Comments

WHEN IN DOUBT, GET LOCKED OUT!: A COMPARISON OF THE 2001 LOCKOUT OF THE NATIONAL FOOTBALL LEAGUE REFEREES' ASSOCIATION AND THE FAILED 1999 RESIGNATION SCHEME OF THE MAJOR LEAGUE BASEBALL UMPIRES' ASSOCIATION

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I. INTRODUCTION

Professional sports in America have always been big business. As with all big business, labor disputes have ensued in each of the four major professional American sports. Within the past twenty years, the National Hockey League (hereinafter “NHL”), the National Basketball Association (hereinafter “NBA”), the National Football League (hereinafter “NFL”), and Major League Baseball (hereinafter “MLB”) have all been subject to some form of labor unrest.¹ Most commonly, these labor problems have concerned the players and their respective unions. However, two recent professional sports labor disruptions involved professional sports game officials. Normally only noticed in sports when they make a bad call, officials came to the forefront of sports labor law in both 1999 and 2001. In 1999, in a move that some have called puzzling, others “a formula for

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disaster,” fifty-seven of sixty-eight members of the Major League Umpires’ Association (hereinafter “MLUA”) sent their letters of resignation to the American League (hereinafter “AL”) and the National League (hereinafter “NL”) offices of MLB. While the MLUA later claimed that this was merely a symbolic gesture in an effort to force negotiations prior to the end of their present collective bargaining agreement, citing what they believed to be the impending threat of a lockout, MLB simply accepted the resignations. While all of the umpires eventually rescinded their resignations, twenty-two were left without jobs following the 1999 season.

In the summer of 2001, it was the NFL’s turn to undergo a dispute with its officials. During that summer, the NFL could not come to terms on a new contract with the National Football League Referees’ Association (hereinafter “NFLRA”). Noting what it considered to be the extremely high demands of the NFLRA, the NFL locked out the officials less than two weeks prior to the start of the 2001 season, opting to use replacement referees until the end of the dispute.

Taking a close look at these two disputes, a strange outcome emerges. Contrary to logic, getting locked out actually seems like a comparatively favorable alternative for a union facing an impasse in contract negotiations. In the simplest terms, a lockout “occur[s] when employers attempt to put economic pressure on a group of employees by refusing to allow them to work.” It is strange that the lockout should be considered favorable to a union in any respect, since it has been considered the employer’s ultimate “weapon[] of industrial warfare.” In the NFLRA-NFL dispute, the NFL used the lockout device rather successfully, eventually reaching an agreement with the NFLRA worth far less than the union’s initial demands.

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of a 400% to 500% wage increase.\(^8\) Therefore, at first glance it would appear that the lockout was an effective means for the NFL to deal with the NFLRA’s attempt to force higher wages and benefits. However, when comparing the results to the results of the MLUA resignation scheme, accepting the lockout emerges as the best, and possibly the only, alternative for a union once it becomes clear that the employer intends to lock a union out when negotiations reach the point of impasse. Despite not getting all of their demands met, the members of the NFLRA did secure a substantial wage increase, and also retained their jobs. The MLUA, on the other hand, believing negotiation to be hopeless and a lockout imminent, attempted to preempt a lockout by having its members resign. As demonstrated by the results, the resignation strategy was a complete failure.

Using these two labor disputes, along with an examination of the seminal lockout cases in American labor law history, this comment will attempt to show that when faced with an imminent lockout, a union has only three options: negotiate to settlement, strike, or accept the lockout. As seen in the MLUA dispute, attempting other, more creative ways out of the dispute may spell disaster.

Part II of this comment will examine the facts of both labor disputes. The discussion will include the demands of the unions and their respective leagues, the events leading up to the actions in question, and the resolution of each situation. Part III will delve into the seminal case law and statutes concerning the legality of lockouts. Part IV will then apply the case law to the NFLRA dispute, proving that the action taken by the NFL was a legal and effective lockout. Upon imagining that the officials from the MLUA had not resigned, the section will also look at the legality of a possible MLB lockout. Part V will look at the legality of MLB’s response to the resignation scheme of the MLUA by following the reasoning of United States District Judge Harvey Bartle III of the Eastern District of Pennsylvania in his December 13, 2001 opinion in *The Major League Umpires’ Association v. American League of Professional Baseball Clubs*. Part VI will compare what was lost by the MLUA as a result of their novel resignation scheme to what the umpires could have gained by accepting a lockout.

II. THE FACTS

A. The 2001 Lockout of the NFLRA

In March of 2001, the seven-year contract between the 119 NFLRA on-field game officials and the NFL expired. The NFL and the NFLRA knew very early on that negotiating a new contract was going to be difficult. Accordingly, the NFL and the NFLRA began to negotiate well in advance, starting in July of 2000. However, with the summer of 2001 winding down, and the 2001 NFL season only weeks away, the two sides were no closer to an agreement than they had been in July of 2000.

Although the NFLRA was seeking increased benefits and appearance fees, their main demand was for a substantial per-game wage increase. In the final year of their contract, wages ranged from between $1,431 per game for a rookie official, to $4,330 per game for a twenty-year veteran. However, the officials felt that these wages were an insult when compared to other major professional sports officials in North America. Tom Condon, lead negotiator for the NFLRA, summed up the union's main grievance by stating, "[we] are looking to be paid along the lines of other top sports [officials] . . . . A twenty-five year [NFLRA officiating veteran], as it is now, would make less than a rookie in the other three [American professional sports] leagues."

While the NFLRA's reasoning may sound like a plausible justification for an increase in pay, the NFL saw two distinct problems with the union's logic. First, the NFL considers NFLRA game officials part-time employees. Each referee only works one game a week during the five-week pre-season and seventeen-week regular season. Referees are individually chosen to work the playoffs and Super Bowl, and are paid for this additional work on a per-game basis. The NFL's contention is supported by the fact that referees hold unrelated jobs during the week, many of which are lucrative occupations, such as doctors, lawyers, and

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9. Despite occurring later chronologically than the events involving in the MLUA labor dispute, the situation of the NFLRA is addressed first in order to present a typical lockout and its desired outcome.
10. See Freeman, N.F.L. Locks Out Officials as Negotiations Falter, supra note 5.
11. Id.
13. See Referees Need Reality Check As Lockout Looms, USA TODAY, Aug. 24, 2001 [hereinafter Reality Check].
While the officials of the NBA, NHL, and MLB earn between $93,000 to $250,000 per year, MLB umpires call eight times as many games in a season than NFL officials, while NHL and NBA referees call four times as many. The NFLRA defended their position by pointing out that travel time, game preparation, and physical conditioning push their weekly officiating responsibilities to between forty and fifty hours per week. However, league spokesman Greg Aiello disagreed: "[I]t is a part-time job. It is what it is: fifteen games during the regular season, no travel during the week, no demand on their time during the week." The NFL’s second problem with the NFLRA’s demands was the size of the wage increase sought. The NFLRA initially believed that to bring their wages to an amount comparable with other major professional sports, increases of up to 500% were necessary. In their final proposal prior to the lockout, the NFLRA came down slightly from that number, seeking 200% to 400% increases, effective immediately. While quite smaller, the NFL’s proposal still offered a substantial graduated wage increase, starting with a 40% raise in 2001, escalating to a full 100% by 2003. NFL commissioner Paul Tagliabue, in his personal plea to the NFLRA to accept this offer, made it quite clear that if this proposal were not accepted, the NFL would be forced to lock out the officials once the contract expired. In coming to this conclusion, Tagliabue cited concerns that an in-season work stoppage by the NFLRA would be too detrimental to the league, and that he had received no promise by the NFLRA not to strike.

As a lockout was becoming more and more likely, the league initiated a search for replacement referees. Beginning on August 23, 2001, the NFL hired replacement referees from the ranks of college football, arena football, and the NFL Europe, offering each official $2,000 per game, along with a guaranteed $4,000 one-time payment if the labor dispute was solved prior to the regular season start on September 9th. In total, the league hired 120 replacement referees.

16. See Reality Check, supra note 13.
17. See Shapiro, supra note 15.
18. Myers, supra note 5.
21. Id.
22. See Shapiro, supra note 15.
23. Id.
25. See Myers, supra note 5.
citing an inability to come to terms on a new contract.\textsuperscript{26}

The replacement referees warmed up by calling the final preseason game. Days before the September 9th start of the regular season, the league increased their offer one last time to a 60\% raise for the 2001 campaign, but it was again rejected by the NFLRA, who chose instead to accept the lockout.\textsuperscript{27}

Two days after the start of the regular season, the September 11, 2001 tragedy occurred, wherein terrorists hijacked four American jets and crashed the planes into the World Trade Center’s Twin Towers in New York City, the Pentagon, and rural Pennsylvania, events resulting in the deaths of thousands.\textsuperscript{28} From that point on, negotiations in the NFL-NFLRA dispute became more productive. Following the attacks, the NFL chose to postpone that week’s upcoming games, which were eventually played at the end of the season.\textsuperscript{29} During the tumultuous days following September 11, the officials decided that during the time of national crisis, getting back to work was most important; on September 19th, the NFLRA accepted an offer by the league that looked almost identical to the NFL’s final graduated plan.\textsuperscript{30} The lockout ended with the officials only gaining 20\% on the league’s base offer of a 40\% raise in 2001, clearly a minimal amount when they were asking for between 200\% and 500\%.\textsuperscript{31} However, their jobs were secure, and they were on the field by the following weekend.

B. The 1999 MLUA Resignation Scheme

1999 was the last year of the 1995 “Basic Agreement between the NL, the AL, and the MLUA,” covering terms and conditions of employment for umpires calling MLB games.\textsuperscript{32} Along with benefits and a termination pay package, this agreement paid MLUA members between $75,000 and $250,000 per year, depending on seniority.\textsuperscript{33} Most importantly, it contained a clause barring the umpires from striking.\textsuperscript{34} Going into the mid-

\textsuperscript{26} Id.; Freeman, supra note 5.
\textsuperscript{27} Bob Glauber, NFL: Final Offer to Refs, N.Y. NEWSDAY, Sept. 6, 2001, at A74.
\textsuperscript{28} N. R. Kleinfield, Hijacked Jets Destroy Twin Towers and Hit Pentagon in Day of Terror, N.Y. TIMES, Sept. 12, 2001.
\textsuperscript{29} Adam Schefter, Time Out To Mourn NFL Calls Off Week 2 Games To ‘Grieve, Reflect’, DENVER POST, Sept. 14, 2001, at D-1.
\textsuperscript{30} See Wong, supra note 8.
\textsuperscript{31} Id.
\textsuperscript{33} Baseball’s Umpires Plan To Quit On Sept. 2; Resigning In Protest Would Not Violate Contract; They Would Get Severance Pay; Decision Seems To Please Owners, ST. LOUIS POST-DISPATCH, July 15, 1999, at A1 [hereinafter Baseball’s Umpires Plan to Quit].
\textsuperscript{34} Heather R. Insley, Major League Umpires Association: Is Collective Bargaining the Answer to or the Problem in the Contractual Relationships of Professional Sports Today?,
season All-Star break in July of 1999, the league showed no signs of urgency in attempting to reach a new deal. Already harboring a list of grievances against MLB, the MLUA feared that the league’s indifferent attitude towards a new agreement signaled its intention to lock the umpires out at the end of the 1999 season. But before getting to how those events played out, some background is necessary.

In 1969, the National Labor Relations Board (hereinafter “NLRB”) certified the MLUA to represent the umpires of MLB, making them the first certified major professional sports officials’ union in America. Since the certification, the MLUA and MLB have endured a rather rocky relationship. Less than a year after their certification, the MLUA staged their first strike immediately prior to the 1970 post-season. This was the first of many strikes by the MLUA throughout the 1970s and 1980s. The league also got in on the game by locking out the umpires on several occasions, most recently in 1995 when MLB locked the MLUA out of the first eighty-six games of that season. This lockout ended when the two sides formulated the Basic Agreement, the agreement that was set to expire after the end of the 1999 season. The difficult negotiation surrounding that agreement surely fed the MLUA’s fears of an impending lockout at the end of 1999.

Thus, in the summer of 1999, the MLUA feared that the league’s reluctance to negotiate a new deal was a clear sign of its intention to lock the union out. The MLUA was already upset with MLB for what it considered to be violations of the still-active 1995 Agreement. The union complained that MLB engaged in activities with the clear intent “to undermine the MLUA as the chosen bargaining representative and to make changes to the umpires’ terms and conditions of employment which violated the Agreement.” Specifically, the MLUA found fault with MLB’s attempt to take control away from the AL and NL with respect to the umpires’ supervision and evaluation, MLB’s unilateral changes in the strike zone, and MLB’s alleged attempts to induce certain umpires to retire by offering larger severance packages than granted by the Agreement. Also, the MLUA complained of what it considered to be the league’s unfair treatment of certain umpires, and of the lack of player punishment

36. See Insley, supra note 34, at 608.
37. Id. at 616.
38. See Baseball’s Umpires Plan to Quit, supra note 33.
39. See Schmuck, supra note 35.
41. Id. at para. 18-19.
following recent confrontations between umpires and players.\textsuperscript{42}

Not content with leaving their fate in the hands of MLB, Richie Phillips, attorney and chief negotiator for the MLUA,\textsuperscript{43} formulated a novel plan. Rather than wait for a lockout, Phillips asked the sixty-eight members of the MLUA to simply resign. Under his plan, the umpires would collectively send letters of resignation to the league in mid-July, effective September 2, in the hope that this would spur MLB into accelerated negotiations.\textsuperscript{44} However, if a deal was not made by the September 2nd deadline, Phillips included a contingency plan that he believed would protect the union. A new professional umpiring company would be incorporated by Phillips, and would sign all of the umpires to contracts that would become effective on September 3rd.\textsuperscript{45} A combination of those actions on the part of the umpires would leave the league with only two options: hire sixty-eight replacements for the last month of the regular season, or contract with this new company for its services.

Fifty-seven of sixty-eight members of the MLUA chose to implement Phillips’ plan. On July 15, 1999, the MLUA submitted twenty-three letters of resignation to the AL, and thirty-four letters to the NL.\textsuperscript{46} While the MLUA publicly stated that the letters were meant simply to spur negotiation, not to actually sever their employment with MLB, the language employed in the resignation letters clearly appeared to give the legal effect of resignation. These letters stated ‘that the resignation was ‘pursuant to’ Article VIII.D of the Basic Agreement, a provision that applies only when an umpire’s employment is ‘terminated’ by the umpire’s own action and not by action taken by the Leagues.”\textsuperscript{47} Those umpires who qualified also immediately demanded their termination pay, which ranged from $150,000 to $400,000, and totaled over $15 million.\textsuperscript{48}

Immediately, sportswriters around the nation began to question the logic of this move. More importantly, so did the league. League Vice President Sandy Alderson decried the scheme as “either a threat to be

\textsuperscript{42} Insley, supra note 34, at 617.
\textsuperscript{43} See Murray Chass, 14 Major League Umps Call Union Plan Flawed, N.Y. TIMES, July 29, 1999, at D3.
\textsuperscript{44} See Schmuck, supra note 35.
\textsuperscript{45} Hal Bodley, Unhappy MLB Umpires Say They’ll Resign Sept. 2, USA TODAY, July 15, 1999, at C1.
\textsuperscript{48} Id.
ignored, or an offer to be accepted.\textsuperscript{49} MLB made it obvious that it was not going to be bullied and would not give in to the MLUA's plan. The League announced that it would accept the resignations and hire replacement umpires to begin work on September 3, 1999.\textsuperscript{50} The League's unwavering stance clearly began to affect some of the members of the MLUA. Initially, eleven of its members chose not to resign. However, by July 20th, five of the fifty-seven resigning umpires changed their minds, officially rescinding their resignations.\textsuperscript{51} Thereafter, more and more umpires rescinded their resignations; within a week, all fifty-seven umpires had rescinded.\textsuperscript{52} Phillips' plan had failed.

As if it were not bad enough that the MLUA's attempt to force negotiations for a new contract had failed, troubles were just beginning for twenty-two members of the MLUA. The league announced that it had already hired replacement umpires, and therefore, that it would accept some of the resignations. By July 23rd, the AL had hired twelve new umpires to fill some of the vacancies, while the NL had hired thirteen by July 28th.\textsuperscript{53} Intent on keeping these new umpires, the AL and NL each determined that only the remaining spots needed to round out their umpiring squads would be available to those who rescinded their resignations. The AL was able to apply a first-come, first-served approach, accepting the first fourteen rescinded resignations received.\textsuperscript{54} The NL, however, received all of the rescinded resignations at one time, and therefore was unable to employ this method. Instead, they chose to decide on the fate of their umpires with performance standards.\textsuperscript{55} In the end, the resignations of twenty-two MLUA members were accepted.\textsuperscript{56}

Not only had the MLUA's resignation scheme failed, but as of September 3, 1999, twenty-two of its members were also out of a job. With nothing to lose, the union challenged MLB's stance in court in an attempt to have their members reinstated. In court and arbitration for more than two years, the case has most recently been decided by the United States District Court of the Eastern District of Pennsylvania, a decision that

\begin{itemize}
  \item \textsuperscript{49} Schmuck, supra note 35.
  \item \textsuperscript{50} See 5 AL Umps Rescind Resignations, BALTIMORE SUN, July 21, 2001, at D4.
  \item \textsuperscript{51} Id.
  \item \textsuperscript{53} Declaration of Budig, supra note 47, at para. 16; Declaration of Coleman, supra note 47, at para. 8.
  \item \textsuperscript{54} See Declaration of Budig, supra note 47, at para. 17.
  \item \textsuperscript{55} See Declaration of Coleman, supra note 47, at para. 10.
  \item \textsuperscript{56} See 22 Umpires Lose Jobs For Rest of the Season; Union Withdraws Suit In Exchange for Pay, Bonuses; Dispute Will Go To Arbitration, ST. LOUIS POST-DISPATCH, Sept. 2, 1999, at A1.
\end{itemize}
will be fully explored in Section V below. In brief, Judge Harvey Bartle III agreed with an arbiter, declaring that MLB must rehire, with back pay, at least nine of the twenty-two umpires, with the fate of three remanded for further evaluation. However, ten umpires were denied reinstatement because the court found that they had resigned.\textsuperscript{57}

The failed resignation scheme completely decimated the MLUA. Not only did the scheme fail to force negotiations, the plan actually resulted in the formation of a new union, and the firing of Richie Phillips.\textsuperscript{58} More importantly, it caused at least ten umpires to be permanently out of the officiating job, and nine held jobless for over two years. It appears that the resignation scheme achieved only one of its goals: it avoided a lockout.

III. THE LOCKOUT IN AMERICAN LABOR LAW

The lockout has been used by employers in America for over 350 years.\textsuperscript{59} However, the National Labor Relations Act (hereinafter "NLRA") does not specifically take a position on this labor weapon.\textsuperscript{60} Instead, the legality of this device developed almost exclusively in the 1950s and 60s, in a series of three United States Supreme Court cases, and one NLRB decision, along with another NLRB decision in 1987.\textsuperscript{61} These cases build on the concept of a legal lockout, each adding a situation in which an employer may use the device. Prior to analyzing the legality of the NFL's lockout decision or the feared lockout by MLB, it is important to review these cases to develop a clear picture of what the courts have determined to be a legal lockout.

The NLRA's failure to either sanction or prohibit the lockout was no mere oversight. A proposed version of section 8(a)(1) of the NLRA

\textsuperscript{57} See The Major League Umpires' Ass'n v. Am. League of Prof'1 Baseball Clubs, No. 01-2790 (E.D. Pa. Dec. 13, 2001). At time of publication, appeals to this decision are pending in the Third Circuit.

\textsuperscript{58} See Insley, supra note 34, at 619-620.


\textsuperscript{60} Peter C. Verrochi, \textit{It is Not a Violation of Section 8(a)(1) or (3) of The National Labor Relations Act for an Employer to Lockout and Temporarily Replace His Union-Represented Employees Solely as a Means of Pressuring the Union Into Settling a Contract Dispute on Terms Favorable to the Employer}, 18 RUTGERS L.J. 961, 964 (1987).

\textsuperscript{61} See id. at 964-968; Dolin, supra note 59, at 353-384, 407, 408; Damon E. Dunn, ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION: THE LABOR LAW HANDBOOK 11.32 (Levin & Funkhouser 1999); Michael H. LeRoy, \textit{Lockouts Involving Replacement Workers: An Empirical Public Policy Analysis and Proposal to Balance Economic Weapons Under the NLRA}, 74 WASH. U. L.Q. 981, 997-1007 (1996). While the individual analyses of the cases in this section are the work of the author of this comment, credit must be extended to these authors, as it is their work that originally turned this author towards the particular line of cases. All the authors discuss the legal evolution of the lockout, and some, if not all, of the cases mentioned in this section.
originally barred the lockout from use by employers as a means to "impair the right of employees guaranteed in" the Act.  However, the reference to the lockout was removed after members of the Senate voiced their opinion that this proposal created a lopsided effect, wherein employees could strike (a right specifically protected by the NLRA), but employers were left no economic weapon of their own. Therefore, without statutory proscription or backing, the lockout would be forced to gain legal support through the courts.

The case considered to be the first approval of an employer's use of a lockout is *NLRB v. Truck Drivers Local Union No. 449*, more commonly known as *Buffalo Linen*. This case involved an employer's use of a lockout as a defensive measure. In *Buffalo Linen*, a dispute arose between the Linen and Credit Exchange of Buffalo, an organization comprised of eight separate linen supply employers, and the Truck Drivers Local Union No. 449, who represented employees from all eight supply companies. After contract negotiations faltered, the union engaged in a "whipsaw strike," wherein the employees of each of the eight companies prepared to take turns engaging in actual work stoppage. A whipsaw strike carried to its full effect involves a union choosing one of the employers in the multi-employer unit, and having only the employees for that one employer strike. An impasse that survives beyond the first strike results in the union choosing another employer to strike, and so on down the line, until all of the employers in the unit finally yield to the union's demands. However, in *Buffalo Linen*, the union was not allowed to carry out its whipsaw strike plan; in response to the first unit going on strike, the employers of the seven other companies locked out their employees, stating that their employment would only be allowed to continue if the strike ended. The Supreme Court in this case was presented with "the narrow question . . . of whether a temporary lockout may lawfully be used as a defense to a union strike tactic . . . ." While the union claimed that a lockout would interfere with their statutory right to strike, the Court reasoned that "the right of employees to strike . . . is not so absolute as to deny self-help by employers

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63. Id. at 317.
64. NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87 (1957). See Dolin, supra note 59, at 353; LeRoy, supra note 61, at 999; Verrochi, supra note 60, at 964-965.
65. Truck Drivers Union Local No. 449, 353 U.S. at 89.
66. Id. at 90.
68. Id. at 90.
69. Id. at 93.
when legitimate interests of employees and employers collide.\textsuperscript{70} In this case, the employers had an interest in preserving their multi-employer bargaining method to avoid competition between themselves.\textsuperscript{71} The Court declared that in cases where the employer faced economic hardship because of a union’s actions, the NLRB must balance the conflicting interests in deciding whether a lockout may be employed.\textsuperscript{72} In this narrow instance, the Supreme Court recognized an employer’s right to lock out its employees.

Eight years later, the Court decided two cases on the same day that would add to the lockout doctrine. First, in \textit{American Ship Building Company v. NLRB}, the Court permitted the use of an offensive lockout by an employer.\textsuperscript{73} The American Ship Building Company could not reach an agreement on a new contract with its employees. Fearful that a strike during a busy period of their seasonal business would destroy the company, American Ship locked out a majority of its workforce until a new contract could be negotiated.\textsuperscript{74} A trial examiner for the NLRB found that, while motivated by economic concerns, the employer engaged in the lockout in an effort to break the impasse in negotiations.\textsuperscript{75} As in \textit{Buffalo Linen}, the union claimed that a lockout would interfere with their rights to bargain and strike. The Supreme Court, however, declared that “the right exclusively to bargain collectively does not entail any ‘right’ to insist on one’s position free from economic disadvantage.”\textsuperscript{76} Similarly, the Court also stated that the right to strike is not equal to “the right exclusively to determine the timing and duration of all work stoppages.”\textsuperscript{77} The Court held that there is nothing in the NLRA to prevent an offensive lockout, as long as the lockout is motivated by a desire to settle a labor dispute.\textsuperscript{78} Conversely, the lockout would be illegal if motivated by a “hostility to the process of collective bargaining.”\textsuperscript{79} This translates into either a desire to discourage union membership, or to completely avoid bargaining.\textsuperscript{80} \textit{American Ship Building} not only supported the use of a second type of lockout, it also pointed to conditions that all lockouts must meet.

On the same day in 1965, the Supreme Court also decided \textit{NLRB v.}
Brown, this one returning to the Buffalo Linen issue of a defensive lockout in response to a whipsaw strike.\textsuperscript{81} The facts differed from the earlier case in that rather than closing their stores during the lockout, as was done in Buffalo Linen, the employer in Brown chose instead to hire temporary replacement workers.\textsuperscript{82} First, the Court declared the lockout to be “within the rule of Buffalo Linen” permitting defensive lockouts.\textsuperscript{83} It then found little difference between the two cases, stating that while pressures are surely greater on the union when replacements are used, the pressure is “the result of the [local’s] inability to make effective use of the whipsaw tactic.”\textsuperscript{84} Once again, the Supreme Court stated that no employee right protected by the NLRA had been violated.\textsuperscript{85} The use of replacement workers in a defensive lockout was legitimized.

In most situations, after an agreement has expired, the parties will continue to bargain until either a new agreement is reached, or the negotiations reach an impasse. Up to this point, all legal lockouts, defensive as well as offensive, had occurred following that impasse. Three years after the Supreme Court decisions in 1965, the NRLB handed down an order that expanded the lockout doctrine even further. In Darling and Company and Lewis Lane\textsuperscript{86}, the employer locked its employees out prior to actually reaching an impasse. In its controversial decision, the NRLB found that an impasse was not a necessary criterion for a legal lockout.\textsuperscript{87} While the absence of an impasse was found to be one noteworthy circumstance when evaluating the motivation for the lockout, the Board stated that the mere “absence of an impasse does not of itself make a lockout unlawful any more than the mere existence of an impasse automatically renders a lockout lawful.”\textsuperscript{88} After Darling and Company, an impasse in negotiations was no longer a requirement of the lockout.

Lastly, towards the end of what one author has called a period in which “replacement lockouts occurred nearly continuously,” the NRLB delivered a decision to add the final piece to the lockout doctrine.\textsuperscript{89} In Harter Equipment, Inc. v. Local 825, International Union of Operating Engineers, AFL-CIO, the employer, Harter Equipment, hired temporary replacements during an offensive lockout.\textsuperscript{90} Up to now, only employers in defensive lockouts had been formally permitted to utilize temporary

\begin{itemize}
\item \textsuperscript{81} 380 U.S. 278 (1965).
\item \textsuperscript{82} \textit{Id.} at 281.
\item \textsuperscript{83} \textit{Id.} at 288.
\item \textsuperscript{84} \textit{Id.} at 286.
\item \textsuperscript{85} \textit{Id.} at 286.
\item \textsuperscript{86} 171 N.L.R.B. 801 (1968).
\item \textsuperscript{87} \textit{Id.} at 802.
\item \textsuperscript{88} \textit{Id.} at 803.
\item \textsuperscript{89} LeRoy, \textit{supra} note 61, at 1011.
\item \textsuperscript{90} 280 N.L.R.B. 597 (1986).
\end{itemize}
employees. However, the Board stated that the use of temporary employees simply "bring[s] economic pressure to bear in support of a legitimate bargaining position," the exact same result that the Supreme Court in *American Ship Building* claimed was brought by an offensive lockout in general.\(^9\) Seeing no persuasive reason to bar a practice that it believed was supported by *American Ship Building*, the NLRB stated that an offensive lockout that uses temporary employees "is a measure reasonably adapted to the achievement of a legitimate end."\(^9\) The last piece of the lockout was complete.

Evolving through those five decisions, today the lockout, if properly motivated, seems to be available in every possible form. First, it may be either defensive, in response to an action taken by a union, normally in the case of a whipsaw strike; or offensive, in an effort to bring economic pressure upon the union. Second, employers instituting both offensive and defensive lockouts may employ temporary labor during the length of a lockout. This not only allows the employer to stay in business during the dispute, but brings added economic pressure to the company's bargaining position. Third, where an agreement has expired, an employer may call a lockout prior to actually reaching an impasse in negotiations. The only significant limitation that remains is that the legality of every lockout still depends on the motivation of the employer. An employer may not be motivated by anti-union sentiment, nor by a desire to avoid collective bargaining altogether. Yet, so long as a lockout is found lacking in these nefarious characteristics, under current law the Supreme Court and the NLRB will deem the device legal.

IV. Lockout Law Applied to the NFL and MLB Disputes

As described above, the labor dispute between MLB and the MLUA had a notably different procedure and outcome than the dispute between the NFL and the NFLRA. This was no doubt a result of the stances each respective union took in the face of a lockout. While fully aware that a lockout was imminent, the NFLRA chose to pass on Commissioner Tagliabue's final offer, accepting the lockout.\(^9\) The MLUA, on the other hand, sure that they would be locked out at the end of the 1999 season as had already happened in 1995, took a different, disastrous route by trying to pre-empt any move by MLB. While this action did effectively stop any attempt of a lockout by MLB, it was at the cost of jobs, and certification of the MLUA. Following the judicially created criteria for a legal lockout, it is rather obvious that the NFL lockout clearly met these standards.

\(^{91}\) *Id.* at 599.
\(^{92}\) *Id.*
\(^{93}\) *See* Shapiro, *supra* note 15.
Although speculating, the MLUA might have had arguments concerning the legality of an MLB lockout if they had simply let MLB continue down that path. However, the success of a legal challenge by the MLUA would surely be up to the courts.

A. The NFL Lockout

To begin, the NFL lockout is partially analogous to the dispute in *American Ship Building Company v. NLRB*\(^94\), the first case in which the Supreme Court approved the use of an offensive lockout by an employer. The American Ship Building Company operated four Great Lakes shipyards, all of which primarily repaired ships.\(^95\) According to the facts of the case, the ship repairing industry is highly seasonal, centered mainly around the winter months.\(^96\) Any unplanned work stoppage during these months would be very costly for the company, placing it in an especially precarious situation if a ship was already in a dock to be repaired. After more than two months of negotiations for a new collective bargaining agreement, an impasse was reached between the union and the employer.\(^97\) Fearing that the union would wait to strike until the busy season, the employer instead closed almost all portions of four shipyards, and temporarily laid off most of the workforce until a settlement could be reached.\(^98\) Similarly, the activities of the NFL and NFLRA are also highly seasonal. Football is largely played in the fall months, with the playoffs extending into the early winter. While the NFL itself is engaged in many activities during the off-season, such as the NFL college draft, the main work of the referees generally lies between the months of August and January.\(^99\) As with *American Ship Building*, a strike in the off-season would have very little, if any, effect, especially if the dispute were settled prior to the start of the season. However, an unannounced strike during the season could easily cripple the league, losing tens, if not hundreds, of millions of dollars if forced to cancel games. As in *American Ship Building*, negotiations between the NFL and NFLRA had clearly reached an impasse. After weeks of negotiations, the NFLRA would not lessen its demands, rejecting Commissioner Tagliabue’s final proposal.\(^100\) Citing the fear of an in-season strike by the officials, and lack of a promise by the

\(^{94}\) 380 U.S. 300 (1965).
\(^{95}\) *Id.* at 302.
\(^{96}\) *Id.*
\(^{97}\) *Id.* at 303.
\(^{98}\) *Id.* at 304.
\(^{99}\) This is barring extraordinary events. In 2001, due to the September 11 tragedy, the entire season was pushed back a week. Consequently, both the Super Bowl and the Pro Bowl, the final two games of the season, were played in February.
\(^{100}\) See Shapiro, *supra* note 15.
officials not to strike during the season, Tagliabue locked out the NFLRA. ¹⁰¹ Up to this point, the NFL lockout is almost identical to the American Ship Building lockout, and therefore completely legal.

The one difference between American Ship Building and the NFL dispute is the use of replacement workers by the NFL. While the American Ship Building Company simply decided to close its shipyards, the NFL had no intention of canceling the 2001 season, instead hiring replacement referees. ¹⁰² Not taking into account the public uproar that would ensue if an NFL season was altogether cancelled, the league’s commitments in the form of player salaries, ticket sales, and venue leases made canceling an unacceptable option. However, this did not affect the legality of the lockout, since the practice of using replacement workers during an offensive lockout was approved by the NLRB in Harter Equipment. ¹⁰³ As with the NFL, Harter Equipment chose to hire temporary replacement workers “so that it could resume operations and meet fixed expenses.”¹⁰⁴ There, the NLRB found nothing wrong with this practice in general, believing it to simply put more pressure on employees without violating any rights protected by the NLRA. ¹⁰⁵

Clearly, the NFL’s lockout of its officials used devices that both the Supreme Court and the NLRB would have deemed legal. More importantly, the NFL’s lockout did not contain any of the aspects which both ruling bodies have deemed illegal in the lockout context. ¹⁰⁶ Again turning back to American Ship Building, the Supreme Court stated that a lockout is illegal if motivated by a “hostility to the process of collective bargaining.” ¹⁰⁷ The NLRB in Harter Equipment put it best when they narrowed the description of this motivation down to both “specific union animus” and “bad-faith bargaining.”¹⁰⁸ These illegal motivations did not apply to the NFL dispute. Aside from essentially calling their demands unrealistic, one was hard-pressed to find any harsh words or actions by the NFL against the NFLRA during the entire dispute.¹⁰⁹ Similarly, the union never complained that it believed the NFL was attempting to discourage union membership or existence. Also, there was no claim or evidence of bad-faith bargaining, or of an attempt to completely avoid the collective bargaining process by the NFL. On the contrary, the NFL repeatedly

¹⁰¹. Id.
¹⁰². See Myers, supra note 5.
¹⁰⁴. Id. at 597.
¹⁰⁵. Id. at 599.
¹⁰⁶. See supra page 28 (discussing illegal lockout characteristics).
¹⁰⁹. See Pedulla & Weisman, supra note 14.
attempted to negotiate, publicly stating many times that they wanted to reach an appropriate deal before a lockout became necessary. At one time in August of 2001, league spokesman Greg Aiello called the negotiations “priority number one,” claiming that both the NFL and the NFLRA were committed to getting a deal done. Unless something happened that we do not know about, it seems clear that the NFL engaged in good-faith bargaining on the road to reaching an impasse in negotiations with the NFLRA.

The NFL lockout of its officials met the judicially created requirements for a legal lockout. It was classified as a type of lockout that has been deemed legal, an offensive lockout with replacement workers; in addition, the employer, the NFL, lacked any nefarious motivations that the courts have deemed improper in this context.

B. The Preempted MLB Lockout

While in the end MLB never actually had to make a definitive decision, the MLUA cited as a main reason for the resignation scheme a fear that MLB planned on locking the umpires out following the 1999 season, the end of the 1995 Basic Agreement. However, imagining that the MLUA did not take its preemptive steps, and that at the expiration of the agreement MLB did lock out the umpires, the MLUA may have had strong arguments to challenge the legality of the lockout.

Any lockout by MLB would have been classified as an offensive lockout. The no-strike clause of the Basic Agreement effectively eliminated the need for a defensive lockout. Therefore, MLB would have most likely waited until the end of the 1999 season, and then offensively locked out the MLUA going into new contract negotiations. As with the NFL, this situation would be analogous to the facts of American Ship Building. Since the lockout would have only occurred after the season, there furthermore would have been no need for replacement umpires. However, the 1995 lockout of the MLUA began during the off-season, and continued through half of the 1995 season. If an extended strike of this nature would have happened following the end of the 1999 season, the Harter Equipment doctrine would have to have been employed, allowing for the use of replacement workers during an offensive strike. Thus, as with the NFL disputes, the two possible versions of a lockout the MLB could have used most likely would have been legal.

110. Freeman, supra note 5; Gary Myers, Clock Ticking On Deal Between NFL, Zebras, DAILY NEWS (New York), Aug. 10, 2001, at 90.
111. See Myers, supra note 5.
112. See Schmuck, supra note 35.
113. See Baseball’s Umpires Plan to Quit, supra note 33.
While the MLUA would not have been able to challenge the type of lockout used, the union may have had arguments concerning the motivation of MLB. To reiterate, for a lockout to be legal, it must not be motivated by bad-faith negotiation, an attempt to avoid negotiation altogether, or anti-union sentiment. First, while still months from the official end of the 1995 collective bargaining agreement, as of the July 15th resignations, MLB had made very little effort to negotiate a new deal with the MLUA. Combining this fact with the MLUA’s belief that MLB was already planning to lock out the umpires, it is a fair assumption that MLB would not have increased their efforts to negotiate prior to locking out the umpires. Clearly, the MLUA could have argued that a lockout without prior meaningful negotiation was an attempt to completely bypass the collective bargaining process, as barred by American Ship Building. Unfortunately, the courts have not set an explicit standard for the amount of negotiating that is required for the employer’s effort to be deemed a “good faith” effort. Along the same lines, if MLB had not stepped up its negotiations, the MLUA could have pointed to the fact that an impasse most likely would not have been reached. While in Darling and Company and Lewis Lane the NLRB stated that an impasse is not a necessary criterion for a legal lockout, the Board did not state that a lack of an impasse is irrelevant. On the contrary, the NLRB stated that a lack of an impasse should be weighed when determining the motivation for a lockout. This could have bolstered the MLUA’s case that the lockout was motivated by a desire to avoid collective bargaining.

Also, throughout the entire 1999 labor dispute and aftermath, certain members of the MLUA complained that MLB was attempting to break the union. While this statement was made after MLB chose to accept the resignations of a large number of umpires, veteran umpire Joe West, quoted in the Chicago Sun Times, had this to say about MLB’s tactics:

Baseball’s tactics are to break the union at any cost. (Attorney)
Ron Shapiro has counseled a majority of American League

114. Harter Equip., Inc., 280 N.L.R.B. 597, 597 (1986)(stating that Harter Equipment’s lockout was legal because “There is no evidence that the Respondent was motivated by specific union animus. . .[and] there is no evidence [of] bad-faith bargaining before or after lockout”).

115. Sam Donnellon, Resigning Umps The Strife Of The Party, BUFFALO NEWS, July 15, 1999, at 1F.

116. 380 U.S. 300, 309 (1965)(proposing that “proper analysis of the problem demands that the simple intent[ion] to support the employer’s bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining that could suffice to render a lockout unlawful.”)

117. Darling & Co., 171 N.L.R.B. 801, 802 (1968)(confirming that the board did “not find that the absence of an impasse renders the [American Ship Building] test per se inapplicable.”).

118. Id. at 803.
umpires in a covert operation to help his friend, (executive vice president) Sandy Alderson, destroy this union. (Shapiro) has interfered with the union’s activities and undermined the general operation. If I’m not mistaken, that is against the law.119

While evidence of such allegations would surely be required, evidence that West did not present at the time of this statement, the MLUA might have offered properly substantiated instances such as this to support a contention that an MLB lockout was motivated by anti-union sentiment.

Make no mistake: it would have been an uphill battle for the MLUA to successfully challenge the legality of an MLB lockout. The lines are not drawn as to how much negotiation constitutes good faith bargaining. Also, while they had allegations against the league, the MLUA would have needed some hard evidence to sustain a claim that MLB was attempting to destroy the union. However, if even just on the point concerning negotiation, the MLUA might have waged some serious challenges against an MLB lockout. Yet, they chose to preempt this lockout.

V. THE LEGALITY OF THE RESIGNATION SCHEME, AND OF MLB’S RESPONSE

Rather than accepting an imminent lockout, the MLUA, under the leadership of Richie Phillips, instead chose to implement an ill-fated resignation scheme. Having been relieved of the decision of whether or not to lock out the umpires, MLB saw the resignation letters as “sav[ing] management officials the trouble of playing hardball with [the umpires] in the off-season.”120 Unfortunately for the MLUA, while there may have been credible arguments against the legality of a lockout, MLB’s response to the resignations was approved in the December 14, 2001 opinion of Judge Harvey Bartle III in The Major League Umpires’ Association v. American League of Professional Baseball Clubs.121

Beginning with the appeal’s procedural posture, the recent decision by the District Court came as an appeal by both the MLUA and MLB of the May 11, 2001 decision by arbitrator Alan Symonette.122 In general, Symonette upheld MLB’s claim that the resignations by the umpires were not protected activity under the NLRA, and that MLB was therefore within

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120. Schmuck, supra note 35.
121. No. 01-2790 (E.D. Pa. Dec. 13, 2001). As of January of 2003, this case has not been published. All page numbers refer to the page of the actual decision as submitted by Judge Bartle. At the time of publication, appeals are pending in the Third Circuit.
122. Id. at *5-6.
its rights to accept some of the resignations. Supra. Symonette did, however, force MLB to allow nine of twenty-two umpires to rescind their resignations, two from the AL and seven from the NL. Supra. The AL umpires were ordered reinstated for lack of evidence as to the existence of one of the resignations, and because of the timing of the other resignation; the NL umpires were ordered reinstated due to problems with the method used by the NL in determining which resignations to accept. Supra. Still, and most important to the analysis at hand, Symonette did find that MLB was entitled to accept most of the resignations and hire permanent replacements. Supra. The MLUA appealed in an effort to reinstate all umpires who were let go, while MLB appealed to be granted the right to accept all twenty-two resignations. Supra.

While also presented with questions of scope of review and arbitrability, a substantial part of the District Court’s opinion concerned the legal effect of the MLUA’s resignation letters, and the legality of MLB’s response. First, the court dismissed the MLUA’s claim that the letters of resignation were not binding, but rather a form of protest motivated by a desire to spark negotiations with MLB. Supra. Instead, the Court found that each umpire who submitted a letter used language and terms that showed that he was intending to resign of his own free will. Supra. The Court noted that each letter not only used the exact phrase “I hereby resign,” but also that the letters invoked Article VIII.D of the Basic Agreement, entitled “Termination Pay Where Termination is By Umpire.” Supra. The Court believed that any other interpretation of the letters would violate the MLUA and MLB’s contract. Supra. As stated previously, the contract barred any strike or work stoppage by the umpires. If the resignations were not meant to be binding, it would simply be an attempt to bypass this clause and violate the contract. Therefore, according to the Court, the resignation letters were exactly that: resignation letters.

Second, the Court addressed MLUA’s claim that the MLB was required to rehire all of the umpires who rescinded their resignations, despite the fact that replacement workers had been hired before the resignations were rescinded. The Court pointed to two arbitration cases which state very plainly that if the employer relies on a resignation and searches for a replacement, the employer is not obligated to allow an
employee to rescind a resignation.\textsuperscript{132} However, each case came to this conclusion with somewhat different interpretations of the same principle.

First, in \textit{Summit Finishing Company, Inc. and the United Steel Workers of America, AFL-CIO, Local No. 3215}, after a heated argument with a supervisor, an employee gave his two week notice of resignation.\textsuperscript{133} Later, while appearing much calmer, he reiterated his intent to resign.\textsuperscript{134} Days later, after supervisors had already begun to search for a replacement, the employee sought to rescind his resignation.\textsuperscript{135} The arbitrator stated that a resignation with notice is binding as long as it is given with the intent to resign.\textsuperscript{136} The arbitrator believed that the point of two weeks notice "is to afford the employer an opportunity to find a replacement before the employee leaves his employment . . . . Were an employee free to retract a two week notice anytime before the two weeks had expired, the notice would have no effect."\textsuperscript{137} By this logic, most any notice of resignation is binding, assuming the employer accepts the resignation and begins searching for a replacement.

The second case to which the court pointed also focused on reliance by the employer in searching for replacements, but likened it to the common law contract principle of offer and acceptance. In \textit{Roadway Express, Inc. and Local 707, International Brotherhood of Teamsters}, an employee submitted her resignation, effective almost a month from the date of the letter, but chose to rescind the resignation a week later.\textsuperscript{138} At this point, the employer had already elevated another employee to the resigning employee's position, had elevated yet another employee to fill the vacancy by the ascending employee, and had posted the vacancy of the job left open by the internal moves.\textsuperscript{139} The arbitrator advanced three separate examples of offer and acceptance to show that the resignation could not be rescinded. First, the arbitrator deemed the employee's letter to be an offer for the employer to accept.\textsuperscript{140} While the union claimed that the employer never formally accepted the offer, the arbitrator found acceptance when the employer posted the employee's job as a vacancy.\textsuperscript{141} Next, the arbitrator also found an offer in a provision of the employment contract used at the

\begin{enumerate}
\item\textsuperscript{132} \textit{Id.} at *15.
\item\textsuperscript{133} \textit{Summit Finishing Company, Inc.}, 86 Lab. Arb. Rep. (BNA) 1160, 1160 (1986) (Archer, Arb.).
\item\textsuperscript{134} \textit{Id.}
\item\textsuperscript{135} \textit{Id.}
\item\textsuperscript{136} \textit{Id.}
\item\textsuperscript{137} \textit{Id.}
\item\textsuperscript{139} \textit{Id.}
\item\textsuperscript{140} \textit{Id.}
\item\textsuperscript{141} \textit{Id.}
\end{enumerate}
company, allowing that "any employee could sever her seniority by voluntarily resigning."\textsuperscript{142} The letter of resignation by the employee was effectively viewed as an acceptance of the contractual provision allowing the employee to sever the seniority position upon her own request.\textsuperscript{143} Lastly, the arbitrator pointed to the reliance of the employer on the resignation when he made the offer to the other two employees to elevate their positions, and the reliance of these employees in accepting these offers.\textsuperscript{144} Putting further emphasis on this reliance created by the employee's resignation, the arbitrator stated the following: "That the employee who quit, thus instigating the chain reaction vacancy filling, now wanted to return to her former position is not in and of itself sufficient cause to dash the expectations of two other employees."\textsuperscript{145}

Following the reasoning in these two cases, the Eastern District of Pennsylvania denied the MLUA's injunction seeking to reinstate all umpires; instead, seven AL umpires were denied reinstatement.\textsuperscript{146} A first-come, first-served approach was used to rehire the umpires until their roster was full, meaning that the nine umpires without jobs were simply the last nine to rescind their resignations.\textsuperscript{147} As for the two rehired umpires, the Court found that one never actually resigned, while the other rescinded his resignation earlier than originally thought.\textsuperscript{148} The NL was a bit more muddled: since the NL received all of the rescinded resignations at the same time, they were not able to utilize the first-come, first-served approach. Instead they used a "merit and skill" determination "to decide which of the 19 Umpires [they] would retain of the 32 who had rescinded their resignations."\textsuperscript{149} The arbitrator found that the method violated the Basic Agreement, and ordered the NL to rehire seven umpires, which the Court did not overturn.\textsuperscript{150} Lastly, the Court remanded the case back to the arbitrator to rehear arguments for three NL umpires, because it believed that the arbitrator used the wrong standard to decide their fates.\textsuperscript{151}

Aside from the remand and the reinstatement of nine of the twenty-two umpires, two important points emerge from the Court’s opinion. First, despite the MLUA’s claim that the resignations were not intended to be actual, the language employed by the umpires in their letters established a

\textsuperscript{142} Id.  
\textsuperscript{143} Id.  
\textsuperscript{144} Id.  
\textsuperscript{145} Id.  
\textsuperscript{147} Id. at 15.  
\textsuperscript{148} Id. at *15-16.  
\textsuperscript{149} Id. at *16.  
\textsuperscript{150} Id. at *6, 18.  
\textsuperscript{151} Id. at *22.
legal intent to resign. Second, where an employer relies upon a resignation and searches for replacement workers, the resignation is binding, and any possible reinstatement of the resigning employee is left to the employer’s discretion. Despite the fact that nine umpires were allowed to go back to work, ten were denied reinstatement. The MLUA was defeated, not only in the courtroom, but also in its attempt to take the power of a lockout from MLB.

VI. THE BENEFITS OF ACCEPTING A LOCKOUT, AND THE PENALTIES FOR PREEMPTING ONE

In the collective bargaining system, when faced with a possible lockout, a union has several options. First, it may simply come down on its demands to a level satisfactory for management, thereby negotiating to settlement and ending the dispute. However, very little, if anything, may be gained by such a strategy. The union may also attempt to get the jump on the employer and strike before it is locked out (providing its present contract does not bar strikes, as was the case with the 1999 MLUA dispute). A strike may catch the employer who is unprepared for a work stoppage off guard, thereby gaining leverage for the union in the dispute. Yet, unless the timing of the stoppage seriously disrupts the employer’s business, this is merely a moral victory. If a lockout was imminent, the company would have already committed to some losses, meaning that the leverage gained by a preemptive strike may not be large at all. Also, just like the lockout, the employees are not earning money during a strike, placing them in no better, immediate position than during a lockout. Lastly, the union may simply allow the lockout to occur, hoping that their continued absence will eventually be too damaging for the company to weather, forcing the employer to come down on its position. Clearly, accepting a lockout is a gamble, due to the judicially approved use of temporary replacement workers. If the temporary workers do an adequate job, the lockout may be extended for a considerable amount of time, forcing the union to come down on its demands if its members hope to return to work. In most cases, the damage to the employer during a lockout will therefore be minimal, but at least the lines of negotiation will remain open.

In the end, none of these three options sounds particularly desirable. Two are gambles, and one is a forfeiture of the union’s position. However, aside from previously contracted arbitration, in almost all cases they are the only viable options. As the MLUA learned, any other route can be disastrous. By comparison, while the MLUA was truly defeated on all fronts, the members of the NFLRA were neither winners, nor losers in their dispute. Looking at what each union gained and lost by their actions
during their respective disputes, it becomes clear that when a strike is undesirable (or impossible, such as in the MLB dispute, where the MLUA's contract contained a no-strike provision), and the union isn't presently willing to come down on its demands, its only option is to accept the lockout. While the chances of receiving everything desired in negotiations are greatly diminished, also diminished is the chance of losing all, as was the case for the ten umpires who lost their jobs.

By comparing what the NFLRA was seeking to what it received, it would appear that the NFLRA was unsuccessful. While originally seeking an immediate 200% to 500% pay increase, the referees eventually agreed to return to work for an immediate raise of 50%, rising to 100% within two years.\footnote{152} Yet, the referees still received what most professions would consider an extremely large pay increase. Clearly, this largely favorable outcome is not a common thread in most cases where unions accept being locked out, but it does emphasize the gambling aspect of accepting the lockout. Some unions do actually lose, forced to give up some benefit in order to come to a settlement. Yet, at least it does not appear that when subjected to a lockout, the employees are gambling with job security. While temporary replacements have been deemed judicially acceptable, the muddled case law concerning permanent replacements seems to state that unless the employer has some extraordinary "legitimate, substantial business justification for hiring such replacements," locked-out workers cannot be permanently replaced.\footnote{153} Surely the NFLRA's decision to accept the lockout was a gamble, for it not only agreed to go without a paycheck for an undetermined amount of time, but it also had no guarantees that it would have any of its demands fulfilled. But the fact that the NFL could not have offered its replacement officials permanent contracts, thereby severing all ties with the NFLRA, granted the referees job security throughout the duration of the lockout. Taking this into account, the wager does not seem as risky.

The MLUA, on the other hand, did not want to incur any risk, instead searching for a way to avoid the gamble and give itself all of the leverage. This failed, and essentially all was lost by a large percentage of MLUA members. However, more than just the jobs of ten umpires were lost by not accepting the impending lockout. Legal challenges that may have favored the MLUA became moot once the resignation letters were accepted.

First, as mentioned in Section IV.B., the legality of a possible lockout by MLB after the 1999 season was less than certain.\footnote{154} The MLUA could have made convincing arguments as to MLB's illegal motivations in

\footnote{152} See Wong, supra note 8.
\footnote{153} See generally Dunn, supra note 61, at 11.33.
\footnote{154} See discussion supra Part IV.B.
deciding to institute a lockout, resulting in arbitration, or court rulings in the union’s favor. By preempting the lockout, the umpires precluded these potentially favorable outcomes for the union.

Second, prior to the resignation scheme, the MLUA believed that it had valid complaints against MLB. In its original complaint seeking a preliminary injunction against MLB, the union lists what it believed were activities with the clear intent “to undermine the MLUA as the chosen bargaining representative and to make changes to the umpires’ terms and condition of employment which violated the Agreement.” The MLUA cited MLB’s attempt to take control away from the AL and NL with respect to the umpires’ supervision and evaluation, MLB’s unilateral changes in the strike zone, and MLB’s alleged attempts to induce certain umpires to retire by offering larger severance packages than granted by the Agreement. Also, the MLUA had complained of what it considered the league’s unfair treatment of certain umpires and the lack of player punishment in recent confrontations between umpires and players. While these allegations may have deserved arbitration, as even MLB conceded, not only were they misplaced in this specific litigation, but as for the ten umpires out of a job, they were essentially moot points. Arbitration would have only repaired these harms for the presently employed umpires through possible injunctions (e.g., an injunction barring MLB from exhibiting leniency towards players who aggressively confront umpires), offering no effect for released umpires. Thus, the more you look at it, the resignation scheme barred much more than employment.

Despite the results obtained by the umpires, it is theoretically possible that a resignation scheme could work. In a retrospective interview, Richie Phillips stated that he believed that the flaw in the umpires’ scheme was in their failure to remain unified: "The real miscalculation is that we miscalculated the depth of the resolve of the umpires... We were shocked (when some umpires initially rescinded their resignations). We did not have a plan for that." However, the true flaw might have been

155. See Insley, supra note 34, at 617.
157. Id. at para. 18-19.
158. Insley, supra note 34, at 617.
160. Id.
the umpires' replaceability. It was simply too easy for MLB to hire replacement umpires. The only possible way for such a scheme to succeed in applying the appropriate pressure on an employer is when the employees are truly irreplaceable. Only then would the employer be forced to choose between two undesirable options: give in to the demands of the union, or simply shut down its operation. Even in this situation, the success of the plan truly depends on how imminent the future lockout is. As with striking prior to a lockout, if the employer is already determined to lockout the union, resignations may have little effect. Yet, as with the umpires, if the resignations occur during a busy season in the industry, months prior to the lockout, the employer may have to give in to the union.

Therefore, it is theoretically possible for a resignation scheme to work; however, real world problems arise. In today's world of assembly line manufacturing and computer automation, irreplaceable union employees are extremely rare, if not non-existent. Very few if any industries are so specialized that they would be able to exert this type of force without fear of simply losing their jobs. Moreover, any attempt at this by a professional sports union just looks silly. Every professional league has a corresponding minor league or college program. Every player, coach, or game official has a counterpart in one of these leagues programs, many of whom would be more than eager to step into the shoes of the major league employee if offered the opportunity. Any union that tries a resignation scheme must be absolutely certain of their irreplaceability. As the MLUA discovered, miscalculation of the probability of replacement will end in pure disaster.

VII. CONCLUSION

While all sports puns have been strenuously avoided up to this point, it is clear that the umpires of the MLUA dropped the ball. Conversely, it appears that the NFLRA referees made the right call, possibly thanks to a bit of help from instant replay. The success of the 2001 NFLRA strategy may have been a direct result of the failure of the 1999 MLUA resignation scheme. Having the benefit of watching baseball's mess, the NFLRA may have learned that the possible gains and definite securities of accepting a lockout vastly outweigh the considerable negatives of attempting a new strategy. However, listening to the words of some MLUA members immediately after turning in their resignations, most umpires also seemed to know what they were getting themselves into: "There is always concern

that something like [MLB accepting the resignations] could happen,” veteran umpire Jim McKean said on July 15, 1999, “but we’re a proud group.” As a defense to their actions, but evidencing full acceptance of what the resignation letter meant, umpire Jerry Crawford said the following:

We just think things have arisen this year that have indicated that they are in the mind to put people out of work. I have my family and everybody else has their family. They would much rather have a sure thing rather than not have a sure thing. My pension, my severance, whatever monies, through this basic agreement that we have. These are all the sure things that we have. Rather than lose them, I have decided to resign.

While Crawford himself was able to retain his job, in the end, all that ten other umpires were left with was their severance pay, and their pride.

The notion of accepting a lockout as the best alternative under the circumstances is counterintuitive. Nobody wants to let his opponent have the upper hand. However, in most situations, if a labor dispute has reached the point of an imminent lockout, the employer already has the upper hand over the employee. When a lockout is imminent, the employer has made a decision that he is willing to incur losses to the company’s detriment, rather than give in to his employees’ demands. The company will continue to incur these losses until either the employee bends, or the firm can no longer withstand the damages. With the use of replacement workers, these losses may be so minimal that they take a very long time, if ever, to have any real effects upon the employer. While most unions contemplating an imminent lockout would want to find a way to reverse the leverage to bear upon the employer, it may simply be out of the union’s hands.

Accepting the lockout will, in most situations, offer a certain degree of job security, preserve legal contract claims, allow the employee to challenge the legality of the lockout itself in the appropriate forum, and at the very least will not sever negotiations. The MLUA would have had all of these things at their disposal had they accepted a lockout. The bases were juiced and the pitcher wasn’t throwing his best stuff. Yet, just like the Mighty Casey, the umpires struck out.