UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, on its own behalf and on behalf of EZEKIEL ELLIOTT,	§	
Petitioner,	§	CASE NO. 4:17-cv-00615
v.	§	
NATIONAL FOOTBALL LEAGUE and NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,	§	PETITIONERS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION
Respondents.	§	

In its Opposition to Petitioners' Emergency Motion for Temporary Restraining Order or Preliminary Injunction ("Opposition"), the NFL declines to engage Petitioners' showing that, in an arbitration entirely about credibility and the existence of "credible evidence," it was fundamentally unfair to deny Elliott essential witnesses and documents. Instead, the NFL principally and predictably tells the Court it is powerless to act. Each of the NFL's arguments about jurisdiction, ripeness, standing and the Norris-LaGuardia Act ("NLGA") is incorrect. And, as we will show at the hearing, Elliott meets the four elements for preliminary injunctive relief.

ARGUMENT

A. The Court Has Jurisdiction, Petitioners Have Standing, and Their Claim is Ripe

Section 301 of the Labor Management Relations Act ("LMRA") provides this Court with subject-matter jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization . . . in any district," such as this one, "in which its duly authorized officers or agents are engaged in representing or acting for employee members." 29 U.S.C.A. § 185(a), (c). The NFL's Opposition ignores the critical point that the arbitral process at issue *already* violates both labor law and the NFL-NFLPA CBA and therefore vests jurisdiction in this Court under Section 301 of the LMRA. Indeed: *there are no more arbitral proceedings left to exhaust*.

The NFL rests its principal response on the Federal Arbitration Act ("FAA"), but these arguments can be dismissed out of hand because the LMRA—not the FAA—supplies the jurisdictional basis for this case. As the NFL has previously and repeatedly argued: "§ 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, [] governs disputes pursuant to collectively-bargained agreements." NFL Def.'s Ltr. Resp. at 1 & n.1, *Johnson v. NFLPA et al.*, No. 17-cv-5131-RJS (S.D.N.Y. filed Aug 22, 2017), ECF No. 94 (arguing it was improper for petitioner to seek vacatur under the FAA). LMRA courts look to FAA cases for guidance on

whether to vacate a labor award, but it is the LMRA that confers jurisdiction.

As for the NFL's LMRA authorities, they stand for the principle that federal courts should not rule on issues regarding ongoing labor arbitration proceedings until the plaintiffs have exhausted their arbitral remedies. The Petition here does not do otherwise. The arbitral record is closed and the NFL does not identify anything that is left for the NFLPA or Elliott to do in the arbitration.[1] Where a plaintiff follows "the CBA procedure [for] filing a grievance . . . and appealing that decision to arbitration," a court may conclude that the plaintiff "has exhausted all . . . administrative remedies under the CBA." *Frost v. Harper*, 2001 WL 34063534, at *3 (S.D. Tex. Nov. 23, 2001); *see also* S*cott v. Anchor Motor Freight, Inc.*, 496 F.2d 276, 279 (6th Cir. 1974); *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 163 (1983) (plaintiff must "attempt to exhaust any grievance or arbitration remedies provided in [a] collective bargaining agreement" before seeking relief in federal court).

The NFL's position here would eviscerate the Court's authority to issue equitable relief. The Award will take immediate effect and cause (additional) irreparable harm to Elliott. If the NFLPA and Elliott were forced to wait for the Award to be rendered before filing the Petition, no court would have the opportunity to stop Elliott's unlawful suspension in its tracks. Needless to say, a litigant who faces an imminent threat of irreparable harm need not wait until he is injured to file a lawsuit—preempting such harm is the very essence of requests for preliminary injunctive relief. For example, in *Lujan v. Defenders of Wildlife*, cited by the NFL, the Supreme Court found that "injury in fact" giving rise to jurisdiction may be "actual ***or imminent***." 504 U.S. 555, 560 (1992). Injunctions are issued when the bulldozer is on the front lawn—not after it has razed the

[1] In contrast, for example, in the *Pennell* matter referred to in the NFL's Motion to Dismiss, the petitioner sought to enjoin *the arbitration itself*.

house. That Arbitrator Henderson could theoretically vacate the discipline simply means that the ongoing harm to Elliott's reputation might stop and Petitioners would no longer seek a TRO. Indeed, Arbitrator Henderson has now advised the parties that he intends to issue his decision by the close of business today. The NFL's attempt to prevent Petitioners from enjoining the immediate harm that would ensue if Henderson affirms the suspension is without legal merit.

The NFL's "standing" argument fails for similar reasons. The NFL argues that Elliott does not satisfy the standing requirement of "injury in fact" and a "personal interest that must exist at the commencement of the litigation." Motion to Dismiss at 8. But at the time he filed the Petition, Elliott's labor law and CBA rights to a fundamentally fair arbitration had already been breached, he had already suffered reputational harm, and the threat of a suspension was imminent.

The NFL's argument that Elliott's claims also are not ripe because the Award is "speculative" or "hypothetical" is yet another misstatement. There is nothing "speculative" about Elliott's vacatur claim—it is based on the lack of fundamental fairness in an arbitration proceeding that is complete and in a record presently before the Court. No aspect of Petitioners' arguments about the unfairness of the proceedings hinge on the outcome of the Award.

Importantly, in conducting a ripeness review, courts balance "the hardship of withholding decision and the fitness of the case for judicial resolution," bearing in mind that ripeness "'is informed by additional circumstances that awaiting [further development of the case] may mitigate if not cure.'" *Roman Catholic Diocese of Dallas v. Sebelius*, 927 F. Supp. 2d 406, 423-424 (N.D. Tex. 2013) (quoting *Brooklyn Union Gas Co. v. FERC*, 190 F.3d 369, 373 (5th Cir. 1999) (alteration in original). "Since ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of the [initial filing] that must govern." *Id.* at 424 (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974)). This case is ripe for judicial

intervention, and without it, Elliott will suffer the additional irreparable harm of missed practices and games before he has even a chance to exercise his LMRA rights.

B. The NLGA Does Not Preclude a TRO

Although one would not know it from the NFL's Opposition, the NLGA does not bar injunctive relief in *all* "labor dispute[s]"; the NLGA simply prohibits injunctive relief that is "contrary to the public policy declared in [the NLGA]," which was passed primarily to protect organized activities of workers from court injunctions and concerns itself "primarily . . . with injunctions against strikes." 29 U.S.C. § 101; *Burlington N. R.R. Co. v. Bhd. of Maint. of Way Emps.*, 481 U.S. 429, 437 (1987). Accordingly, both the Supreme Court and the Fifth Circuit have held that the Act's prohibition against injunctions is inapplicable where the relief requested would not operate to enjoin a strike or other peaceful, concerted labor activity. *See, e.g., Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 253 (1970) (holding that a federal court may enjoin the breach of a collective bargaining agreement to preserve the arbitration process under the contract despite the NLGA); *Jacksonville Maritime Ass'n v. Int'l Longshoremen's Ass'n*, 571 F.2d 319 (5th Cir. 1978). Here, Petitioners seek injunctive relief to enforce—not undermine—the CBA, relief which is consistent with the NLGA. *See Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 454 (1957) ("If [parties] can break [labor] agreements with relative impunity, then such agreements do not tend to stabilize industrial relations."); *Dist. Lodge 26 of Int'l Ass'n of Machinists & Aerospace Workers v. United Techs. Corp.*, 610 F.3d 44, 55 (2d Cir. 2010).

Indeed, as the NFL knows, there are a number of cases holding that the NLGA does not prevent injunctive relief against sports leagues enforcing illegal conduct against particular players. *See, e.g., Mackey v. NFL*, 543 F.2d 606, 623 (8th Cir. 1976) (affirming injunction against the NFL's antitrust violations notwithstanding the NLGA); *Jackson v. NFL*, 802 F. Supp. 226, 234-35 (D. Minn. 1992) (holding NLGA did not apply at all or, alternatively, relief could still issue

based on the League's non-violent antitrust violation and the traditional factors for determining equitable relief); *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971) (enjoining NBA from enforcing an illegal bylaw), *reinstated by Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204 (1971). This issue was most recently addressed in *Starcaps*, where the District of Minnesota held that the NLGA is "not a blanket prohibition on any injunction in a labor case" and does not preclude an injunction "against the suspensions of particular players whose arbitration awards, according to the NFLPA, are tainted by the NFL's conduct." *NFLPA v. NFL ("Starcaps")*, 598 F. Supp. 2d 971, 978 (D. Minn. 2008). Nor was the "illegal acts" test invoked by the NFL held relevant to the court's determination in this context. *See id.* at 983.

C. Petitioners Satisfy the Elements for Preliminary Injunctive Relief

Petitioners will respond at the hearing to the NFL's limited arguments concerning the merits of the TRO Motion. We note now, however, that *Brady* and *Peterson* (in which district courts initially vacated arbitration decisions) principally concerned notice issues not present here and involved the deprivation of witnesses or evidence which the appeals court found to be merely collateral. As for *Holmes v. NFL*, it concerned a player's appeal under a drug policy *not* subject to the "credible evidence" standard set forth in Commissioner Goodell's Personal Conduct Policy and at the heart of the proceedings below. Nor did *Holmes* concern the present situation in which the player was denied his right to know Goodell's basis for discipline (*i.e.*, was Goodell informed that his Director of Investigations believed there was no such basis?) or a he-said/she-dispute in which the player was denied the right to cross-examine his accuser and to exculpatory witness statements. In short, the *Holmes* court's conclusion that the player was not denied evidence that could have made a difference on the merits of his appeal has no application here.

Dated: September 5, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically in compliance with Local Rule CV-5(a).

/s/ *Thomas M. Melsheimer*
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