion." Slip op. 21-22.

Affirming discipline on grounds not even *mentioned* in the disciplinary decision under review exceeded Goodell's power under the CBA to decide "appeals." There are countless collective bargaining arrangements that provide for appeal following the initial notice of discipline, and in no case before *this* one has a court upheld a labor arbitrator's decision to affirm punishment on new grounds. The majority's decision cripples the ability of employees to challenge workplace discipline. Had Brady known, for example, that his alleged role in the purported

gift-giving scheme would be a ground for the discipline, he easily could have introduced overpowering evidence during the arbitration to rebut that charge. The majority's decision deprives employees of their right to fair notice of the conduct that could subject them to punishment.

The majority noted that the CBA allows a "hearing" before an arbitrator, and stated that it would be "incoherent" to "insist that no new findings or conclusions" could be based on the expanded hearing record. Slip op. 20. This is an egregious misstatement of labor law. The authority to take evidence to determine whether the *existing* grounds for discipline are justified is not a license for the arbitrator to develop *new* grounds for discipline—and to affirm a penalty based on conduct that differs from the conduct that warranted the punishment in the first place. *See* Elkouri, *supra*, at 15-58 ("[A]rbitrators have drawn a distinction between additional *grounds* for discharge, which remain inadmissible, and *evidence* of pre- or post-discharge conduct relevant to the originally stated grounds.").

The panel decision also creates an untenable situation for both employers and employees by injecting uncertainty into the dispute-resolution process. CBAs commonly provide for an initial disciplinary decision followed by an appeal to an arbitrator. If that arbitrator has the power to act in a non-appellate capacity—by upholding discipline for reasons not given in the order under review—it will deter employees from invoking their appeal rights for fear the arbitrator could search for

alternative grounds for punishment. Likewise, employers value the efficiency and predictability of arbitration. If, however, arbitrators are not confined to the authority expressly granted under the CBA—if they are free ignore probative CBA terms and apply their own free-ranging conceptions of industrial justice—labor arbitration becomes a source of turmoil rather than a fair and consistent method of dispute resolution under the rule of law.

II. The Panel Opinion Conflicts With *Boise Cascade* And Other Decisions Holding That Vacatur Is Warranted Where An Arbitrator Fails To Address Critical Provisions In The CBA.

Brady's defense relied on the collectively-bargained penalty schedule for equipment-related violations—and the provision stating that "***[f]irst offenses will result in fines***." Brady argued that these provisions barred Goodell from suspending him for the alleged tampering with footballs. Brady also argued that, at a minimum, the penalty schedule was highly relevant to determining an appropriate sanction because it provided an objective, collectively-bargained benchmark of penalties for comparable conduct. For example, a violation of the prohibition on stickum—a substance that, like deflating a football, enhances a player's grip, provides a competitive advantage, and avoids referee detection—warrants a fine of $8,268 ($16,537 for aggravated cases). Slip op. 6 (dissent).

Although these collectively bargained penalty provisions were a critical part of Brady's defense, Goodell failed even to *mention* them. Instead, he looked to the

applicable punishment for steroid use. SPA57. He did not explain why the steroid provision was more relevant to determining the penalty for an equipment-related violation than the penalty schedule for equipment-related violations. As Chief Judge Katzmann noted, "one would have expected the Commissioner to at least fully consider other alternative and collectively bargained-for penalties, even if he ultimately rejected them." Slip op. 6 (dissent). This was particularly true given that the NFL conceded that the penalty schedule's potential applicability.

The majority's holding—that requiring Goodell to at least consider the collectively-bargained schedule of penalties would not be "consistent with our obligation to afford arbitrators substantial deference" (Slip op. 18)—directly conflicts with the rule applied in the Eighth Circuit. In *Boise Cascade*, 309 F.3d at 1084, the court held that deference to an arbitrator's award does *not* extend to the arbitrator's "fail[ure] to discuss probative terms" of the parties' agreement. The court vacated the arbitral award before it for that very reason, explaining that "given the decision's silence on this crucial issue, [the court could not] know whether [the arbitrator] simply overlooked" the probative provision "or whether he obliquely construed it." *Id.*; *accord George A. Hormel & Co. v. United Food & Commercial Workers*, 879 F.2d 347, 351 (8th Cir. 1989). The Eighth Circuit's approach properly recognizes that judicial deference does not extend to determinations that an arbitrator should have made, but did not.

The majority sought to prop up Goodell by reasoning that the CBA's list of penalties may have been inapplicable because it did not specifically mention deflating footballs. Slip op. 16. But the parties did not bargain for the *panel majority's* interpretation of the CBA; they "bargained for the *arbitrator's* construction of their agreement." *E. Assoc. Coal Corp. v. Mineworkers*, 531 U.S. 57, 62 (2000) (quotation omitted and emphasis added). The majority's emphasis on the "deference" due arbitrators rings hollow given that the *majority* ultimately supplied its *own* interpretation of the critical contract terms rather than require the *arbitrator* to do so. *See Boise Cascade*, 309 F.3d at 1084 (concluding that *had* the arbitrator construed the probative terms, "we would be obliged to affirm.") Even under *Clinchfield Coal Co. v. District 28, UMW*, 720 F.2d 1365 (4th Cir. 1983) (cited at slip op. 15)—a case that applies a more relaxed standard than the Eighth Circuit's standard—the majority's approach is wrong because "the arbitrator fail[ed] to discuss critical contract terminology, which terminology might reasonably require an opposite result" (720 F.2d at 1369), a point the NFL effectively conceded by acknowledging that the equipment-violation provisions are "potentially applicable" to Brady's case. NFL Br. 43.

Had the majority applied the Eighth Circuit's rule that arbitrators must at least *acknowledge* probative terms of the parties' agreement, it would have vacated Goodell's decision, as there can be no serious dispute that penalty provisions for

equipment-related violations are "probative" in determining the appropriate penalty for an equipment-related violation. Indeed, the NFL has conceded that footballs are "equipment." JA1192, 504-05.

Under the panel majority's misguided approach, an arbitrator is now free to ignore critical provisions of a CBA reflecting collectively-bargained penalties. This holding will create great uncertainty in labor arbitrations, as employers and employees alike reasonably assume and anticipate that an arbitrator will use a collectively bargained penalty schedule in determining the appropriate sanction in a particular case—or at least explain why he believes the penalty schedule is inapplicable. More broadly, employers and employees alike reasonably assume that the arbitrator will not simply *ignore* provisions of a CBA that form the basis of one party's claim or defense. Even if the arbitrator believes the provisions in question are inapplicable to a particular dispute, the arbitrator must at least *acknowledge* them—thereby confirming that the arbitrator is actually applying the CBA and not "doling out his own brand of industrial justice." Slip op. 8 (dissent).

CONCLUSION

The panel decision stands in stark conflict with fundamental rules of labor law and undermines the rights of union members and employers alike. This Court should grant rehearing.

Respectfully submitted,

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May 23, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2016, I caused the foregoing Petition for Panel Rehearing or Rehearing En Banc to be filed with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit via the Court's CM/ECF system. I further certify that service was accomplished on all parties via electronic filing.

____
Theodore B. Olson