Cornell Law Review

Volume 99
Issue 4 *May 2014*

Article 6

Locked out without a Key: How the Eighth Circuit Wielded a Pro-Labor Statute as a Sword against Labor

Matthew Tymann

NOTE

LOCKED OUT WITHOUT A KEY: HOW THE EIGHTH CIRCUIT WIELDED A PRO-LABOR STATUTE AS A SWORD AGAINST LABOR

Matthew Tymann†

INTRODUCTION

The Norris-LaGuardia Act of 1932[1] restricted the jurisdiction of federal courts to enjoin particular work stoppages in cases "involving or growing out of a labor dispute."[2] For many years, the Act has been universally understood to prevent federal judges from issuing injunctions against employee-initiated strikes.[3] The Supreme Court and many other sources, including the Act's legislative history, have made

† B.A., Georgetown University, 2008; J.D., Cornell Law School, 2014; Articles Editor, *Cornell Law Review*, Volume 99. My most important acknowledgment goes to my parents, who deserve more credit than can be easily articulated in one sentence. Beyond that, I would like to thank Nadia Chernyak and Brendan Venter for their consistent support throughout my time in law school—as well as before and (I would anticipate) after. Thanks also to everyone on the *Cornell Law Review* who helped render this Note publishable, especially Joshua Brooks, Minsuk Han, Stephanie Mark, Conor McCormick, and Derek Stueben. Finally, thank you to Professor Angela Cornell for assigning the paper that later turned into this Note.

1 29 U.S.C. §§ 101–115 (2012).

2 29 U.S.C. § 101.

3 *See, e.g.*, Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Prods., Inc., 311 U.S. 91, 99–100 (1940).

clear that the basic purpose of the Act was to protect organized labor from the stifling power of judicial injunctions.[4] However, the Eighth Circuit in *Brady v. NFL*[5] arguably added a new layer to the Act's ban on injunctions when it construed the Act as also barring federal courts from enjoining employer-initiated work stoppages (commonly known as lockouts).[6] Given the recent increase in employer-initiated lockouts,[7] the *Brady* decision could have wide-ranging effects that may not be easy to foresee. The decision is also not without its detractors. Judge Kermit Bye, the dissenter of the three circuit judges in *Brady*,[8] portrayed the majority as drastically breaking with federal precedent.[9] The viability of his argument, to be explored below, leaves open the possibility that other federal circuit courts could choose to limit the Act's injunction provision to cases involving employee-initiated strikes, thereby contravening *Brady*. This could lead to a circuit split and leaves this area of law relatively unsettled.

In short, this Note will address (1) whether *Brady* comports with precedent, (2) the likelihood of an impending circuit split on the issue, and (3) the ramifications the decision could have on future labor disputes both in professional sports and more generally.

Part I of the Note will provide some essential background information on the topic, both about the 2011 NFL lockout (and the litigation arising out of that dispute) and the Norris-LaGuardia Act. This should brief the reader on both the factual and legal context in which the *Brady* case arose.

Part II will proceed with a close examination of past Norris-LaGuardia cases to determine the degree to which the *Brady* court stayed true to precedent. This Part concludes that the *Brady* court broke new ground in holding that the Norris-LaGuardia Act prevents federal courts from enjoining employer-initiated lockouts.[10] In addition, this Part will consider the legislative history of the Act[11] and ultimately determine that the *Brady* court strayed far from the intended goals of the Congress that enacted this statute.

---

4 *See* United States v. Hutcheson, 312 U.S. 219, 235–36 (1941); H.R. REP. NO. 72-669, at 3 (1932).

5 644 F.3d 661 (8th Cir. 2011).

6 For more on lockouts, see generally 2 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1732–71 (John E. Higgins, Jr. et al. eds., 6th ed. 2012) [hereinafter DEVELOPING LABOR LAW]. For the seminal case establishing the legality of lockouts, see *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 309–10 (1965).

7 *See* Steven Greenhouse, *More Lockouts as Companies Battle Unions*, N.Y. TIMES, Jan. 23, 2012, at A1.

8 644 F.3d at 682 (Bye, J., dissenting).

9 *Id.* at 688–90.

10 *See id.* at 680–81 (majority opinion) ("[W]e conclude that § 4(a) of the Norris-LaGuardia Act deprives a federal court of power to issue an injunction prohibiting a party to a labor dispute from implementing a lockout of its employees.").

11 Particularly H.R. REP. NO. 72-669, at 3 (1932).

Part III of this Note will then turn to the future and consider the effect the *Brady* decision could have on future labor disputes. Part III points out that, according to a Bloomberg BNA report, the number of employer-initiated lockouts has seen a sharp increase of late.[12] Given this empirical fact, the impact of *Brady* could be much larger than it might otherwise have been. Specifically, Part III will argue that *Brady* could function as a "sleeping giant": a case that may not have an immediate impact but could have a devastating effect on labor unions if followed in a different context. Given the original understanding of the Norris-LaGuardia Act, to be discussed prior to this Part, this Note asserts that the *Brady* court did violence not only to the past history of jurisdiction-stripping cases, but also to the future application of what was originally a pro-labor statute.

Part IV then sketches the course of action that the federal courts could take to minimize the damage done by *Brady*, while stepping on the toes of the Eighth Circuit as little as possible. This solution draws on Judge Bye's dissent but goes beyond it in addressing the potential future impact of *Brady* across the entire labor law spectrum.

Part V will provide a brief conclusion, summarizing Parts II, III, and IV and noting further developments that could affect the balance analyzed in this Note.

I
Background

This section proceeds as follows: I begin with a procedural history of the 2011 NFL lockout, beginning in March 2011 and ending with the *Brady* decision in July. This should provide sufficient background for the reader to understand the *factual* context of the *Brady* decision as it related to the parties at hand. Subpart B goes on to give a brief history of the Norris-LaGuardia Act to explain the *legal* context surrounding the decision.

A. The 2011 NFL Lockout: Procedural History

Brady v. NFL[13] culminated the legal portion of a 2011 dispute between the National Football League (NFL) and the National Football League Players Association (NFLPA). This dispute primarily centered on the terms of the ensuing collective bargaining agreement (CBA)

---

12 Greenhouse, *supra* note 7, at B2; *see* Robert Combs, *Labor Stats and Facts: A Record Year for Lockouts*, Bloomberg BNA Lab. & Emp. Blog (Jan. 25, 2012), http://www.bna.com/labor-stats-facts-b12884907454.

13 644 F.3d 661 (8th Cir. 2011). For some historical background on NFL labor strife, see Robert Berry et al., Labor Relations in Professional Sports 97–98 (1986).

between the two sides.[14] The previous CBA had expired on March 11, 2011, and the NFL had initiated a lockout of its players the next day.[15] Players received no compensation during the lockout and could not make use of team facilities.[16]

On April 25, Judge Susan Nelson of the U.S. District Court for the District of Minnesota granted the players' motion for a preliminary injunction of the lockout.[17] Relying on the NFLPA's strategic decision to disclaim its status as a labor union immediately before filing suit, Judge Nelson held that the case before her did not arise out of a labor dispute and that the Norris-LaGuardia Act therefore did not apply.[18] The league quickly appealed, and the Eighth Circuit, over dissent, first granted a stay of the injunction pending the appeal.[19] Approximately two months later, a 2–1 majority formally vacated Judge Nelson's order and filed a lengthy opinion holding that, under the Norris-LaGuardia Act, the district court had lacked jurisdiction to enjoin the lockout.[20]

---

14 NFL players, like other professional athletes, are in the unique position of being bound by a CBA but still having the freedom to negotiate their own individual contracts. *See* Ryan T. Dryer, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267, 267. For an exposition of the general incongruity of individual contracts with collective bargaining agreements, see *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335–37 (1944).

15 Elliot T. Dube, *District Court Lacked Jurisdiction to Enjoin NFL Lockout, Eighth Circuit Says in 2-1 Split*, BLOOMBERG BNA DAILY LAB. REP. (July 8, 2011), http://news.bna.com/dlln/display/batch_print_display.adp?searchid=18350351.

16 *Id.*

17 Brady v. NFL, 779 F. Supp. 2d 992, 1042–43 (D. Minn.), *vacated*, 644 F.3d 661 (8th Cir. 2011).

18 *Id.* at 1026–27. Disclaiming the NFLPA's status as a union was the first step in a process called decertification. In beginning the decertification process, the NFLPA hoped to take its impending lawsuit out of the realm of labor law and into the realm of antitrust law. Due to the nonstatutory labor exemption, the NFL is not subject to antitrust law if and only if it is engaged in or operating under the product of successful collective bargaining. *See* Mackey v. NFL, 543 F.2d 606, 623 (8th Cir. 1976); *abrogated in part by* Brown v. Pro Football, Inc., 518 U.S. 231 (1996), *as recognized in* Eller v. NFL Players Ass'n, 731 F.3d 752, 755 (8th Cir. 2013). The decertification strategy was not new, *see* Sean W.L. Alford, *Dusting Off the AK-47: An Examination of NFL Players' Most Powerful Weapon in an Antitrust Lawsuit Against the NFL*, 88 N.C. L. REV. 212, 224–26 (2009). The interplay between labor law and antitrust law has given rise to much of the legal scholarship analyzing the 2011 lockout. *See, e.g.*, Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales After* Brady v. NFL *and* Anthony v. NBA, 45 U.C. DAVIS L. REV. 1221, 1249–51 (2012). Note also that, as a result of the decertification strategy, the actual plaintiffs in *Brady v. NFL* were individual players, not the NFLPA. For the sake of convenience, however, I will sometimes refer to the plaintiff in the litigation as the NFLPA.

19 Brady v. NFL, 640 F.3d 785, 794 (8th Cir. 2011).

20 *See Brady*, 644 F.3d at 680–81 (8th Cir. 2011).

B. The Norris-LaGuardia Act

The Norris-LaGuardia Act of 1932[21] greatly restricts the jurisdiction of federal courts to issue injunctions in any case "involving or growing out of a labor dispute."[22] Section 7 of the Act dictates specific procedures that a court must follow, and facts that it must find, before issuing any injunction in a case involving a labor dispute.[23] Section 4 of the Act goes even further, imposing an absolute ban on enjoining nine specific types of labor-related activity.[24] That is, no facts or procedural safeguards can negate the jurisdictional ban on injunctions of these nine protected activities.[25] The first of these activities, codified in section 4(a) of the Act, is "[c]easing or refusing to perform any work or to remain in any relation of employment."[26] Courts have long interpreted this language to cover employee- or union-initiated strikes, and have accordingly refused to enjoin this type of work stoppage.[27]

The *Brady* court, however, faced a less common situation: that of the employer-initiated lockout.[28] Whether section 4(a) applied to protect *lockouts*, as opposed to just strikes, from the force of injunctions presented a question without an immediately clear answer. Judge Nelson of the district court had enjoined the NFL lockout on the ground that the *Brady* case did not involve or grow out of a labor dispute at all and in so doing had avoided the need to put forth a construction of section 4(a).[29] And in fact, the *Brady* court had some opportunity to avoid the section 4(a) question as well, as it also held that the district court had not successfully conformed to the procedural requirements of section 7 and that its injunction was improper on

---

21 29 U.S.C. §§ 101–115 (2012).

22 29 U.S.C. § 101.

23 29 U.S.C. § 107 (2012). These hurdles are not easy to clear: section 7(a) requires, inter alia, that the court find that "unlawful acts . . . will be committed unless restrained." *Id.* § 107(a).

24 29 U.S.C. § 104 (2012).

25 *See id.*

26 *Id.*

27 *See, e.g.*, United States v. Hutcheson, 312 U.S. 219, 234–35 (1941).

28 *The Developing Labor Law* defines a lockout as "the withholding of employment by an employer from its employees for the purpose of either resisting their demands or gaining a concession from them." DEVELOPING LABOR LAW, *supra* note 6, at 1733–34.

29 The district court's holding was based on the NFLPA's decertification as the bargaining representative of the players, a process which the union had strategically initiated just before the start of the lockout. *See* Brady v. NFL, 779 F. Supp. 2d 992, 1022 (D. Minn.), *vacated*, 644 F.3d 661 (8th Cir. 2011). The players argued, successfully in the district court, that the case did not properly involve a labor dispute since they no longer enjoyed any union representation. The Eighth Circuit disagreed, holding that since the two sides maintained ongoing disagreement pertaining to terms and conditions of employment, the case did arise out of a labor dispute and therefore was subject to the restrictions of the Norris-LaGuardia Act. *See Brady*, 644 F.3d at 672–73.

that ground as well.[30] But in order to hold that the lockout merited complete protection from injunction, thereby insulating the NFL from any attempted cure of the procedural defects by the court below, the *Brady* court had no choice but to grapple with the language and history of section 4(a). It was in this portion of the analysis where the majority opinion of Circuit Judge Steven Colloton (joined by Circuit Judge Duane Benton) and the dissenting opinion of Circuit Judge Kermit Bye most sharply differed.

II
THE *BRADY* DECISION

Part II will first set out the position of the *Brady* majority in further detail, so as to establish a basis for criticism. Next, subpart B of Part II will engage in a critical review of the majority opinion, ultimately concluding that it did not comport with either precedent or the original legislative purposes (as demonstrated by legislative history) of the Norris-LaGuardia Act.

A. The Opinion

The majority, through an opinion authored by Circuit Judge Colloton, engaged in a highly textual analysis of section 4(a). The court first pointed out that the introductory clause to section 4 proscribes any injunction that would prohibit "any person or persons participating or interested" in a labor dispute from engaging in the protected activity set forth within section 4.[31] Employers, asserted the court, clearly are persons participating in a labor dispute.[32] The court then moved on to 4(a) itself, setting its focus on the second half of the subsection: "[o]r to remain in any relation of employment."[33] Again leveraging the expansive meaning of the word "any," the court concluded that a lockout amounts to an employer's refusal to remain in a particular relation of employment to its employees.[34]

To provide additional support for its broad reading of this language of the Act, the court cited to *Ali v. Federal Bureau of Prisons*,[35] a 2008 Supreme Court case in which the Court directly stated that the word "any," read naturally, "has an expansive meaning."[36] The *Brady* court further pointed out that the first half of 4(a)—"[c]easing or refusing to perform any work"—has already received a similarly

30 *Brady*, 644 F.3d at 681.
31 *Id.* at 675.
32 *Id.*
33 *Id.* at 674.
34 *Id.* at 676.
35 552 U.S. 214 (2008).
36 *Id.* at 219 (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997)).

expansive reading in the Supreme Court, such that injunctions are forbidden even when employees refuse to perform "a certain type of work," as opposed to all work.[37] The *Brady* court thus contended that if "any" is to be read broadly in the first half of 4(a), it ought to be read just as broadly in the second half of 4(a).[38]

On this basis, the majority held that section 4(a) stripped federal courts, including the U.S. District Court for the District of Minnesota, from enjoining employer-initiated lockouts.[39] The dissenter was Judge Bye, who argued that neither judicial precedent nor the legislative history of the Norris-LaGuardia Act supported the majority's decision.[40] Judge Bye concluded that the Norris-LaGuardia Act does not and should not operate to strip federal courts of the jurisdiction to issue injunctions against *employer* action.[41] This Note now proceeds to agree with Judge Bye and attempts to augment his cogent analysis with a closer examination of the judicial opinions, legislative documents, and scholarly articles that have construed the Norris-LaGuardia Act since its enactment in 1932.

B. *Brady* Did Not Comport with Precedent or Legislative History

The essential holding of *Brady* is that the Norris-LaGuardia Act strips federal courts of the jurisdiction to enjoin employer-initiated lockouts.[42] In so holding, the *Brady* majority construed a statute, enacted to protect labor, in a way that instead protected *management* from losing a powerful negotiating weapon.[43] This Note contends not only that the *Brady* court erred in straying from the original purpose

---

37 *Brady*, 644 F.3d at 676 (citing Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association, 457 U.S. 702, 704–05 (1982)). In *Jacksonville Bulk Terminals*, a longshoremen's union refused, for political reasons, to load goods on ships bound for the Soviet Union. 457 U.S. at 704–05. The Court held that the Norris-LaGuardia Act's prohibition on injunctions should be read to apply to this type of work stoppage. *Id.* at 723–24.

38 *Brady*, 644 F.3d at 676.

39 *Id.* at 680–81.

40 *Id.* at 688–90 (Bye, J., dissenting).

41 *Id.* Judge Bye dissented on other grounds as well, most notably that he felt the case did not "involv[e] or grow[ ] out of a labor dispute" as would be required for the Norris-LaGuardia Act to apply at all. *See* 29 U.S.C. § 101 (2012); *Brady*, 644 F.3d at 868 (Bye, J., dissenting). On this point, Judge Bye was agreeing with Judge Nelson of the district court; both relied on the fact that the NFL Players' Union had decertified before filing suit in finding that the *Brady* case did not arise out of a labor dispute. *See Brady*, 644 F.3d at 686 (Bye, J., dissenting); Brady v. NFL, 779 F. Supp. 2d 992, 1026–27 (D. Minn.), *rev'd*, 644 F.3d 661 (8th Cir. 2011). That is, both Judge Bye and Judge Nelson felt that because there was no active labor union involved in the case, the case did not arise out of a labor dispute. For a deeper analysis of this aspect of the case, see Feldman, *supra* note 18, at 1249–51.

42 *See Brady*, 644 F.3d at 680–81.

43 *See* Greenhouse, *supra* note 7, at B2 ("[C]ompanies see lockouts as a way to wrest concessions and set an example for workers at their other facilities.").

of the Norris-LaGuardia Act but also that it acted in contravention of the weight of judicial authority. In supporting this two-pronged contention, this subpart will proceed chronologically, beginning with a more detailed exposition of the original purpose of the Norris-LaGuardia Act and then moving on to examine relevant case law.

1. *Legislative History*

Congress enacted the Norris-LaGuardia Act in 1932 as a response to the demonstrated power of judicial injunctions against employee-initiated strikes.[44] One source affirms that the "labor injunction" was so powerful and widespread in the 1920s that "courts in a sense assist[ed] firms to compel a nonunion shop throughout an industry."[45] Commentators at the time encouraged Congress to pass legislation that would restrict the jurisdictional authority of the federal courts to issue these injunctions and thereby improve the balance of power between labor and management.[46]

The legislature obliged with the Norris-LaGuardia Act and did not hide its intent behind the Act. The House of Representatives stated, in a House Report, that "[t]he purpose of the bill is to protect the rights of *labor* in the same manner the Congress intended when it

---

44 *See* MICHAEL C. HARPER & SAMUEL ESTREICHER, LABOR LAW: CASES, MATERIALS, AND PROBLEMS 66–68 (7th ed. 2011). The Clayton Act, 29 U.S.C. § 52 (2012), had actually been passed in 1914 in part to accomplish the same purpose, but it had been given a very narrow interpretation, and essentially neutered, by federal court judges. *See* United States v. Hutcheson, 312 U.S. 219, 230 (1941) (explaining that judges took the Clayton Act as only applying to "trade union activities directed against an employer by his own employees"). The relevant language of the Clayton Act reads as follows:

> No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right . . . .

29 U.S.C. § 52 (2012).

45 HARPER & ESTREICHER, *supra* note 44, at 67; *see, e.g.*, United Mine Workers v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839 (4th Cir. 1927).

46 *See, e.g.*, Felix Frankfurter & Nathan Greene, *Labor Injunctions and Federal Legislation*, 42 HARV. L. REV. 766, 776–77 (1929). Frankfurter (prior to his time as a Supreme Court Justice) and Greene were among the drafters of the Norris-LaGuardia Act and were quite prolific in publishing about the need for it during this time period. The just-cited article was one of two on the same subject that the pair published in top law journals within two months. *See* Felix Frankfurter & Nathan Greene, *Legislation Affecting Labor Injunctions*, 38 YALE L.J. 879 (1929). A year later, Frankfurter and Greene published an entire book on the subject. FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930) [hereinafter THE LABOR INJUNCTION]. *S*ee infra notes 56–60 and accompanying text for more on this book.

enacted the Clayton Act."[47] The Clayton Act, enacted in 1914, had also contained a provision which seemed to restrict the jurisdiction of the federal courts to enjoin strikes, but that provision had proved "ineffectual" as a result of its narrow "construction and application by the [f]ederal courts."[48] Given that the 72nd Congress specifically stated that the purpose of the Norris-LaGuardia Act was to mirror what "Congress intended when it enacted the Clayton Act," this analysis could benefit from any evidence of the intent of the 63rd Congress that enacted the Clayton Act.[49]

Some evidence of that kind comes from an earlier House Report stating:

> The consensus of judicial view . . . is that workingmen may lawfully combine to further their material interests without limit or constraint, and may for that purpose adopt any means or methods which are lawful. It is the enjoyment and exercise of that right and *none other* that this bill forbids the courts to interfere with.[50]

By connecting these dots, we already have a strong argument that the Norris-LaGuardia Act restricts federal jurisdiction only with respect to strikes and not employer-initiated lockouts. Simply put, the 72nd Congress stated that the intent of the Norris-LaGuardia Act was to restore the jurisdiction-stripping effect intended by the 63rd Congress in adopting the Clayton Act.[51] And the 63rd Congress stated that the Clayton Act *only* forbids courts to interfere with the above-described right of *workingmen*.[52] By explicitly stating that the bill does *not* forbid the courts from interfering with any *other* rights (such as those of employers against employees), the 63rd Congress made its intent—to protect employees in their efforts to strike—quite clear.

With that said, it is certainly fair for the naysayer to point out that the above-constructed argument arrives not only after numerous steps but also with only nonstatutory documents supporting its validity. That is, one might reasonably complain that piecing together language from multiple House Reports may not accurately gauge the true intent of the 72nd Congress in enacting the Norris-LaGuardia Act. However, there are at least two more sources that would seem to provide access into the minds of the drafters of the Norris-LaGuardia

---

47 H.R. REP. NO. 72-669, at 3 (1932) (emphasis added); *see also* S. REP. NO. 72-163, at 8–9, 16–18 (1932) (expressing a similar sentiment). For more on the Clayton Act, see *supra* note 44 and *infra* note 50 and accompanying text.

48 H.R. REP. NO. 72-669, at 3; *see also supra* note 44 (describing the particular, narrow construction courts applied to the Clayton Act).

49 H.R. REP. NO. 72-669, at 3.

50 H.R. REP. NO. 63-627, at 32 (1914) (emphasis added).

51 *See supra* note 44 and accompanying text.

52 *See supra* note 47 and accompanying text.

Act, and both seem to indicate the same conclusion as reached in the previous paragraph.

One of these sources is a work briefly mentioned in a footnote above: Felix Frankfurter and Nathan Greene's book, *The Labor Injunction*.[53] Frankfurter, before President Franklin Roosevelt nominated him to the Supreme Court bench,[54] served as one of the drafters of the Norris-LaGuardia Act.[55] Thus, this work, published in 1930, provides insight into the goals of an author of the Act at a time very close to when the Act was enacted. A quote listed in the book described the Clayton Act as the "charter of liberty of labor."[56] The book also asserted that the Norris-LaGuardia Act (as yet unnamed at the time of the book) should and would attempt to fill the gaps created by judicial misconstruction of the Clayton Act.[57] Frankfurter and Greene also made economic arguments in favor of passing the future Norris-LaGuardia Act.[58] It is not central to this Note to detail these arguments, but it is notable that the thrust of these arguments was that Congress should protect labor's right to organize as a means to improve the balance of power in labor disputes.[59] Examining *The Labor Injunction*, as well as some of Frankfurter and Greene's other publications on this subject, leads unavoidably to the conclusion that at least two drafters of the Norris-LaGuardia Act sought to protect labor.[60]

Yet there is still stronger evidence of the purpose of the Norris-LaGuardia Act: the text of the Act itself. Specifically, section 2 of the Act, which purports to set out the Act's underlying public policy, strongly supports the interpretation that Congress was concerned exclusively with the rights of labor.[61] This section states that the Act was enacted in response to the right of workers to "be free from the interference, restraint, or coercion of employers of labor" when engaging in "concerted activities for the purpose of collective bargaining

---

53 THE LABOR INJUNCTION, *supra* note 46.

54 John Simkin, *Felix Frankfurter*, SPARTACUS EDUC., http://www.spartacus.schoolnet.co.uk/USAfrankfurter.htm (last visited Feb. 24, 2014).

55 As did Greene. *See* Matthew C. Lawry, Comment, Jacksonville Bulk Terminals*: The Norris-LaGuardia Act and Politically Motivated Strikes*, 44 OHIO ST. L.J. 821, 825 (1983).

56 THE LABOR INJUNCTION, *supra* note 46, at 164.

57 *Id.* at 215–20.

58 *See id.* at 205.

59 *See* Clyde W. Summers, *Frankfurter, Labor Law and the Judge's Function*, 67 YALE L.J. 266, 267 (1957) (providing a more complete summary of Frankfurter's economic views and confirming that his aim was to strengthen labor).

60 *See also supra* note 46 and accompanying text (describing the Norris-LaGuardia Act's drafters' stated motivation to protect labor). The Supreme Court has noted that the drafter of legislation is "an unusually persuasive source as to the meaning of the relevant statutory language." Carcieri v. Salazar, 555 U.S. 379, 390 n.5 (2009).

61 *See* 29 U.S.C. § 102 (2012).

or other mutual aid or protection."[62] The section says nothing of the rights of management. Further, section 2 specifically states that the Act intends to protect employees from "interference . . . or coercion" by employers.[63] Thus, one need not stop at the conclusion that section 2 does not provide for the protection of management activities; indeed, the public policy set out in the section could easily be read as *disfavoring* lockouts. After all, are lockouts not an example of employer interference with, or coercion of, employee activities?

This consideration counsels against interpreting any portion of the Norris-LaGuardia Act as protecting employers. It seems more plausible, based on this passage at least, to think of the Act as being *anti-employer*. One need not go this far to disagree with the interpretation favored by the *Brady* majority, but at the very least section 2 would seem to establish a strong presumption that employer activity is not directly protected under the Norris-LaGuardia Act.

The only argument put forth by the *Brady* majority as to the construal of section 2 comes from a Supreme Court case that supposedly established a different interpretation of the overall policy of the Act.[64] That case, *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad*, included a line stating that Congress, in enacting the Act, sought "to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital."[65] First of all, it is worth noting that the *Brady* majority apparently felt incapable of directly citing the words of section 2 to fit its view. Instead, the majority was forced to rely on a general statement about the underlying goals of the Act which came in a separate case, twenty-five years after the Act was enacted.[66]

More importantly, the *Brady* court at best puts its own spin on, and at worst skews, the meaning of the quote from the *Brotherhood of Railroad Trainmen* opinion. In the same paragraph as the quoted section, Chief Justice Earl Warren wrote for the Court, "The Norris-LaGuardia Act . . . was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining."[67] These two quoted sentences appear in conjunction with each other in the paragraph; and on a plain reading they appear to be in harmony with one another.

Yet the *Brady* majority refers to the *Brotherhood of Railroad Trainmen* passage this way: "The Supreme Court has observed that

62 *Id.*
63 *Id.*
64 *See* Brady v. NFL, 644 F.3d 661, 678 (8th Cir. 2011).
65 353 U.S. 30, 40 (1957).
66 *See Brady*, 644 F.3d at 678.
67 *Brotherhood of Railroad Trainmen*, 353 U.S. at 40.

while the Act was designed to protect workingmen, the broader purpose was 'to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital.' "[68] The term "broader purpose" gives the impression that this second, broader goal supersedes the first, narrower goal as the legislature's underlying intention in enacting the Norris-LaGuardia Act. And indeed, this is exactly the *Brady* majority's conclusion.[69] But nowhere within the *Brotherhood of Railroad Trainmen* passage appears any term like or equivalent to "broader purpose." This reading of the passage is far from natural or intuitive. With no further justification provided for this interpretation, the *Brady* majority's rebuttal to the plain language argument of section 2 falls flat.

The above review of legislative history and drafter commentary, plus policy language within the Norris-LaGuardia Act itself, should make clear that the *Brady* majority's construal of the Act (stripping federal judges of the power to enjoin lockouts) is at minimum not fully consistent with the original aims of the Act. With that said, it is possible that the understanding of a particular statute could change over time. Perhaps the *Brady* majority was guided not by its own peculiar reasoning but by the more modern understanding of a statute enacted almost eighty years prior to the decision. To explore this possibility, we now examine the relevant case law, continuing our chronological path from the time of the Act's enactment toward the present day.

2. *Cases Interpreting Relevant Portions of the Norris-LaGuardia Act*

Early cases involving the Norris-LaGuardia Act affirmed that the primary purpose of the Act was to provide extra protection for labor against the power of the judicial injunction.[70] These early courts also confirmed the tight relationship between the Norris-LaGuardia Act and the earlier Clayton Act, and they specifically confirmed the understanding that the Norris-LaGuardia Act had been enacted, at least in part, to fill in unforeseen gaps within the Clayton Act.[71] These

---

68 *Brady*, 644 F.3d at 678 (emphasis omitted) (quoting *Brotherhood of Railroad Trainmen*, 353 U.S. at 40). The *Brady* majority also italicizes the last thirteen words of the quote (starting with "upsetting"). The original source contains no italics.

69 *See Brady*, 644 F.3d at 678, 680–81 (emphasizing the "natural interplay of the competing economic forces" mentioned in *Brotherhood of Railroad Trainmen* and concluding that "[a]n employer's lockout is part of this interplay").

70 *See, e.g.*, United States v. Hutcheson, 312 U.S. 219, 235–36 (1941) ("The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction.").

71 *See* Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Prods., Inc., 311 U.S. 91, 102 (1940) (quoting language from the House Judiciary Committee to support the

judicial opinions align perfectly with the House Reports,[72] drafter commentary,[73] and statutory text[74] examined above.

However, while the above paints a compelling picture of the *overall* purposes of the Norris-LaGuardia Act, it does not directly address the particular interpretive question facing the *Brady* court. As detailed above,[75] the *Brady* court was tasked by the facts of the case with a close analysis of section 4(a) of the Norris-LaGuardia Act, which reads: "No court of the United States shall have jurisdiction to issue any . . . injunction in any case involving or growing out of any labor dispute to prohibit any person . . . from . . . [c]easing or refusing to perform any work or to remain in any relation of employment."[76] As also explained above,[77] the *Brady* majority interpreted this language as applying to both strikes and employer-initiated lockouts.[78]

Considering only the plain language of the quoted text, this reading is admittedly plausible. After all, a lockout presumably qualifies as "any labor dispute," and locking out employees could reasonably be interpreted as "refusing . . . to remain in any relation of employment."[79] Instead, the earlier portion of this Part demonstrated that the *Brady* majority's interpretation, while potentially plausible with no other context, does not comport with the legislative goals of the Norris-LaGuardia Act, as evidenced by multiple sources, including early case law.[80] But another useful piece of the puzzle in assessing the majority's interpretation of section 4(a) would be any prior interpretations of that particular section by courts of comparable or greater authority. This section now proceeds to examine three such cases in detail, and one other in brief.

In *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad*, a group of railway labor organizations sued to invalidate a new work rule that railway carriers had recently imposed on their workers.[81] The labor organizations managed to secure an injunction against the enforcement of the rule from the U.S. District Court for the Northern

---

proposition that Congress fashioned the Norris-LaGuardia Act primarily to strengthen labor in the same way that the drafters of the Clayton Act intended).

72 *See* H.R. REP. NO. 72-669, at 3 (1932); S. REP. NO. 72-163, at 8–9, 16–18 (1932); H.R. REP. NO. 63-627, at 32 (1914); *supra* notes 47–50 and accompanying text.

73 *See supra* note 46; *see also supra* notes 55–60 and accompanying text (describing the drafters' motivation to protect labor).

74 *See supra* notes 61–63 and accompanying text.

75 *See supra* notes 28–30 and accompanying text.

76 29 U.S.C. § 104(a) (2012). The full text of the statute restricts courts from issuing restraining orders and temporary or permanent injunctions.

77 *See supra* Part II.A.

78 Brady v. NFL, 644 F.3d 661, 680–81 (8th Cir. 2011).

79 29 U.S.C. § 104(a).

80 *See, e.g.*, United States v. Hutcheson, 312 U.S. 219, 235–36 (1941); Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Prods., Inc., 311 U.S. 91, 102 (1940).

81 310 F.2d 513, 514–15 (7th Cir. 1962).

District of Illinois.[82] On appeal, the railway carriers argued that section 4(a) should have barred the district court from issuing the injunction, since the underlying controversy between the carriers and labor organizations was a labor dispute.[83] The Seventh Circuit disagreed, holding that the Norris-LaGuardia Act contemplated a "nonreciprocal policy" and thus did not prevent federal courts from issuing injunctions against management.[84] The court did not mince words in concluding: "[O]ur study of th[e] history and the language of the Act . . . convinces us that the purpose of Congress in this respect was to protect *only* employees and unions."[85]

Eight years after the Seventh Circuit decided *Brotherhood of Locomotive Engineers*, the First Circuit found itself forced to unpack section 4(a) in *de Arroyo v. Sindicato de Trabajadores Packinghouse*.[86] *De Arroyo* centered on seven employees' quest to be reinstated and allowed to return to work for their former employer, Puerto Rico Telephone Company.[87] The company argued that section 4(a) should be interpreted as barring a federal court from enjoining its refusal to rehire the plaintiffs.[88] Thus, while the context was different from both the prior case of *Brotherhood of Locomotive Engineers* and the future *Brady* case, the underlying issue was similar: the First Circuit was forced to decide whether section 4(a) bans injunctions of *employer* activity as well as of employee activity.[89] In line with, and indeed citing, *Brotherhood of Locomotive Engineers*, the *de Arroyo* court concluded that section 4(a) did not ban such injunctions.[90] The court stated directly: "Our understanding of the legislative history behind section 4(a) leads us to conclude that that section was not intended as a protection for employers."[91] Thus, while the *de Arroyo* case, like *Brotherhood of Locomotive Engineers*, did not involve a lockout, the court's explanation of its reasoning logically covers lockout situations, as refusing to enjoin a lockout on statutory grounds would be concluding that section 4(a) of the Norris-LaGuardia Act *does* function as a "protection for employers."

---

82 *See id.*

83 *See id.* at 516.

84 *Id.* at 518.

85 *Id.* (emphasis added).

86 425 F.2d 281 (1st Cir. 1970).

87 *Id.* at 283.

88 *See id.* at 290–91. The company urged the court to "read [section 4(a)] as prohibiting a federal court from enjoining an employer from refusing to reemploy a former employee, even an improperly discharged one." *See id.* at 290 n.12.

89 *See id.* at 290–91 (concluding that the company's literal interpretation of the Act disregarded its purpose to protect "working men in the exercise of organized, economic power").

90 *See id.* at 291.

91 *Id.*

The Ninth Circuit weighed in on the issue eleven years later in *Local 2750, Lumber & Sawmill Workers Union v. Cole*, a case similar to *de Arroyo* in that it also involved a potential worker reinstatement.[92] After discussing *de Arroyo* at length, Chief Judge James Browning came to the same conclusion: the Norris-LaGuardia Act does not operate as a bar to judicial injunctions against management, at least in the reinstatement context.[93] And like the court in *de Arroyo*, Chief Judge Browning spoke in terms that, on a natural reading at least, would apply to all potential injunctions against management. After reviewing case law and the legislative history, Chief Judge Browning stated succinctly: "Section 4(a) was intended to protect the right of workers and labor unions to strike . . . ."[94] He also agreed with the court in *de Arroyo* that "the 'remains in any relation of employment' language of section 4(a) does not refer to any right of an employer not to continue the employment relationship."[95] The interpretation directly rejected by *de Arroyo* and *Lumber & Sawmill Workers Union* is essential to the NFL's argument in *Brady*: it is the "remain in any relation of employment" portion of section 4(a) that could potentially be read as covering lockouts.[96] Thus, *Lumber & Sawmill Workers Union*, despite centering on a claim for reinstatement as opposed to a work stoppage, directly contradicts the majority's position in *Brady*.[97]

Finally, it is worth noting that at least one previous Eighth Circuit[98] case indirectly supports *Brotherhood of Locomotive Engineers*, *de Arroyo*, and *Lumber & Sawmill Workers Union*. In *Tatum v. Frisco Transportation Co.*,[99] the U.S. District Court for the Western District of Missouri had previously ordered Frisco Transportation Company to reinstate a former employee after finding that Frisco had violated its collective bargaining agreement.[100] On appeal, the company

92 Local 2750, Lumber & Sawmill Workers Union v. Cole, 663 F.2d 983, 984 (9th Cir. 1981).

93 *See id.* at 986–87 ("Measured against the broader purpose of the Act, reinstatement orders were not among the injunction devices employed [by the employer] to weaken labor and defeat its efforts to organize and bargain collectively . . . .").

94 *Id.* at 986.

95 *Id.* (quoting 29 U.S.C. § 104(a) (2012)).

96 *See* 29 U.S.C. § 104(a).

97 *See also* Allison Stoddart, Comment, *A Stronger Defensive Line: Extending NFL Owners' Antitrust Immunity Through the Norris-LaGuardia Act in* Brady v. NFL, 53 B.C. L. REV. E. SUPP. 123, 132 (2012), http://lawdigitalcommons.bc.edu/bclr/vol53/iss6/11 (giving the same take on *Lumber & Sawmill Workers Union*).

98 *Brady* took place in the Eighth Circuit, with suit originating in the District of Minnesota. *See* Dube, *supra* note 15.

99 626 F.2d 55 (8th Cir. 1980).

100 *Id.* at 57. The plaintiff in *Tatum* actually sued both his employer and his union (for violation of the duty of fair representation) and won a judgment against both. *Id.*

challenged the authority of the district court to order equitable relief such as reinstatement.[101]

The Eighth Circuit, per Circuit Judge J. Smith Henley, not only rejected this claim but also specifically cited to *de Arroyo*.[102] Moreover, the portion of *de Arroyo* to which Judge Henley cited (a three-page section)[103] is the exact portion which contains that court's assertion that "the primary purpose behind the anti-injunction provisions [is] 'to protect working men in the exercise of organized, economic power.'"[104] That same portion also contains *de Arroyo*'s conclusion that section 4(a) "was not intended as a protection for employers."[105] Further, a close reading of the three cited pages of *de Arroyo* reveals no plausible alternate explanation as to which portion of the three pages *Tatum* intended to cite.[106]

While it may not be fair, based solely on the above considerations, to definitively conclude that the *Tatum* court necessarily agreed with all of *de Arroyo*'s reasoning, *Tatum*'s citation to this particular portion of the *de Arroyo* opinion is strong evidence that the court would not have held section 4(a) applicable to injunctions against employers if forced to rule on this exact point. If this conclusion is fair, then the *Brady* court not only contravened the holdings of three of its fellow circuit courts but also defied the spirit of a prior case within its own circuit.

Regardless of how much weight should be assigned to the *Tatum* portion of the analysis, the above review of *Brotherhood of Locomotive*

---

101 *Id.* at 60. The opinion does not indicate that Frisco directly relied on the Norris-LaGuardia Act in advancing this contention. *See id.*

102 *Id.*

103 De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 290–92 (1st Cir. 1970).

104 *Id.* at 291 (quoting Brotherhood of Railroad Trainmen v. Chi. River & Ind. R.R., 353 U.S. 30, 40 (1957)).

105 *Id.*

106 Page 290 of the *de Arroyo* opinion is primarily about a separate (though related) issue from the reinstatement issue which concerned *Tatum*: that of prejudgment interest. *Id.* at 290. Near the end of that page, however, the court did state that other courts have ordered reinstatement and that it supports the power of the district court of Puerto Rico (the relevant lower court in *de Arroyo*) to reinstate the seven phone company employees. *Id.* The court also expressly stated, near the end of page 290, that the Norris-LaGuardia Act should not act as a bar to this reinstatement. *See id.* Page 291 contains the passages quoted in the text accompanying footnotes 104 and 105, strongly supporting the view that section 4(a) does not operate as a bar on injunctions against employer activity. *Id.* at 291. The rest of page 291, together with page 292, goes on to explain why reinstatement may or may not be an appropriate remedy (beyond simply not being barred by the Norris-LaGuardia Act). *See id.* at 291–92. In short, if *Tatum* had not intended to cite to the portion of the *de Arroyo* opinion that discussed the Norris-LaGuardia Act, then it had no need to include page 290 in its citation. Including this page, rather than citing only to pages 291 and 292, admittedly may not be sufficient proof that the *Tatum* court supported the reading of section 4(a) later rejected by *Brady*. However, it is, at the very least, much stronger evidence for that position than for the opposing claim.

Engineers, *de Arroyo*, and *Lumber & Sawmill Workers Union* strongly indicates that the weight of past authority rested on the side of dissenting Judge Bye in *Brady*.[107] This review of precedent, especially when combined with the legislative history and stated policy of the Norris-LaGuardia Act, both discussed above,[108] sheds considerable doubt on the validity of the *Brady* court's conclusions.

In fact, the *Brady* court could be interpreted as having implicitly conceded that point, based on language within its majority opinion. After acknowledging the existence of the *de Arroyo* and *Lumber & Sawmill Workers* cases, the court chose not to refute the reasoning of those opinions and instead curtly announced, "With due respect to these courts, we think it better to begin the analysis with the text of § 4(a)."[109] The majority then made the detailed textual argument summarized above.[110] At best, then, the majority declined its opportunity to directly rebut the *de Arroyo* and *Lumber & Sawmill Workers* courts.

To be fair, Judge Colloton in his *Brady* opinion had no obligation to honor the holdings of *de Arroyo*, *Lumber & Sawmill Workers*, *Brotherhood of Locomotive Engineers*, or even *Tatum*.[111] The *Brady* court was not bound by any decision of the Supreme Court, and so it was free to fashion its own rule in interpreting section 4(a).[112] Further, there does exist a contingent of modern scholars and jurists who advocate for a strict textualist approach in interpreting statutes.[113] For these scholars, legislative history has little, if any, place in construing statutory language.[114] On this view, the majority opinion can be defended: Judge Colloton followed a textualist approach in interpreting section 4(a), largely ignoring legislative history; he disregarded prior

107 *See* Brady v. NFL, 644 F.3d 661, 682 (8th Cir. 2011) (Bye, J., dissenting).

108 *See supra* Part II.B.1.

109 *Brady*, 644 F.3d at 675 (majority opinion).

110 *See supra* Part II.A.

111 Since the First, Seventh, and Ninth Circuits are all on an equal plane to the Eighth Circuit, the Eighth Circuit need not follow their decisions. *See* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 790 (2012) (explaining that "vertical stare decisis" only requires a court to follow the prior decisions of a court that could reverse its decision). The prior position taken by *Tatum*, besides almost certainly qualifying as dicta, came from the same court and so the same principle leaves a modern iteration of the Eighth Circuit free to disregard that prior position. *See id.* However, the doctrine of "law of the circuit" does require that a federal court of appeals use the en banc procedure to overturn one of its past decisions. *See id.* at 798–99.

112 *See id.* at 790.

113 *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623–25 (1990) (describing the "new textualism" movement and championing Justice Antonin Scalia as its spearhead).

114 *See id.* at 623–24 ("The new textualism posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant. Legislative history should not even be consulted to confirm the apparent meaning of a statutory text.").

precedent, but he was under no obligation to follow it.[115] And indeed, at no point does this Note state that *Brady* was *improperly* decided, as opposed to *incorrectly* decided.[116] The *Brady* majority did not violate its judicial authority in deciding the case as it did.

With that said, consider again the balance of factors laid out above. The *Brady* decision blatantly contradicts the original stated purpose of the Norris-LaGuardia Act, as displayed by House and Senate reports,[117] scholarship by drafters of the bill,[118] and early judicial interpretations of legislative intent.[119] It also disregards three other courts of appeals decisions from the First,[120] Seventh,[121] and Ninth Circuits.[122] Counteracting all of this authority is two judges' interpretation of the word "any."[123] Is the meaning of "any" within this statute open to just one interpretation?[124] Unless one believes that it is, or that the legislative history and prior precedent have almost *no* relevance, it is hard to understand how the majority's opinion would win out among the alternatives.

Finally, the (arguably) strongest evidence against the majority's interpretation withstands even a textualist approach. As detailed above, section 2 of the Norris-LaGuardia Act explicitly sets out the policy of the Act and focuses completely on the protection of employees' rights.[125] Unlike congressional reports, journal articles, and cases, this evidence of legislative intent appears directly in the

---

115 *See supra* notes 111–14 and accompanying text.

116 By improper, I mean out of the realm of responsible, judicial decision making. A decision can be the poorer (or poorest) alternative without being "improper."

117 *See* H.R. REP. NO. 72-669, at 3 (1932); S. REP. NO. 72-163, at 8–9, 16–18 (1932); H.R. REP. NO. 63-627, at 32 (1914); *supra* notes 47–50 and accompanying text.

118 *See supra* note 46; *supra* notes 55–60 and accompanying text.

119 *See, e.g.*, United States v. Hutcheson, 312 U.S. 219, 233–37 (1941); Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Prods., Inc., 311 U.S. 91, 102–03 (1940).

120 *See* de Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 290–93 (1st Cir. 1970).

121 *See* Brotherhood of Locomotive Engineers v. Balt. & Ohio R.R., 310 F.2d 513, 518 (7th Cir. 1962).

122 *See* Local 2750, Lumber & Sawmill Workers Union v. Cole, 663 F.2d 983, 986 (9th Cir. 1981).

123 The two-judge majority that decided *Brady* relied heavily on the use of the word "any" in section 4(a) as establishing that the Act applied to any injunction against any actor in any labor dispute. *See* Brady v. NFL, 644 F.3d 661, 676 (8th Cir. 2011).

124 Judge Bye did not think so when dissenting in *Brady*. In contrast to the majority's interpretation, he points out that refusing to perform "any" work or to remain in "any relation of employment" could both be interpreted as referring only to employees, since employers cannot refuse to perform work. It is thus simpler to understand both clauses as referring only to employees. *See id.* at 690 (Bye, J., dissenting).

125 *See* 29 U.S.C. § 102 (2012); *supra* notes 61–63 and accompanying text.

statute.[126] Thus, even following the majority's method of statutory interpretation, its conclusions should inspire serious doubts.

III
How Will *Brady* Affect Future Labor Disputes?

Having argued that the *Brady* decision failed to comport with the legislative history of the Norris-LaGuardia Act, as well as the prior cases interpreting it, this Note now must turn to a more practical question: Will it matter? In some sense, of course, it already has mattered; litigation between the NFL and the NFLPA promptly ended with the *Brady* decision, and the lockout ended approximately two weeks later.[127] But there has already been ample coverage of the ensuing history between the NFL and its players.[128] This Note aims to predict the impact the *Brady* decision could have on future labor disputes. And the reason *Brady*'s ruling about lockouts could have a substantial impact on future labor disputes is simple: the number of lockouts in industry is on the rise.[129]

From 1990 to 2009, the ratio of lockouts per year, as a percentage of total work stoppages, averaged 4.57%.[130] In the years 2010 and 2011, the percentage of work stoppages represented by lockouts was 9.64%, a figure more than twice as high as the average over the previous twenty years.[131] In 2011, the number was the highest it has been

---

126 In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

> Whereas under prevailing economic conditions . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. § 102.

127 Mark Maske, *NFL Back in Business After Player Leaders Recommend Ratification of CBA*, Wash. Post (July 25, 2011), http://www.washingtonpost.com/sports/nfl-back-in-business-after-player-leaders-recommend-ratification-of-cba/2011/07/25/gIQAwtmwYI_story.html.

128 *See, e.g.*, Nate Davis, *NFL, Players Announce New 10-Year Labor Agreement*, USA Today (July 25, 2011, 8:03 PM), http://content.usatoday.com/communities/thehuddle/post/2011/07/reports-nfl-players-agree-to-new-collective-bargaining-agreement/1#.UQKDKh3Ack0.

129 *See* Greenhouse, *supra* note 7, at A1.

130 *See* Combs, *supra* note 12 (aggregating data from 1990–99 and 2000–09).

131 *See id.*

since Bloomberg BNA began tracking it: 11.3%.[132] While lockouts like those in the NFL, NBA, and NHL receive the most media attention,[133] the majority of the lockouts tracked by BNA do not involve professional sports.[134] Lockouts like the one initiated by American Crystal Sugar Company against its employees have left workers "scrounging to make ends meet," with some facing "foreclosure and utility disconnection notices."[135] There have even been a number of recent lockouts at hospitals and other patient-care facilities.[136]

In short, not all lockouts inconvenience only millionaire professional athletes.[137] While the *Brady* decision had an immediate impact on that demographic (and, indirectly, on fans and advertisers), its long-term consequences could assist an employer in sticking to a hard-line stance through the "forceful approach" of lockouts.[138] Section 4 of the Norris-LaGuardia Act purports to place an absolute bar on injunctions of particular activities; by interpreting that section to cover lockouts, the *Brady* court held that federal courts can *never* enjoin a lockout under the Act.[139]

This does not mean that locked-out employees have no recourse if an employer is using unfair tactics, as the union could still file an

---

132 *Id.*

133 *See, e.g.*, Tyler Cowen & Kevin Grier, *Two Economists Explain the NBA Lockout*, GRANTLAND (Oct. 31, 2011, 6:23 PM), http://www.grantland.com/blog/the-triangle/two-economists-explain-the-nba-lockout (coverage of the NBA lockout); Gabe Feldman, *The Complete NHL Lockout FAQ, Part 1*, GRANTLAND (Oct. 1, 2012, 10:30 PM), http://www.grantland.com/blog/the-triangle/the-exhaustive-nhl-lockout-faq-part-i (coverage of the NHL lockout); Patrick Rishe, *Who Won the 2011 NFL Lockout?*, FORBES (July 21, 2011, 10:44 PM), http://www.forbes.com/sites/sportsmoney/2011/07/21/who-won-the-2011-nfl-lockout/ (coverage of the NFL lockout).

134 *Cf.* Combs, *supra* note 12 (reporting 416 total lockouts between 1990 and 2011).

135 Greenhouse, *supra* note 7, at B2. One employee of American Crystal Sugar, quoted in the Greenhouse article, claimed she could no longer afford clothing or shoes for her children as a result of the lockout. *Id.*

136 *Id.*

137 In 2010, the *minimum* annual salary for an NFL player was $320,000. *See* Mike Florio, *Minimum Salaries Shoot Up Under New Deal*, NBC SPORTS (July 25, 2011, 4:14 PM), http://profootballtalk.nbcsports.com/2011/07/25/minimum-salaries-shoot-up-under-new-deal ("The minimum salaries for NFL players have increased by $55,000 across the board. For 2011, that means rookies will get $375,000."). Quarterback Peyton Manning, one of the named plaintiffs in the *Brady* case, earned $23 million in 2011 alone. *Highest Paid NFL Players 2011*, RICHEST (Aug. 18, 2011, 8:49 PM), http://www.therichest.com/sports/highest-paid-nfl-players-2011.

138 *Cf.* Greenhouse, *supra* note 7, at B2 (noting that "some employers think the time is ideal to use lockouts, a forceful approach they were once reluctant to use").

139 *See supra* note 39 and accompanying text. Section 7 of the Act sets out procedures that a federal court must follow (such as conducting a hearing), and facts it must find (for instance, that unlawful acts have been threatened), before it can issue an injunction in a case arising out of a labor dispute. *See* 29 U.S.C. § 107 (2012); Pulte Homes, Inc. v. Laborers' International Union, 648 F.3d 295, 305 (6th Cir. 2011). However, this section does not overcome section 4: the specific acts listed in section 4 enjoy absolute immunity from injunction. *See* Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association, 457 U.S. 702, 707 (1982).

unfair labor practice charge with the National Labor Relations Board.[140] But this process often moves slowly,[141] and delay benefits those with greater resources (namely, employers). Indeed, the delays involved in administrative adjudication of unfair labor practice charges are what led Congress to enact section 10(j) of the National Labor Relations Act, which allows a union to seek immediate injunctive relief in federal court in cases of ongoing unfair labor practices.[142] Section 10(j) also does not provide a perfect solution, as a federal court will only be able to use it to enjoin the *unfair portion* of a lockout, not the entire lockout.[143] In *Rivera-Vega v. ConAgra, Inc.*, the district court ruled completely in favor of the plaintiff employees but still did not order the end of the lockout: it simply ordered the employer to stop "locking out . . . employees because of the bargaining position of the employees' designated bargaining representative and in furtherance of the Employer's own unlawful bargaining conduct."[144]

To some extent, of course, the problem facing the NFL players in 2011 is unique for reasons stretching beyond the intense media coverage. For one thing, the NFLPA is entrenched as the NFL players' union and thus has an easier time temporarily decertifying (and thereby allowing a lawsuit outside of the labor law regime) than would other labor unions.[145] Second, NFL players always have a ready-made lawsuit at their fingertips once their union decertifies, both because the league's thirty-two teams are collaborative, not competitive, and

140 *See* HARPER & ESTREICHER, *supra* note 44, at 101–03 (discussing unfair labor practice and typical representation proceedings).

141 *See* Arlook v. S. Lichtenberg & Co., 952 F.2d 367, 369 (11th Cir. 1992) (noting that "the administrative machinery of labor dispute resolution moves slowly").

142 *See id.* at 371 ("Congress enacted § 10(j) because administrative resolution was so time-consuming that guilty parties could violate the Act with impugnity [sic] during the years of pending litigation . . . ." (alteration in original) (internal quotation marks omitted)); S. REP. NO. 80-105, at 8 (1947) ("Time is usually of the essence in these matters, and consequently the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives . . . .").

143 *See* Rivera-Vega v. ConAgra, Inc., 876 F. Supp. 1350, 1373 (D.P.R. 1995).

144 *Id.* at 1372.

145 *Cf.* HARPER & ESTREICHER, *supra* note 44, at 403–04 ("Unions win only 30 percent of decertification elections. Roughly 50 percent of decertification petitions, however, never culminate in an election. One reason nearly half of decertification petitions do not lead to an election is the Board's blocking charge policy. Unions have a strong incentive to file unfair labor practice charges that will stave off an election that may well result in their ouster." (citations omitted)).

because there is no comparable professional football league in the market.[146] These factors do not exist within typical industries.[147]

However, just because a future lawsuit by employees in a different industry would be different in character than the suit filed by the NFL players does not immunize it to the *Brady* holding. As Judge Bye points out in his dissent, the majority opinion "puts the power of the Act in the service of employers, to be used against *non-unionized* employees who can no longer avail themselves of protections of labor laws."[148] While unionized employees still have the protections and procedures of the NLRA,[149] nonunionized employees enjoy those protections to a much lesser extent.[150]

Nonunionized employees also have the opportunity to bring antitrust claims, which can and often do crop up outside of professional sports.[151] Since nonunionized employees are not engaged in collective bargaining, the nonstatutory labor exemption does not apply, and antitrust suits are fair game.[152] Thus, as a result of the *Brady* opinion, nonunionized employees not only lack most of the protections of labor law, they also will have to face employer-opponents who have the protections of the Norris-LaGuardia Act at their disposal. Once again, this seems directly contrary to the original purpose of the Act.[153]

Potential employee-litigants do have at least some basis to hope that future courts might not follow *Brady*. For one thing, only federal

---

146 *See* Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2216 (2010) ("The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions."). *But see id.* at 2212 (noting that "[t]he teams compete with one another").

147 *Cf.* BERRY ET AL., *supra* note 13, at 2–4 (discussing the uniqueness of the sports industry).

148 Brady v. NFL, 644 F.3d 661, 682 (8th Cir. 2011) (Bye, J., dissenting) (emphasis added).

149 *Cf.* HARPER & ESTREICHER, *supra* note 44, at 88 ("The 1935 Wagner Act was framed to encourage collective bargaining. . . . Moreover, §8, the unfair labor practice provision, regulated only employer conduct; it set out five employer unfair labor practices, but did not outlaw any conduct on the part of unions.").

150 For an example of the NLRA applying to nonunion workers, see *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 13–15, 18 (1962) (holding that employees who walked out of work due to cold conditions were protected under the NLRA).

151 *See, e.g.*, Province v. Cleveland Press Publ'g Co., 571 F. Supp. 855, 858 (N.D. Ohio 1983) (denying employer-defendant's motions to dismiss and motions for summary judgment in favor of newspaper employee-plaintiffs' antitrust claims); Burkhead v. Phillips Petroleum Co., 308 F. Supp. 120, 122 (N.D. Cal. 1970) (addressing service station lessee's antitrust claim against petroleum company owner).

152 *See* Mackey v. NFL, 543 F.2d 606, 623 (8th Cir. 1976), *abrogated in part by* Brown v. Pro Football, Inc., 518 U.S. 231 (1996). This was recognized by *Eller v. NFL Players Ass'n*, 731 F.3d 752, 755 (8th Cir. 2013) ("But despite this clarification, the scope of the nonstatutory exemption remains unsettled, so antitrust lawsuits . . . continued to be part of the labor relations landscape . . . .").

153 *See supra* Part II.

district courts within the Eighth Circuit will actually be bound by the *Brady* decision. For courts in other circuits, the decision will be only persuasive authority.[154] Just as *Brady* essentially disregarded the decisions in *Brotherhood of Locomotive Engineers*,[155] *de Arroyo*,[156] and *Lumber & Sawmill Workers*,[157] so might a future court look past the *Brady* decision and provide its own take. However, while these three cases construed section 4(a), they did not address the precise issue of an attempt to enjoin a lockout. *Brady* is currently the only case to have dealt with that issue directly; for this reason, it may be less likely that a future court would disregard it. Faced with a similar issue, it might be difficult for another federal court (particularly a district court) to ignore a direct opinion on the subject from the Eighth Circuit.

One path toward disregarding the *Brady* decision might start with a judicial determination that the *Brady* facts were just too particular to be generalizable. As detailed above, most lockouts do not involve millionaire professional athletes.[158] Ignoring the legislative history—which was fashioned in the context of disenfranchised, poor workers—makes significantly more sense in a case involving millionaire professional athletes. A judge in a case involving, say, sugar beet workers,[159] may feel inclined to limit *Brady* to its facts. A judge with this desire could leverage language like the passage from *Brotherhood of Railroad Trainmen*[160] that *Brady* itself quoted. The passage stated that Congress enacted the Norris-LaGuardia Act in order "to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital."[161] Where *Brady* interpreted that line as a license to ignore the initial purpose of the Act,[162] a future court could use it to support the proposition that different economic balances should properly yield different results under the statute. That is, on the theory that the primary purpose of the Norris-LaGuardia Act is simply to maintain economic balance between labor and management, a court might distinguish *Brady* as applying only in cases of extremely well-off employees (or hold that

154 *See* Mead, *supra* note 111, at 790 (discussing vertical and horizontal stare decisis).

155 310 F.2d 513, 518 (7th Cir. 1962).

156 425 F.2d 281, 290–92 (1st Cir. 1970).

157 663 F.2d 983, 986 (9th Cir. 1981).

158 Bloomberg BNA reports that there were seventeen lockouts in 2011; only two of those occurred in professional sports leagues. *See* Combs, *supra* note 12; Phil Villarreal, *NBA Joins NFL in Pro Sports Lockout Club*, CONSUMERIST (July 1, 2011), http://consumerist.com/2011/07/01/nba-joins-nfl-in-pro-sports-lockout-club/.

159 *See* Greenhouse, *supra* note 7, at A1. The example need not be sugar beet workers; any workers who make a more standard wage suffice as an example to make the point.

160 353 U.S. 30, 40 (1957).

161 *Id.*

162 *See supra* Part II.B.1.

the *Brady* rule should apply in every case *except* one involving particularly impoverished employees).

But while this solution could be convenient, it is creative to say the least. A court relying on a passage like the one from *Brotherhood of Railroad Trainmen* above[163] would still be ignoring the weight of legislative history—and the language of section 2 of the Norris-LaGuardia Act[164]—in its attempt to dance around the *Brady* decision. Considerably simpler, and perhaps more genuine, would be either to follow *Brady* or directly contradict it. The first option would perpetuate the violence against the original purpose of the Norris-LaGuardia Act; the second could potentially create a circuit split. This is the state of the law after *Brady*.

This Note does not intend to take a pro-labor stance but instead simply points out that Congress enacted the Norris-LaGuardia Act for a reason—to protect labor and to improve the balance of power within labor disputes[165]—and that *Brady* may serve to undermine that goal.

IV
What Should Be Done?

Fixing the damage done by *Brady* may not be as simple as handing down a contrary ruling in a sister circuit. For one thing, such a ruling could only come in a case that arises out of similar facts and reaches a similar point in what is likely to be protracted litigation. After all, not every industry faces the same kind of time pressure as does the NFL.[166] This means that, at a minimum, the thrust of the law will be antilabor for the years that pass after *Brady* and before a possible corrective decision. But even once another case reaches a federal court of appeals, questions will remain. A court inclined to rule against *Brady* will have to decide whether to cabin the decision to its specific facts—essentially, holding that professional athletes play by different rules than do members of other labor organizations—or break with the Eighth Circuit altogether and declare a contrary rule.

Yet even this latter option may not be simple in practice. A court faced with the prospect of contravening *Brady* will face the prospect of charting an entirely new course concerning lockouts. This is because the question whether the Norris-LaGuardia Act prevents federal courts from enjoining lockouts was one of first impression in *Brady*.

---

163 *See id.*

164 29 U.S.C. § 102 (2012); *see supra* notes 61–63 and accompanying text.

165 *See supra* note 4 and accompanying text.

166 *See NFL Lockout 2011: NFL Owners and Players Need Hurry-Up Offense for New Labor Deal*, Associated Press (July 6, 2011, 7:03 PM), http://www.cleveland.com/ohio-sports-blog/index.ssf/2011/07/nfl_lockout_2011_nfl_owners_an.html.

While this author—and Judge Bye—feels that precedent pointed strongly away from the majority's decision, no prior case had directly announced a rule either way. Thus, one of the enduring legacies of *Brady* is that it spoke on this question at all, separate from the answer it gave.[167]

In other words, *Brady* created a situation in which future courts will have no choice but to address the subject question of this Note, either in following *Brady* or contravening it. This could have important implications for the world of labor. Previously, the uncertainty in this area of the law necessarily left both sides unconfident in their legal rights and thus less prone to brash decisions. The NFL and all other management organizations had no direct legal evidence whether a lockout could be enjoined under the Norris-LaGuardia Act. Arguments could be made either way,[168] but no court had directly spoken on the issue. Now, however, the *Brady* majority has put a thumb on the scale in favor of management. Likewise, any court that breaks with *Brady* will not be able to rebalance the scale; instead, its thumb will inevitably tip the balance in favor of labor. The equality created by uncertainty has been forever destroyed by *Brady*.

Accepting this reality, a federal court faced with a similar set of facts must settle for the second-best possible resolution: that endorsed by Judge Bye in *Brady*.[169] As demonstrated above, the legislative history and language of the Norris-LaGuardia Act makes clear that "Congress passed the Norris-LaGuardia Act to forestall judicial attempts to narrow labor's statutory protection."[170] The law was never intended to offer equal protections to both labor and management.[171] The Act barred judges from enjoining employee-initiated strikes as a direct reaction to the early decades of the twentieth century, in which the practice was rampant.[172] If a direct decision must be reached as to the federal courts' power to enjoin lockouts—and it now must because of *Brady*—then that decision must support that power.

---

167 Note that the *Brady* majority did not necessarily have to address this particular question in order to resolve the case. The court could simply have relied on its holding that the case arose "out of a labor dispute" and either assumed away the lockout issue or left it for the district court to resolve. *See* Brady v. NFL, 644 F.3d 661, 671 (8th Cir. 2011).

168 *See id.*

169 Judge Bye argued that the Norris-LaGuardia Act "should be interpreted in such a manner as to protect employees, rather than employers." *Id.* at 688 (Bye, J., dissenting).

170 Burlington N. R.R. v. Brotherhood of Maintenance of Way Employes, 481 U.S. 429, 443 (1987).

171 *See supra* Part I.A.1–2 (discussing the legislative history and cases interpreting the Norris-LaGuardia Act).

172 *See* DEVELOPING LABOR LAW, *supra* note 6, at 1678–79 (laying out the purpose of the Norris-LaGuardia Act); *Norris-LaGuardia Act of 1932*, SOC'Y FOR HUM. RESOURCE MGMT. (Dec. 3, 2008), http://www.shrm.org/LegalIssues/FederalResources/FederalStatutesRegulationsandGuidanc/Pages/Norris-LaGuardiaActof1932.aspx (discussing the history behind the Act).

CONCLUSION

The 2011 NFL lockout received media attention primarily because it involved famous athletes and an interruption of the nation's most popular sport.[173] From a legal perspective, most journalists and scholars focused on the antitrust implications of the NFLPA's litigation against the league.[174] But perhaps the most significant, hidden legal development that came out of the NFL lockout involved the Eighth Circuit Court of Appeals's construal of the Norris-LaGuardia Act. In upholding the lockout and holding that the District of Minnesota did not have jurisdiction to enjoin it,[175] the majority may have simply seen itself as furthering the resolution of the underlying labor dispute. After all, enjoining the lockout would not have brought the nation any closer to football, and both of the parties to the dispute had ample resources to survive a long work stoppage and to represent their own interests.[176] However, forcing the parties to mediate could bring an end to the dispute.[177] Indeed, within a month of the *Brady* court's decision, the lockout ended and NFL players returned to their respective teams.[178] The 2011–2012 NFL season began on time, and all was well with the world.[179]

Or was it? As this Note has attempted to show, the *Brady* court broke sharply with precedent and with the legislative purpose of the Norris-LaGuardia Act in construing it to bar not only injunctions of employee-initiated strikes but also injunctions of employer-initiated lockouts.[180] No previous case had so held, and indeed all of the early interpretations of the Act made clear that it was, first and foremost, a pro-labor statute.[181] By allowing the unique context of the *Brady* case (and thus the "fair" outcome in that specific context) to dictate the

---

173 Sean Leahy, *Poll: NFL Beats Baseball Again as America's Most Popular Sport*, USA TODAY (Jan. 25, 2011, 1:23 PM), http://content.usatoday.com/communities/thehuddle/post/2011/01/poll-nfl-beats-baseball-again-as-americas-most-popular-sport/1#.UL0c-uTAck0.

174 *See generally, e.g.*, Stoddart, *supra* note 97 (focusing on the antitrust issues involved in *Brady*); Kristi Dosh, *What Is the NFL Players' Lawsuit All About?*, FORBES (Mar. 14, 2011, 12:31 PM), http://www.forbes.com/sites/sportsmoney/2011/03/14/what-is-the-nfl-players-lawsuit-all-about (same). For a brief piece by a law professor about the legal ramifications of the lockout that touches on a wider range of issues, see Michael McCann, *Legal Lessons from NBA/NFL Lockouts*, MIT SLOAN SPORTS ANALYTICS CONF., http://www.sloansportsconference.com/?p=5244 (last visited Feb. 14, 2014).

175 Brady v. NFL, 644 F.3d 661, 663 (8th Cir. 2011).

176 For an example of the substantial resources present on both sides, both the NFL and the NFLPA spent hundreds of thousands of dollars at least in lobbying efforts on Capitol Hill. *See* Dan Eggen, *NFL Labor Dispute Heads to a New Gridiron: Halls of Congress*, WASH. POST, Jan. 16, 2011, at A4.

177 *See* McCann, *supra* note 174 (explaining how deadlines forced a resolution to the lockout).

178 Maske, *supra* note 127.

179 *See id.* (noting the start dates for preseason and regular-season games).

180 *See Brady*, 644 F.3d at 680–81.

181 *See supra* Part II.

construction of a statute that applies to labor disputes generally, the *Brady* court may have inadvertently upset the balance of power in future labor disputes. At the very least, the Eighth Circuit did a major disservice to labor unions at a time when organized labor has already experienced a sharp decline in power and influence.[182]

Post-*Brady*, labor unions will have to hope that the unique context in which *Brady* arose counsels future courts either to ignore *Brady* or distinguish its holding. This is certainly possible; no other litigation between millionaire employees and billionaire employers is likely to reach the courts of appeals in the near future, unless Major League Baseball, the National Hockey League, or the National Basketball Association find themselves in a similar spot.[183] Courts may find themselves more sympathetic for locked-out employees in other industries and thus work around the *Brady* holding in some fashion.

However, a court will be hard pressed to hold that the Norris-LaGuardia Act provides no bar to a federal court's injunction of an employer-initiated lockout without running directly against the *Brady* holding. If another circuit confronts substantially similar facts to those in *Brady* (in the context of a different industry), it will be forced to either follow the Eighth Circuit's antilabor interpretation of the Norris-LaGuardia Act, find some way to creatively distinguish *Brady*, or directly contradict the Eighth Circuit's holding. If that court follows the Eighth Circuit, organized labor could weaken still further, perhaps on its way to a total collapse. If that court contradicts the Eighth Circuit, then a circuit split, resolvable only by the Supreme Court, will ensue. Either way, the *Brady* case has set the stage for fascinating developments in our understanding of the law of lockouts and labor disputes in general.

---

182 *See* Bruce Bartlett, *The Decline and Fall of Organized Labor*, FISCAL TIMES (June 8, 2012), http://www.thefiscaltimes.com/Columns/2012/06/08/The-Decline-and-Fall-of-Organized-Labor.aspx#page1. The decline of organized labor is far from new. The prevalence and influence of labor unions has been in a free fall since at least the 1980s. *See generally* MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES (1989) (discussing the trend).

183 Of course, it should be noted that the NHL did start down a similar path in late 2012. The league suffered through its second lockout in eight years, resulting in a delayed start to the NHL season. *See* Norman Chad, *NHL Lockout Is Over—For the Next Eight Years, Anyway*, WASH. POST (Jan. 13, 2013), http://articles.washingtonpost.com/2013-01-13/sports/36312117_1_nhl-lockout-stanley-cup-finals-john-tortorella. During the lockout, the league filed suit in federal court and filed an unfair labor practice charge with the National Labor Relations Board. Adam Gretz, *NHL Lockout: NHL Files Class Action Complaint in Federal Court*, CBS SPORTS (Dec. 14, 2012, 5:05 PM), http://www.cbssports.com/nhl/blog/eye-on-hockey/21402459/nhl-lockout-nhl-files-class-action-complaint-in-federal-court. Further, the National Basketball Association missed sixteen of eighty-two regular-season games due to a lockout in 2011. *See* Alana Glass, *Why the NBA Lockout Wasn't So Bad After All*, FORBES (Dec. 2, 2011, 9:39 AM), http://www.forbes.com/sites/sportsmoney/2011/12/02/why-the-nba-lockout-wasnt-so-bad-after-all.