

2. DISCIPLINE GRIEVANCES

The most common use of labor arbitration is the review of discharge and discipline cases by an independent neutral. Employers determine, typically under a contract “just cause” provision, to suspend or terminate a worker for conduct that interferes with the essential interests of management in productivity. See, Roger I. Abrams and Dennis R. Nolan, *Toward a Theory of ‘Just Cause’ in Employee Discipline Cases*, 1985 Duke L. J. 594. In the business of sports, management normally has the unrestricted (and non-grievable) right to release a player who, in the sole opinion of the team, does not have the skill and ability to play the game at the required level. On the other hand, on occasion sports management will discipline a player for conduct inconsistent with his obligations to his club.

As a result of a series of incidents in 2005, the Philadelphia Eagles suspended their star receiver, Terrell Owens. His union, the National Football League Players Association, initiated a grievance protesting T.O.’s discipline under the terms of its collective bargaining agreement with the National Football League. Unable to resolve the matter, the union processed Owens’ case to arbitration as provided in Article XXVII of its agreement with management. The case was heard by the parties’ permanent umpire, Richard Bloch.¹

NFL PLAYERS ASS’N AND PHILADELPHIA EAGLES

(Terrell Owens).

Arbitration, November 23, 2005.

BLOCH, ARBITRATOR

Following a stormy 2005 pre-season and an event-filled start of the season, the Philadelphia Eagles suspended Owens for four weeks and announced that, following the suspension, the team would not play him during the season’s remaining games . . . The Players Association (hereinafter “Association”) immediately filed this protest contending that the Club’s actions violate the “Maximum Discipline” provisions of the NFL Collective Bargaining Agreement (“CBA”) and contending, as well, that the discipline is arbitrary and excessive.

Analysis

[Following the 2003 NFL season, Terrell Owens signed a 7-year contract with the Eagles valued at about \$49 million. During his first season with the club, Owens performed exceptionally well, as did the team. The Eagles went to the Super Bowl where the Eagles lost to the New England Patriots. Shortly after the Super Bowl, Owens announced that his year-old contract did not adequately reflect his playing level, and he demanded a new deal. His agent, Drew Rosenhaus, announced the Owens had “out-performed the contract;” Owens, for his part, claimed “I know I’m a top player in the game, and my current contract doesn’t justify that.” Starting about that time, according to the Eagles, Owens engaged in a consistent “pattern of disruptive misconduct intended to force the Eagles either to give him a new contract or cut him loose.” He skipped mini-camp and team meetings, ignored coaches and fellow players and publicly criticized the team, the Eagles organization and his teammates.]

In his quest to secure a new agreement or to have the team release him, Mr. Owens embarked in what the Club accurately characterizes as a “nearly non-stop pattern of disruptive misconduct.” In an ESPN interview on April 12, 2005, the Player commented provocatively on his contribution to the Super Bowl and his own efforts to get back in shape after a broken ankle:

¹ Co-author Roger I. Abrams tells the story of the Owens arbitration in *T.O. Meets the Arbitrator*, in Chapter 10 of *Sports Justice: The Law & the Business of Sports* (Hanover, NH: Univ. Press of New England, 2010).

“I played every snap they allowed me to play. I wasn’t even running until, like, two weeks before the game. But I made sure I was in the best shape possible. I wasn’t the one who got tired in the Super Bowl.”

That comment was perceived by many, including Head Coach Andy Reid and quarterback Donovan McNabb, as a slap directed at McNabb.

Owens skipped a mandatory team mini-camp in late April and, shortly thereafter, announced his appearance at the pre-season training camp on a “satisfactory” re-negotiation of the contract. Rosenhaus and Owens were unequivocal in letting the team know that Owens’ happiness was tied toward renegotiating the contract. Coach Andy Reid testified as to their communications to him:

A. [Drew and Terrell said] . . . that things weren’t going to be pretty if he did come to camp. Somewhere in there, you know, T.O. mentioned that he knew how I was wired and the discipline that I asked of the Players, and that I wouldn’t be happy with what I saw.

In July, prior to training camp, and in the face of renewed threats by the Player, the coach sent Mr. Owens a letter that cited his threats to disrupt the team, warned him of the team’s readiness to respond with “all available fines and contractual remedies” and demanded repayment of the 1.725 million dollar signing bonus the Player had forfeited by missing the April mini-camp . . . [T]he letter warned that “[r]epeated violations of club rules will result in escalation of the discipline imposed by the club and increasing fine amounts, up to and including you being fined and/or suspended for Conduct Detrimental to the club . . .”

Owens reported to camp but, among other things, refused to speak with team personnel . . . Owens would interact with some teammates but not others, including Donovan McNabb, according to the record. His antics were affecting the team. There was, says Coach Reid, a lot of tension: “The Players felt it, the coaches felt it. I think on both sides of the ball, it was a different feeling. I had Players coming to me talking to me about the situation and it just wasn’t real healthy. I tried to make that part work.”

. . . Reid testifies to a confrontation in early August:

“I went up to him and he was in a corner area where there weren’t any people around. . . . I didn’t want to put him on the spot in front of anybody. I don’t do that. That’s not my style. I said hey, listen, I don’t know if you’ve heard what I said, but you’ve got autographs today, it’s Receiver’s day up. And he said I’m not going to do it.”

Thereafter, both men got into a heated exchange and told each other to “shut up.” Following this interchange, the Coach brought Owens to his room and told him he was going to suspend him for a week. [Reid sent Owens another letter on August 10 warning that the club expected him to return after his suspension] “with a renewed attitude and focus. That includes abiding by all terms of your contract, being respectful to your teammates and coaches and playing within a structure that will lead us all to have success . . .” [The Arbitrator says this letter] should reasonably have put Owens on notice of serious Club concerns. As to that, there can be no real doubt. The letter specifies, in unambiguous language, the shortfalls at issue—missing mandatory autograph sessions, being insubordinate to the Offensive Coordinator and to the Coach and engaging in generally unacceptable behavior since he reported to camp. [Agent Rosenhaus inquired about the grounds for the club’s actions, and Reid wrote another letter which detailed the Eagles’ concerns.]

The August 12th letter protests Owens having “made a spectacle” of the situation, lying to the media, violating team rules, disrespecting coaches and the quarterback and continuing in a course of having “followed through with your threat” to disrupt the team. And, the letter details, in two places, that this constitutes Owens being put on notice for the third time and forecasts, as

well, potential punishment involving fines and suspension for Conduct Detrimental to the Club. To the extent there had been any misunderstanding as to the Club's view of Owens' behavior, there should have been none thereafter.

During his time away, the Player appeared on a televised interview with his agent. That appearance provides no evidence of intent to turn things around. Asked whether Andy Reid and he could work things out upon his return, Owens responded "My attitude is not going to change."

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The breaking point was reached as a result of an ESPN interview given by Owens on November 3. He expressed his continued unhappiness with his contract situation, claimed, as he had on an earlier occasion, that the Eagles had forced him to sign a "secret waiver" relating to his medical condition during the Super Bowl and objected to the team's not adequately celebrating his 100th career receiving touchdown:

You know [the Club's] reaction shows you the type of class and integrity of an organization that they claim not to be. You know, they claim to be first class and the best organization. I just felt it was an embarrassment. It just shows the lack of class that they had. My publicist talked to the head PR guy, and he made an excuse about (how) they didn't recognize it, or they didn't realize that it was coming up. But I know that was a blatant lie. If it would have been somebody else, they probably would have popped fireworks around the stadium.

According to Coach Reid, Owens' comments inflamed the team.

Several observations are in order. First, Owens' denial, repeated in his testimony at the arbitration hearing, is unpersuasive. It is difficult, at the least, to accept the Player's contention that his statement "I wasn't the one that got tired" should be construed to mean "I was the one who got tired." But the more significant point in all of this is the one discussed earlier—the perception, one of which the Player was fully aware, was that he had, once more, taken aim at his quarterback. In this highly charged atmosphere, the perceptions are of substantial importance, and they weigh heavily in evaluating the conduct of the Player immediately thereafter, to be discussed below.

[Finally, Owens refused Reid's directive that he apologize to quarterback McNabb. The Club suspended him for the game that week and then for a total of four weeks.] The Coach also told Owens of his determination that he would not play during the remainder of the season . . .

The Four-Game Suspension

Article VIII of the Collective Bargaining Agreement establishes a Maximum Discipline schedule that provides, in relevant part:

Conduct Detrimental to Club—Maximum fine of an amount equal to one week's salary and/or suspension without pay for a period not to exceed four (4) weeks.

While the Association concedes there is room for some Club response under these circumstances, it claims the four-week suspension is overkill and contends, as well, that removal from the Club for the rest of the season may only be viewed as disciplinary in nature. As such, it contravenes the limitations of Article VIII and, in any event, is lacking just cause.

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Extent of Penalty

[T]here exists the . . . question of whether a suspension of [four-weeks] meets the dictates of just cause. It is, as the Association notes, an unusually long penalty. But these are remarkable circumstances and unparalleled detrimental misconduct. At the time of the suspension, the Eagles were faced with the specter of a player who, together with his agent, had announced, prior

to the season that, failing a successful contract re-negotiation, it would be his intent to disrupt the Club. The Coach wouldn't like, said Owens, what he would be bringing to training camp. And, Mr. Owens' actions from the start, and continuing thereafter, proved him true to his word. While some of the Player's outright insubordination was tempered in some, but not all, respects after the season began, the media circus and general distraction he had inspired and supported continued unabated as, by his own admission, did his own dissatisfaction with the Club, his coach and his quarterback. It may hardly be argued that Terrell Owens was unaware either that he was treading on increasingly thin ice or that his actions, considered individually or taken together, did not constitute conduct that was in fact detrimental to the Club. To conclude that Owens had not been previously disciplined would be to trivialize to the point of absurdity the explicit and repeated written warnings and verbal counseling from the Coach, as well as the one-week banishment from training camp. . . .

* * *

Among the most compelling facts in considering the just cause aspects of this discipline is the fact that Terrell Owens could have avoided any and all time off by simply acceding to the Coach's request to step up to his teammates collectively and, in the case of McNabb, privately, to make things right. Mr. Owens believed then, and continues now to assert that because he said nothing negative about Donovan McNabb in the ESPN interview, there was no reason to speak to him.

But the critical issue that continues to elude the Player is that, without regard to who was right on the true meaning of the statements, the team and McNabb were upset by them. Owens knew this. And, he knew that any suspension could be immediately avoided by addressing his teammates, and McNabb, in an effort to make things right. Yet, with full knowledge that discipline was hanging in the balance, he refused to take these steps. The Association suggests that, had Owens been fully aware that the suspension would extend to four games instead of one, he might have complied with the Coach's conditions. Even this possibility, however, speaks loudly to questions of the Player's sincerity, attitude and commitment to a fresh course of conduct . . .

* * *

Terrell Owens' stature as a compelling athlete and outspoken public figure contributed meaningfully to the destructive power of his actions. Despite all attempts by the Club to persuade him to modulate his posture and his posturing, he persisted in broadcasting his dissatisfaction and in stirring and stoking the growing attention and dissent around him. In so doing, he engaged in conduct that was manifestly detrimental to the Club.

The Removal

The Association also claims the decision of the Club to remove Owens from the playing and practice fields for the remainder of the season (albeit with pay) should be considered discipline that is inappropriate on at least two scores: (1) It exceeds the maximum discipline set forth in Article VIII for Conduct Detrimental and (2) it is disproportionate in relation to the offense. The Club, for its part, observes that the CBA provides no basis for directing a club to play or practice particular Players in games. Indeed, it is argued, the CBA expressly reserves to the clubs the right to manage and direct their operations, except as limited by the terms of the Agreement. "No term in the CBA," argues the Club, "limits a club's right to determine which Players will appear on the field or be permitted in the team facility while a team is preparing for its games. The absence of such a limitation is not accidental. No decision is more quintessentially a prerogative of club management than the decision as to which Players will take the field." . . .

The Association concedes the coach has the final say as to who actually plays the game, at least on a week-to-week basis. It claims, however, that this same discretion cannot extend to questions of who practices and otherwise participates off-field. The coach may bench the player, says the Association, but he can't send him home. The "practice/play" distinction, if there be one,

is particularly important in this case where, uniquely, the Player's on-field performance has been superb, and is not at issue. The Club's concern is focused, instead, on his articulated intent to engender disruption and dissent off the field. May a coach consider these factors in deciding how to form and field a team? The answer must be "yes". It cannot be that a coach's discretion is limited to Sundays. Surely, the coaching elements of team management take place not only in the games, but in the weeks preparing for them. None of the parties to this relationship, it is fair to say, envisioned the prospect of an arbitrator reviewing a coach's decisions as to, for example, how many reps a player should take in practice, the particular squad to which he should be assigned or, indeed, whether he should practice at all. Nothing in the CBA [collective bargaining agreement] or in the Player's individual contract requires a contrary conclusion. Concededly, a coach's decision to preclude both practice and play will disadvantage a player, arguably more so than merely riding the bench. This, and the potential overlap between the discretionary and the disciplinary elements of this CBA, is why careful scrutiny is required of all relevant facts of a given case.

This case, then, is about the challenge faced by this team, dealing with this player in these particular circumstances. Mr. Owens and his agent threatened a campaign of disruption and implemented it through repeated acts, large and small, of disrespect, dissent and insubordination, culminating with a well-publicized verbal assault on the team and on the quarterback. The Coach could properly conclude that, however excellent Owens' performance was on the field, his off-field conduct and demeanor were seriously devitalizing the organization. Moreover, and this is important, there was ample reason for the Coach to conclude, in November, that the problem was by no means resolved. At the moment of his being warned of the impending discipline, Mr. Owens was, after all, willing to "sit" rather than attempt to work things out with the team. Indeed, even at the arbitration hearing, the Player made it abundantly clear that his contract issue—the one that inspired his marked change in attitude during the current season—was still alive. And, he made it clear, as well, that his view of his obligations to co-exist as a teammate had not changed: In his view, for example, speaking to his quarterback was still not necessary.

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The Association argues that, to the extent the Coach wished to keep the Player from the fields or the locker room, he should have released him. It is a mark of the highly unusual nature of this case that this should be regarded not only as not disciplinary, but as the desired goal of the Player and his representatives. More to the point, while releasing the Player is an available option, it is not a mandatory one.

In summary, there is ample room to find that the Club could respond to this Player's actions, suspending him without pay to the limits permitted by the collective bargaining agreement for his behavior in this matter. Thereafter, the Coach properly exercised his inherent discretion to conclude that, on balance, the team would be better protected and better off by practicing and fielding a team that did not include Mr. Owens. The problem—a continuing one—was almost entirely off-field, and the response properly dealt with that reality. . . .

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The grievance is denied.

QUESTIONS FOR DISCUSSION

1. The NFL Players Association fired Arbitrator Bloch as the permanent arbitrator immediately after he issued this decision. Why would it do that? Bloch had served the NFL and the NFLPA for almost decade rendering awards for both management and labor. He is generally considered among the finest labor arbitrators in the country.

2. How does an arbitrator determine whether a Club has “just cause” for discipline? Are there any relevant differences between working for a professional football team and working for a widget manufacturer?

3. Do you think Arbitrator Bloch was correct in his decision on “just cause?” What about his decision to uphold the Club’s action in removing Owens from the team?

4. How else could Owens and Rosenhaus have obtained a better contract for the player? Wasn’t this is only strategy they could employ?

5. Labor arbitration is used to resolve disputes in all unionized sports. See, Roger I. Abrams, *Keep Your Eye on the Pelota: Sports Arbitration at the Jai-Alai Fronton*, 16 Marq. Sports L. Rev. 1 (2005). Do you think it would be useful to select as an arbitrator someone who knows the sport in question?
