**NFL MANAGEMENT COUNCIL v. NFL PLAYERS ASS’N**

820 F.2d 527 (2d Cir. 2016)

Barrington D. Parker, *Circuit Judge*:

This case involves an arbitration arising from New England Patriots quarterback Tom Brady's involvement in a scheme to deflate footballs used during the 2015 American Football Conference Championship Game to a pressure below the permissible range. Following an investigation, the NFL suspended Brady for four games.  Brady requested arbitration and League Commissioner Roger Goodell, serving as arbitrator, entered an award confirming the discipline. The parties sought judicial review and the district court vacated the award, reasoning that Brady lacked notice that his conduct was prohibited and punishable by suspension, and that the manner in which the proceedings were conducted deprived him of fundamental fairness. The League has appealed and we now reverse.

The basic principle driving both our analysis and our conclusion is well established: a federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential—indeed, among the most deferential in the law. Our role is not to determine for ourselves whether Brady participated in a scheme to deflate footballs or whether the suspension imposed by the Commissioner should have been for three games or five games or none at all. Nor is it our role to second-guess the arbitrator's procedural rulings. Our obligation is limited to determining whether the arbitration proceedings and award met the minimum legal standards established by the *Labor Management Relations Act*, [*29 U.S.C. § 141 et seq.*](http://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GRS1-NRF4-40R8-00000-00&context=) (the "*LMRA*"). We must simply ensure that the arbitrator was "even arguably construing or applying the contract and acting within the scope of his authority" and did not "ignore the plain language of the contract." [*United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G5R0-003B-41XC-00000-00&context=). These standards do not require perfection in arbitration awards. Rather, they dictate that even if an arbitrator makes mistakes of fact or law, we may not disturb an award so long as he acted within the bounds of his bargained-for authority.

Here, that authority was especially broad. The Commissioner was authorized to impose discipline for, among other things, "conduct detrimental to the integrity of, or public confidence, in the game of professional football." In their collective bargaining agreement, the players and the League mutually decided many years ago that the Commissioner should investigate possible rule violations, should impose appropriate sanctions, and may preside at arbitrations challenging his discipline. Although this tripartite regime may appear somewhat unorthodox, it is the regime bargained for and agreed upon by the parties, which we can only presume they determined was mutually satisfactory.

...

**BACKGROUND**

On January 18, 2015, the New England Patriots and the Indianapolis Colts played in the American Football Conference Championship Game at the Patriots' home stadium in Foxborough, Massachusetts to determine which team would advance to Super Bowl XLIX. During the second quarter, Colts linebacker D'Qwell Jackson intercepted a pass thrown by Brady and took the ball to the sideline, suspecting it might be inflated below the allowed minimum pressure of 12.5 pounds per square inch. After confirming that the ball was underinflated, Colts personnel informed League officials, who decided to test all of the game balls at halftime. Eleven other  [\*533]  Patriots balls and four Colts balls were tested using two air gauges, one of which had been used before the game to ensure that the balls were inflated within the permissible range of 12.5 to 13.5 psi. While each of the four Colts balls tested within the permissible range on at least one of the gauges, all eleven of the Patriots balls measured below 12.5 psi on both.

On January 23, the National Football League announced that it had retained Theodore V. Wells, Jr., Esq., and the law firm of Paul, Weiss, Rifkind, Wharton & Garrison to conduct an independent investigation into whether there had been improper ball tampering before or during the game. That investigation culminated in a 139-page report released on May 6, which concluded that it was "more probable than not" that two Patriots equipment officials—Jim McNally and John Jastremski—had "participated in a deliberate effort to release air from Patriots game balls after the balls were examined by the referee." Joint App. at 97.[[1]](#footnote-1)2 Specifically,  the Report found that McNally had removed the game balls from the Officials Locker Room shortly before the game, in violation of standard protocol, and taken them to a single-toilet bathroom, where he locked the door and used a needle to deflate the Patriots footballs before bringing them to the playing field.

In addition to videotape evidence and witness interviews, the investigation team examined text messages exchanged between McNally and Jastremski in the months leading up to the AFC Championship Game. In the messages, the two discussed Brady's stated preference for less-inflated footballs. McNally also referred to himself as "the deflator" and quipped that he was "not going to espn . . . yet," and Jastremski agreed to provide McNally with a "needle" in exchange for "cash," "newkicks," and memorabilia autographed by Brady. Joint App. at 99-102. The Report also relied on a scientific study conducted by Exponent, an engineering and scientific consulting firm, which found that the underinflation could not "be explained completely by basic scientific principles, such as the Ideal Gas Law," particularly since the average pressure of the Patriots balls was significantly lower than that of the Colts balls. Joint App. at 104-08. Exponent further concluded that a reasonably experienced individual could deflate thirteen footballs using a needle in well under the amount of time that McNally was in the bathroom.[[2]](#footnote-2)3

The investigation also examined Brady's potential role in the deflation scheme. Although the evidence of his involvement was "less direct" than that of McNally's or Jastremski's, the Wells Report concluded that it was "more probable than not" that Brady had been "at least generally aware" of McNally and Jastremski's actions, and that it was "unlikely that an equipment assistant and a locker room attendant would deflate game balls without Brady's" "knowledge," "approval," "awareness," and "consent." Joint App. at 112, 114. Among other things, the Report cited a text message exchange between McNally and Jastremski in which McNally complained about Brady and threatened to overinflate the game balls, and Jastremski replied that he had "[t]alked to [Tom] last night" and "[Tom] actually brought you up and said you must have a lot of stress trying to get them done." Joint App. at 112. The investigators also observed that Brady was a "constant reference point" in McNally and Jastremski's discussions about the scheme, Joint App. at 112, had publicly stated his preference for less-inflated footballs in the past, and had been "personally involved in [a] 2006 rule change that allowed visiting teams to prepare game balls in accordance with the preferences of their quarterbacks," Joint App. at 114.

Significantly, the Report also found that, after more than six months of not communicating by phone or message, Brady and Jastremski spoke on the phone for approximately 25 minutes on January 19, the day the investigation was announced. This unusual pattern of communication continued over the next two days. Brady had also taken the "unprecedented step" on January 19 of inviting Jastremski to the quarterback room, and had sent Jastremski several text messages that day that were apparently designed to calm him. The Report added that the investigation had been impaired by Brady's refusal "to make available any documents or electronic information (including text messages and emails)," notwithstanding an offer by the investigators to allow Brady's counsel to screen the production. Joint App. at 116.

In a letter dated May 11, 2015, NFL Executive Vice President Troy Vincent, Sr., notified Brady that Goodell had authorized a four-game suspension of him pursuant to Article 46 of the Collective Bargaining Agreement between the League and the NFL Players Association (the "Association" or the "NFLPA") for engaging in "conduct detrimental to the integrity of and public confidence in the game of professional football." Joint App. at 329.[[3]](#footnote-3)4 The disciplinary letter cited the Wells Report's conclusions regarding Brady's awareness and knowledge of the scheme, as well as his "failure to cooperate fully and candidly with the investigation, including by refusing to produce any relevant electronic evidence (emails, texts, etc.) despite being offered extraordinary safeguards by the investigators to protect unrelated personal information." Joint App. at 329.

Brady, through the Association, filed a timely appeal of the suspension, and the Commissioner exercised his discretion under the CBA to serve as the hearing officer. The Association sought to challenge the factual conclusions of the Wells Report, and also argued that the Commissioner had improperly delegated his authority to discipline players pursuant to the CBA. Prior to the hearing, the Association filed several motions, including a motion to recuse the Commissioner, a motion to compel NFL Executive Vice President and General Counsel Jeff Pash to testify regarding his involvement in the preparation of the Wells Report, and a motion to compel the production of Paul, Weiss's internal investigation notes.

The Commissioner denied the motions in decisions issued on June 2 and June 22, 2015. He reasoned that his recusal was not warranted because he did not "delegate [his] disciplinary authority to Mr. Vincent" and did "not have any first-hand knowledge of any of the events at issue." Special App. at 67-68. The Commissioner also declined to compel Pash's testimony .... As to the Paul, Weiss investigation notes, the Commissioner ruled that the CBA did not require their production and, in any event, the notes played no role in his disciplinary decision.

On June 23, the Commissioner held a hearing involving nearly ten hours of sworn testimony and argument and approximately 300 exhibits. Shortly before the hearing, it was revealed that on March 6—the same day that he was to be interviewed by the Wells investigative team—Brady had "instructed his assistant to destroy the cellphone that he had been using since early November 2014, a period that included the AFC Championship Game and the initial weeks of the subsequent investigation," despite knowing that the investigators had requested information from the phone several weeks before. Special App. at 42. Although Brady testified that he was following his ordinary practice of disposing of old cell phones in order to protect his personal privacy, he had nonetheless retained phones that he had used before and after the relevant time frame.

On July 28, the Commissioner issued a final decision affirming the four-game suspension. Based upon the newly revealed evidence regarding the destruction of the cell phone, the Commissioner found that Brady had not only failed to cooperate with the investigation, but "made a deliberate effort to ensure that investigators would never have access to information that he had been asked to produce." Special App. at 54. The Commissioner consequently drew an adverse inference that the cell phone would have contained inculpatory evidence, and concluded:

(1) Mr. Brady participated in a scheme to tamper with the game balls after they had been approved by the game officials for use in the AFC Championship Game and (2) Mr. Brady willfully obstructed the investigation by, among other things, affirmatively arranging for destruction of his cellphone knowing that it contained potentially relevant information that had been requested by the investigators.

Special App. at 54. Finally, the Commissioner analogized Brady's conduct to that of steroid users, whom he believed seek to gain a similar systematic competitive advantage, and consequently affirmed that, in his view, the four-game suspension typically imposed on first-time steroid users was equally appropriate in this context.

The League commenced an action the same day in the United States District Court for the Southern District of New York (Berman, *J.*), seeking confirmation of the award under the *LMRA*. The Association brought an action to vacate the award in the United States District Court for the District of Minnesota, which was subsequently transferred to the Southern District.

On September 3, the district court issued a decision and order granting the Association's motion to vacate the award and denying the League's motion to confirm. [*Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 125 F. Supp. 3d 449 (S.D.N.Y. 2015)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GV5-MJF1-F04F-000C-00000-00&context=). The court reasoned that Brady lacked notice that he could be suspended for four games because the provisions applicable to his conduct provided that only fines could be imposed. The court also held that the award was defective because the Commissioner deprived Brady of fundamental fairness by denying the Association's motions to compel the production of Paul, Weiss's internal notes and Pash's testimony regarding his involvement with the Wells Report. The League timely appealed, and we now reverse.

**STANDARD OF REVIEW**

We review a district court's decision to confirm or vacate an arbitration award *de novo* on questions of law and for clear error on findings of fact. [*Wackenhut Corp. v. Amalgamated Local 515, 126 F.3d 29, 31 (2d Cir. 1997)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RJ6-G350-00B1-D0RN-00000-00&context=). Because this dispute involves the assertion of rights under a collective bargaining agreement, our analysis is governed by *section 301* of the LMRA. [*Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509, 121 S. Ct. 1724, 149 L. Ed. 2d 740 (2001)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:431Y-D9S0-004C-200T-00000-00&context=).

The *LMRA* establishes a federal policy of promoting "industrial stabilization through the collective bargaining agreement," with particular emphasis on private arbitration of grievances. [*United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HPP0-003B-S0CJ-00000-00&context=). The Act embodies a "clear preference for the private resolution of labor disputes without government intervention." [*IBEW, Local 97 v. Niagara Mohawk Power Corp., 143 F.3d 704, 714 (2d Cir. 1998)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SN3-S640-0038-X22B-00000-00&context=).

Under this framework of self-government, the collective bargaining agreement is not just a contract, but "a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." [*Warrior, 363 U.S. at 578*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HPP0-003B-S0CJ-00000-00&context=). Collective bargaining agreements are not imposed by legislatures or government agencies. Rather, they are negotiated and refined over time by the parties themselves so as to best reflect their priorities, expectations, and experience. Similarly, the arbitrators are chosen by the parties because of their expertise in the particular business and their trusted judgment to "interpret and apply [the] agreement in accordance with the 'industrial common law of the shop' and the various needs and desires of the parties." [*Alexander v. Gardner-Denver Co., 415 U.S. 36, 53, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CFC0-003B-S4D0-00000-00&context=). The arbitration process is thus "part and parcel of the ongoing process of collective bargaining." [*Misco, 484 U.S. at 38*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G5R0-003B-41XC-00000-00&context=).

Our review of an arbitration award under the *LMRA* is, accordingly, "very limited." [*Garvey, 532 U.S. at 509*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:431Y-D9S0-004C-200T-00000-00&context=). We are therefore not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement, but inquire only as to whether the arbitrator acted within the scope of his authority as defined by the collective bargaining agreement. Because it is the arbitrator's view of the facts and the meaning of the contract for which the parties bargained, courts are not permitted to substitute their own. [*Misco, 484 U.S. at 37-38*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G5R0-003B-41XC-00000-00&context=). It is the arbitrator's construction of the contract and assessment of the facts that are dispositive, "however good, bad, or ugly." [*Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2071, 186 L. Ed. 2d 113 (2013)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58MC-8R41-F04K-F014-00000-00&context=). \*\*\*

... our task is simply to ensure that the arbitrator was "even arguably construing or applying the contract and acting within the scope of his authority" and did not "ignore the plain language of the contract." [*Misco, 484 U.S. at 38*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G5R0-003B-41XC-00000-00&context=). Even failure to "follow arbitral precedent" is no "reason to vacate an award." [*Wackenhut, 126 F.3d at 32*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RJ6-G350-00B1-D0RN-00000-00&context=). As long as the award "'draws its essence from the collective bargaining agreement' and is not merely the arbitrator's 'own brand of industrial justice,'" it must be confirmed. [*Niagara Mohawk, 143 F.3d at 714*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3SN3-S640-0038-X22B-00000-00&context=) (quoting [*United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960))*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HPP0-003B-S0CK-00000-00&context=); *see also* [*Garvey, 532 U.S. at 509*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:431Y-D9S0-004C-200T-00000-00&context=); [*187 Concourse Assocs. v. Fishman, 399 F.3d 524, 527 (2d Cir. 2005)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FKJ-VSV0-0038-X105-00000-00&context=).[[4]](#footnote-4)5 If the arbitrator acts within the scope of this authority, the remedy for a dissatisfied party "is not judicial intervention," but "for the parties to draft their agreement to reflect the scope of power they would like their arbitrator to exercise." [*United Bhd. of Carpenters v. Tappan Zee Constr., LLC, 804 F.3d 270, 275 (2d Cir. 2015)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5H66-BSS1-F04K-J02Y-00000-00&context=) (internal quotation marks omitted)  (quoting [*T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 345 (2d Cir. 2010))*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XJC-1BJ0-YB0V-D03P-00000-00&context=). Against this legal backdrop, we turn to the decision below and the arguments advanced on appeal.

**DISCUSSION**

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The district court identified three bases for overturning Brady's suspension: (1) the lack of adequate notice that deflation  of footballs could lead to a four-game suspension, (2) the exclusion of testimony from Pash, and (3) the denial of access to the investigative notes of the attorneys from Paul, Weiss who prepared the Wells Report. We conclude that each of these grounds is insufficient to warrant vacatur and that none of the Association's remaining arguments have merit.

**I. Lack of Adequate Notice**

The parties agree that the "law of the shop" requires the League to provide players with advance notice of "prohibited conduct and potential discipline." The district court identified several grounds for concluding that Brady had no notice that either his conduct was prohibited or that it could serve as a ground for suspension.

**A. The Player Policies**

The Association's chief ground for vacatur, relied upon by the district court, is that the Commissioner improperly suspended Brady pursuant to the "conduct detrimental" clause of Article 46 because Brady was only on notice that his conduct could lead to a fine under the more specific "Discipline for Game-Related Misconduct" section of the League Policies for Players (the "Player Policies"). These Policies, which are collected in a handbook distributed to all NFL players at the beginning of each season, include a section entitled "Other Uniform/Equipment Violations."[[5]](#footnote-5)7

The Association argues that the Commissioner was not permitted to impose a four-game suspension under Article 46 because the Player Policies mandated only a fine for equipment infractions. The Association further contends that the award is additionally defective because the Commissioner failed to make findings as to the applicability or interpretation of the Player Policies. *See* [*Clinchfield Coal Co. v. Dist. 28, United Mine Workers, 720 F.2d 1365, 1369 (4th Cir. 1983)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-Y760-003B-G2RP-00000-00&context=) ("Where . . . the arbitrator fails to discuss critical contract terminology, which terminology might reasonably require an opposite result, the award cannot be considered to draw its essence from the contract.").

[The Court suggested that the PA’s argument was flawed because of somewhat inconsistent legal positions taken during the arbitral process, but proceeded to reject it on its merits.] We conclude that the equipment provision does not apply and, in any event, the punishments listed for equipment violations are minimum ones that do not foreclose suspensions.

**1. Applicability of the Player Policies**

The Association primarily relies on a statement in the "Other Uniform/Equipment Violations" section, which provides that "First offenses will result in fines." It argues that equipment violations include "ball or equipment tampering" and "equipment tampering such as ball deflation." But the Association finds language in the "Other Uniform/Equipment Violations" provision that we cannot locate. The provision says nothing about tampering with, or the preparation of, footballs and, indeed, does not mention the words "tampering," "ball," or "deflation" at all. Moreover, there is no other provision of the Player Policies that refers to ball or equipment tampering, despite an extensive list of uniform and equipment violations ranging from the length of a player's stockings to the color of his wristbands.

On the other hand, Article 46 gives the Commissioner broad authority to deal with conduct he believes might undermine the integrity of the game. The Commissioner properly understood that a series of rules relating to uniforms and equipment does not repeal his authority vested in him by the Association to protect professional football from detrimental conduct. We have little difficulty in concluding that the Commissioner's decision to discipline Brady pursuant to Article 46 was "plausibly grounded in the parties' agreement," which is all the law requires. *See* [*Wackenhut, 126 F.3d at 32*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RJ6-G350-00B1-D0RN-00000-00&context=).

**2. 2014 Schedule of Fines**

Even were the district court and the Association correct, and they are not, that Brady could be punished only pursuant to the Player Policies and its "Other Uniform/Equipment Violations" provision, it would not follow that the only available punishment would have been a fine. While the Player Policies do specify that, with regard to "Other Uniform/Equipment Violations," "[f]irst offenses will result in fines," the 2014 Schedule of Fines, which appears five pages later and details the fines for these violations, makes clear that the "[f]ines listed below are minimums." Joint App. at 384, 389. The Schedule of Fines goes on to specify that "[o]ther forms of discipline, including higher fines and suspension may also be imposed, based on the circumstances of the particular violation." Joint App. at 389. Read in conjunction, these provisions make clear that even first offenders are not exempt from punishment, and serious violations may result in suspension. But even if other readings were plausible, the Commissioner's interpretation of this provision as allowing for a suspension would easily withstand judicial scrutiny because his interpretation would be at least "barely colorable," which, again, is all that the law requires. *See In re Andros Compania Maritima, S.A., 579 F.2d 691, 704 (2d Cir. 1978)*.

**B. Steroid Comparison**

The district court also took issue with the comparison drawn by the Commissioner between Brady's conduct and that of steroid users. In his arbitration award, the Commissioner noted that the four-game suspension typically imposed on first-time steroid users was a helpful point of comparison because, like Brady's conduct, "steroid use reflects an improper effort to secure a competitive advantage in, and threatens the integrity of, the game." Special App. at 57. \*\*\* [The appeals court rejected this argument, holding that while Brady] may have been entitled to notice of his range of punishment, it does not follow that he was entitled to advance notice of the analogies the arbitrator might find persuasive in selecting a punishment within that range.

The dissent contends that we must vacate the award because the Commissioner failed to discuss a policy regarding "stickum," which the dissent views as "a natural starting point for assessing Brady's penalty." Dissenting Op. at 7. We do not believe this contention is consistent with our obligation to afford arbitrators substantial deference, and by suggesting that the stickum policy is the more appropriate analogy, the dissent improperly weighs in on a pure sports question—whether using stickum by one player is similar to tampering with footballs used on every play. And even if the fine for stickum use is the most appropriate analogy to Brady's conduct, nothing in the CBA or our case law demands that the arbitrator discuss comparable conduct merely because we find that analogy more persuasive than others, or because we think the analogy the arbitrator chose to draw was "flawed" or "inapt." Nor does the CBA require the arbitrator to "fully explain his reasoning," Dissenting Op. at 6; it merely mandates that the hearing officer render a "written decision," Joint App. at 346. The Commissioner not only did just that, but he also explained why he found the analogy to steroid use persuasive. Not even the Association finds defect in the award on this point—this argument was never raised by the Association, either below or on appeal. While we appreciate that our dissenting colleague might view the penalty meted out to Brady as harsh, we do not believe that view supplies a sufficient basis to warrant vacatur.

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**C. General Awareness**

The district court also concluded that the award was invalid because "[n]o NFL policy or precedent provided notice that a player could be subject to discipline for general awareness of another person's alleged misconduct." [*Nat'l Football League, 125 F. Supp. 3d at 466*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GV5-MJF1-F04F-000C-00000-00&context=). This conclusion misapprehends the record. The award is clear that it confirmed Brady's discipline not because of a general awareness of misconduct on the part of others, but because Brady both "participated in a scheme to tamper with game balls" and "willfully obstructed the investigation by . . . arranging for destruction of his cellphone." Special App. at 54.

The Association takes a somewhat different tack and argues that the Commissioner was bound to the Wells Report's limited conclusion that Brady was at least "generally aware" of the inappropriate activities of Patriots equipment staff. But the Association offers no persuasive support for its contention that the universe of facts the Commissioner could properly consider was limited by the Wells Report. Nothing in Article 46 limits the authority of the arbitrator to examine or reassess the factual basis for a suspension. In fact, in providing for a hearing, Article 46 strongly suggests otherwise. Because the point of a hearing in any proceeding is to establish a complete factual record, it would be incoherent to both authorize a hearing and at the same time insist that no new findings or conclusions could be based on a record expanded as a consequence of a hearing.

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Unprompted by the Association, our dissenting colleague contends that because the Wells Report "never concluded that it was 'more probable than not' that the gifts Brady provided were intended as rewards or advance payments for deflating footballs in violation of League Rules," Dissenting Op. at 3, the Commissioner deprived Brady of notice by concluding that he "provided inducements and rewards in support of [the] scheme," Special App. at 51.

But the Wells Report was clear that its conclusion was "significantly influenced by the substantial number of communications and events consistent with [its] finding, including that [McNally] . . . received valuable items autographed by Tom Brady the week before the AFC Championship Game." Joint App. at 108. With specific regard to Brady's involvement, the Wells Report noted that "Brady [was] a constant reference point in the discussions between McNally and Jastremski about . . . items to be received by McNally." Joint App. at 112-13. And as the dissent admits, the Association questioned Brady at the hearing on this very point, and the Commissioner determined that Brady's testimony was not credible. The record establishes that Brady was on notice from the outset that the Wells Report's conclusions were "significantly influenced" by his providing McNally with autographed memorabilia, the Association confronted this allegation at the hearing, and the Commissioner rejected Brady's explanation. Brady knew that the factual predicates of his discipline (the text messages, the phone calls, the autographed memorabilia, etc.) would be at issue in the arbitration. That he chose to focus on some more than others simply reflects his own tactical decision as to how to present his case. And again, the Association never put forth this contention, either before us or in the district court below.

We therefore find that the Commissioner was within his discretion to conclude that Brady had "participated in a scheme to tamper with game balls." Because the parties agree that such conduct is "conduct detrimental," the district court erred in concluding that the Commissioner's deviation from the Wells Report's finding of general awareness was a ground for vacatur.

**D. Discipline for Non-cooperation**

The district court held and the Association contends that Brady's suspension cannot be sustained on the grounds that he obstructed the Commissioner's investigation.  The court reasoned that "[n]o player suspension in NFL history has been sustained for an alleged failure to cooperate with—or even allegedly obstructing—an NFL investigation." [*Nat'l Football League, 125 F. Supp. 3d at 465*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GV5-MJF1-F04F-000C-00000-00&context=) (internal quotation marks omitted). The League, on the other hand, argues that not only is the deliberate obstruction of a league investigation "conduct detrimental" within the meaning of Article 46, but also the destruction of the cell phone permitted the Commissioner to draw an adverse inference against Brady that supported the finding that he participated in the deflation scheme.

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For a number of reasons, the Association's assertion that Brady lacked notice that the destruction of the cell phone would be an issue in the arbitration has no support in the record. \*\*\*

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**II. Exclusion of Testimony from NFL General Counsel**

...

It is well settled that procedural questions that arise during arbitration, such as which witnesses to hear and which evidence to receive or exclude, are left to the sound discretion of the arbitrator and should not be second-guessed by the courts. [*Misco, 484 U.S. at 40*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G5R0-003B-41XC-00000-00&context=). Arbitrators do not "need to comply with strict evidentiary rules," and they possess "substantial discretion to admit or exclude evidence." [*LJL 33rd St. Assocs., LLC v. Pitcairn Props. Inc., 725 F.3d 184, 194-95 (2d Cir. 2013)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5918-0TV1-F04K-J004-00000-00&context=); *see also* [*Volt Information Sciences v. Board of Trustees, 489 U.S. 468, 476, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-C9S0-003B-43G5-00000-00&context=).

However, a narrow exception exists under the Federal Arbitration Act ("FAA"), which provides that an award may be vacated where "the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy." [*9 U.S.C. § 10(a)(3)*](http://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GT51-NRF4-44RK-00000-00&context=). We have held that vacatur is warranted in such a circumstance only if "fundamental fairness is violated." [*Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F720-00B1-D01S-00000-00&context=).[[6]](#footnote-6)13 There is little question that the  exclusion of the testimony was consistent with the Commissioner's broad authority to regulate procedural matters and comported with the CBA. Thus, the Commissioner's ruling can be revisited in court only if it violated fundamental fairness, and we see no such violation.

The central issue in the arbitration was whether Brady had engaged in conduct detrimental to the League. The "insights" Pash might have had and the role he might have played in the preparation of the Wells Report were concerns that were collateral to the issues at arbitration. The CBA does not require an independent investigation, and nothing would have prohibited the Commissioner from using an in-house team to conduct the investigation.  The Association and the League bargained for and agreed in the CBA on a structure that lodged responsibility for both investigation and adjudication with the League and the Commissioner. Moreover, the Commissioner made clear that the independence of the Wells Report was not material to his decision, thus limiting any probative value the Pash testimony may have had.

...

**III. Denial of Access to Investigative Files**

The district court's third and final ground for vacatur is that Brady was entitled under the CBA to the interview notes and memoranda generated by the investigative team from Paul, Weiss, and that the denial of those notes amounted to fundamental unfairness. The League argues that this is not a ground for vacatur because the CBA does not require the exchange of such notes.

We agree. ...

**IV. Additional Issues**

...

**B. Evident Partiality**

The Association's final contention is that the Commissioner was evidently partial with regard to the delegation issue and should have recused himself from hearing at least that portion of the arbitration because it was improper for him to adjudicate the propriety of his own conduct. This argument has no merit.

We may vacate an arbitration award "where there was evident partiality . . . in the arbitrator[]." [\*\*49]  *[9 U.S.C. § 10(a)(2)](http://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GT51-NRF4-44RK-00000-00&context=)*. "Evident partiality may be found only 'where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.'" *Scandinavian Reins. Co. v. Saint Paul Fire & Marine Ins. Co., 668 F.3d 60, 64 (2d Cir. 2012)* (quoting [*Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137 (2d Cir. 2007))*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P55-77T0-TXFX-4274-00000-00&context=). The party seeking vacatur must prove evident partiality by "clear and convincing evidence." [*Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 729 F.3d 99, 106 (2d Cir. 2013)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:597N-4B31-F04K-J02N-00000-00&context=). However, arbitration is a matter of contract, and consequently, the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen. [*Williams v. Nat'l Football League, 582 F.3d 863, 885 (8th Cir. 2009)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4X6N-NN10-TXFX-B386-00000-00&context=); [*Winfrey v. Simmons Food, Inc., 495 F.3d 549, 551 (8th Cir. 2007)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4P79-6Y30-TXFX-B31C-00000-00&context=).

Here, the parties contracted in the CBA to specifically allow the Commissioner to sit as the arbitrator in all disputes brought pursuant to Article 46, Section 1(a). They did so knowing full well that the Commissioner had the sole power of determining what constitutes "conduct detrimental," and thus knowing that the Commissioner would have a stake both in the underlying discipline and in every arbitration brought pursuant to Section 1(a). Had the parties wished to restrict the Commissioner's authority, they could have fashioned a different agreement.

**...**

Katzmann, *Chief Judge, dissenting*:

Article 46 of the Collective Bargaining Agreement between the NFL Players Association (the "Association") and the NFL Management Council requires the Commissioner to provide a player with notice of the basis for any disciplinary action and an opportunity to challenge the discipline in an appeal hearing. When 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 Association 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.

...

Additionally, [\*\*51]  on a more fundamental level, I am troubled by the Commissioner's decision to uphold the unprecedented four-game suspension. The Commissioner failed to even consider a highly relevant alternative penalty and relied, instead, on an inapt analogy to the League's steroid policy. This deficiency, 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." [*United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HPP0-003B-S0CK-00000-00&context=).

...

II.

...

... I believe there are significant differences between the limited findings in the Wells Report and the additional findings the Commissioner made for the first time in his final written decision. The letter announcing Brady's discipline explained that his "actions as set forth in the [Wells Report] clearly constitute[d] conduct detrimental to the integrity of and public confidence in the game of professional football" and warranted a four-game suspension. Joint App. at 329-30. The Wells Report, in turn, concluded that it was "more probable than not that Tom Brady . . . was at least generally aware of the inappropriate activities of [Jim] McNally and [John] Jastremski involving the release of air from Patriots game balls," Joint App. at 97, and that it was "unlikely" that McNally and Jastremski deflated the balls without Brady's "knowledge," "approval," "awareness," and "consent," Joint App. at 114. The Commissioner's final written decision, however, went further. It found that Brady "knew about, approved of, consented to, *and provided inducements and rewards* in support of a scheme by which, with Mr. Jastremski's support, Mr. McNally tampered with the game balls." Special App. at 51 (emphasis added).

...

Accordingly, I would find that the Commissioner exceeded his authority, to Brady's detriment, by resting Brady's discipline on factual findings not made in the Wells Report.

III.

I would also find that the Commissioner's decision fails at the second step of our analysis because it does not draw its essence from the CBA. It must be emphasized that the case at hand involves an unprecedented punishment. Precisely because of the severity of the penalty, one would have expected the Commissioner to at least fully consider other alternative and collectively bargained-for penalties, even if he ultimately rejected them. Indeed, the CBA encourages—though, as the majority observes, does not strictly require—the Commissioner to fully explain his reasoning by mandating that he issue a written decision when resolving an Article 46 appeal. That process is all the more important when the disciplinary action is novel and the Commissioner's reasoning is, as here, far from obvious.

Yet, the Commissioner failed to even mention, let alone explain, a highly analogous penalty, an omission that underscores the peculiar nature of Brady's punishment. The League prohibits the use of stickum, a substance that enhances a player's grip. Under a collectively bargained-for Schedule of Fines, a violation of this prohibition warrants an $8,268 fine in the absence of aggravating circumstances. Given that both the use of stickum and the deflation of footballs involve attempts at improving one's grip and evading the referees' enforcement of the rules,[[7]](#footnote-7)4 this would seem a 1 natural starting point for assessing Brady's penalty. Indeed, the League's justification for prohibiting stickum—that it "affects the integrity of the competition and can give a team an unfair advantage," Joint App. at 384 (League [\*\*61]  Policies for Players)—is nearly identical to the Commissioner's explanation for what he found problematic about the deflation—that it "reflects an improper effort to secure a competitive advantage in, and threatens the integrity of, the game," Special App. at 57.[[8]](#footnote-8)5

Notwithstanding these parallels, the Commissioner ignored the stickum penalty entirely. This oversight leaves a noticeable void in the Commissioner's decision, and in my opinion, the void is indicative of the award's overall failure to draw its essence from the CBA. Even taking into account the special circumstances here—that the alleged misconduct occurred during the AFC Championship Game, that team employees assisted in the deflation, that a deflated football arguably affects every play, and that Brady failed to cooperate in the subsequent investigation—I am unable to understand why the Commissioner thought the appropriate penalty was a four-game suspension and the attendant four-game loss of pay, which, in Brady's case, is far more than $8,268. The lack 1 of any meaningful explanation in the Commissioner's final written decision convinces me that the Commissioner was doling out his own brand of industrial justice. *Cf.* [*Burns Int'l Sec. Servs. v. International Union, 47 F.3d 14, 17 (2d Cir. 1995)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1490-003B-P16K-00000-00&context=) ("*[I]f* a ground for the arbitrator's decision can be inferred from the facts of the case, the award should be confirmed." (quoting [*Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1216 (2d Cir. 1972))*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2WD0-0039-X067-00000-00&context=) (emphasis added). In this regard, it bears noting that the Schedule of Fines provides that a player caught violating the prohibition on stickum a second time is to be fined $16,537. Thus, even where aggravating circumstances exist, the Schedule of Fines does not provide for the extreme increase in penalty that the Commissioner found appropriate here.

...

I respectfully dissent.

1. 2The Report assessed the evidence under the "more probable than not" standard, which applies to violations of this kind. [↑](#footnote-ref-1)
2. 3The Wells Report concluded that the evidence did not establish that any other Patriots personnel participated in or had knowledge of these actions. [↑](#footnote-ref-2)
3. 4Article 46, Section 1(a), reads, in full:

   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.

   Joint App. at 345. Article 46 further provides that "the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion." Joint App. at 346. [↑](#footnote-ref-3)
4. 5This deferential standard is no less applicable where the industry is a sports association. We do not sit as referees of football any more than we sit as the "umpires" of baseball or the "super-scorer" for stock car racing. Otherwise, we would become mired down in the areas of a group's activity concerning which only the group can speak competently. *See* [*Crouch v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 845 F.2d 397, 403 (2d Cir. 1988)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1GF0-001B-K0JV-00000-00&context=); [*Charles O. Finley & Co., Inc. v. Kuhn, 569 F.2d 527, 536-38 (7th Cir. 1978)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YNR0-0039-M276-00000-00&context=). [↑](#footnote-ref-4)
5. 7The "Other Uniform/Equipment Violations" section reads, in full:

   The 2014 Uniform Policy, the 2014 On Field Policy, and the enforcement procedures for these policies are attached at the end of this section.

   A League representative will conduct a thorough review of all players in uniform during pregame warm-ups.

   All uniform and On Field violations detected during the routine pregame check must be corrected prior to kickoff, or the offending player(s) will not be allowed to enter the game. A violation that occurs during [\*\*21]  the game will result in the player being removed from the game until the violation is corrected.

   League discipline may also be imposed on players whose equipment, uniform, or On Field violations are detected during postgame review of video, who repeat violations on the same game day after having been corrected earlier, or who participate in the game despite not having corrected a violation when instructed to do so. ***First offenses will result in fines***.

   In addition, in accordance with Article 51, Section 13(c) of the NFL-NFLPA Collective Bargaining Agreement, all players will be required to wear a non-obtrusive sensor or GPS tracking device during NFL games. League discipline will be imposed on any player who refuses to wear such a device, or after having such a device affixed to his equipment, removes the device prior to or during a game. ***First offenses will result in fines***.

   Joint App. at 384. [↑](#footnote-ref-5)
6. 13The FAA does not apply to arbitrations, like this one, conducted pursuant to the ***LMRA***, "but the federal courts have often looked to the [FAA] for guidance in labor arbitration cases." [*Misco, 484 U.S. at 40 n.9*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G5R0-003B-41XC-00000-00&context=). However, we have never held that the requirement of "fundamental fairness" applies to arbitration awards under the ***LMRA***, *cf.* [*Bell Aerospace Co. Div. of Textron, Inc. v. Local 516 Int'l Union, 500 F.2d 921, 923 (2d Cir. 1974)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-W6S0-0039-X36P-00000-00&context=) (applying, without explanation, [*9 U.S.C. § 10(a)(3)*](http://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GT51-NRF4-44RK-00000-00&context=) (formerly [*§ 10(c)*](http://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GT51-NRF4-44RK-00000-00&context=)) to an arbitration under the ***LMRA***), and we note that the circuits are divided on this question, *compare* [*Lippert Tile Co., Inc. v. Int'l Union of Bricklayers, 724 F.3d 939, 948 (7th Cir. 2013)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:591G-6H41-F04K-R00X-00000-00&context=) ("[***LMRA***] review simply does not include a free-floating procedural fairness standard absent a showing that some provision of the CBA was violated."), *with* [*Carpenters 46 N. Cal. Ctys. Conference Bd. v. Zcon Builders, 96 F.3d 410, 413 (9th Cir. 1996)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-0VS0-006F-M104-00000-00&context=) ("Although deference [\*\*42]  must be given to an arbitrator's decisions concerning procedural issues, it is generally recognized that the courts may consider a claim that a party to an arbitration has been denied a fundamentally fair hearing."). While the League does not explicitly dispute the applicability of the "fundamental fairness" standard here, it also does not contest the Association's arguments regarding fundamental unfairness, and instead only argues that the Commissioner's procedural rulings did not violate the terms of the CBA. Regardless of which position we adopt, our result is the same, and thus we need not decide whether the "free-floating procedural fairness standard" of the FAA ought to be imported to our review of arbitrations conducted pursuant to the ***LMRA***. [↑](#footnote-ref-6)
7. 4Just as the referees check the inflation level of the footballs before the start of the game, they check players for stickum "prior to the game and prior to the beginning of the second half." Joint App. at 384. [↑](#footnote-ref-7)
8. 5Although the Commissioner reasoned that steroid use also has the same adverse effects on the League, the fact that numerous infractions may be said to compromise the integrity of the game and reflect an attempt to gain a competitive advantage serves only to render more problematic the Commissioner's selection of what appears to be the harshest potential comparator without any meaningful explanation. This is especially true since, for the reasons stated by the district court, the Commissioner's analogy to steroid use is flawed. *See* [*Nat'l Football League Mgmt. Council, 125 F. Supp. 3d at 465*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GV5-MJF1-F04F-000C-00000-00&context=). In short, the Commissioner's reliance on the League's steroid policy seems to me to be nothing more than mere "noises of contract interpretation" to which we do not ordinarily defer. [*In re Marine Pollution Serv., Inc., 857 F.2d 91, 94 (2d Cir. 1988)*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-Y5S0-001B-K155-00000-00&context=) (quoting [*Ethyl Corp. v. USW, 768 F.2d 180, 187 (7th Cir. 1985))*](http://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G1K0-0039-P2JT-00000-00&context=). [↑](#footnote-ref-8)