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After Further Review: How the Eighth Circuit's Misinterpretation of the Norris-LaGuardia Act Fumbled the District Court's Ruling in Brady v. NFL

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I. INTRODUCTION

> It would be ironic if a statute that had been enacted to protect the rights of individual employees from improper actions by employers and the courts were turned against those employees and used to justify [violations] under the Sherman Act.[1]
>
> —Judge David S. Doty

The National Football League's (NFL) "lockout" of all NFL players threatened the 2011 and future seasons of the most popular and financially successful sport in the United States. On the eve of the commencement of the NFL's "lockout"—and after the National Football League Players Association (NFLPA) had disclaimed its role as the collective bargaining representative of the NFL players—Tom Brady and nine other players filed a Class Action Complaint and Motion for a Preliminary Injunction in the Federal District Cou-

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1. Jackson v. NFL, 802 F. Supp. 226, 233 (D. Minn. 1992).

rt of Minnesota against the NFL and its 32 member Clubs seeking to enjoin the NFL's "lockout" as a violation of Section 1 of the Sherman Act. Although the District Court agreed with the Plaintiffs and enjoined the NFL's "lockout," the Eighth Circuit Court of Appeals vacated the injunction, finding that the Norris-LaGuardia Act precluded the court from issuing the requested injunction with respect to players who were under contract with an NFL Club. As set forth in this article, the authors believe that the court's interpretation of the Norris-LaGuardia Act is inconsistent with the history, purpose, and plain text of the Act and cannot be reconciled with well-settled precedent.

II. BACKGROUND

Before any touchdowns could be thrown or any highlight catches could be made during the 2011 NFL season, the NFL and its players first had to square off in the courtroom. On March 12, 2011, the NFL instituted a "lockout" of all NFL players, putting the 2011 season in jeopardy.[2] One day earlier, the NFL players had disbanded their union and nine professional football players—Tom Brady, Drew Brees, Vincent Jackson, Ben Leber, Logan Mankins, Peyton Manning, Brian Robison, Osi Umenyiora, and Mike Vrabel—and one then-prospective NFL player—Von Miller—(collectively, the "*Brady* Plaintiffs") filed a Class Action Complaint and Motion for a Preliminary Injunction in the Federal District Court of Minnesota against the NFL and its member Clubs seeking, among other things, to enjoin the NFL's impending "lockout" as an antitrust violation.[3] Specifically, the *Brady* Plaintiffs contended that the NFL's "lockout"—which was designed to eliminate competition for the services of NFL players and coerce them into accepting a substantial reduction in compensation and other competitive restraints—would be a *per se* unlawful group boycott and price fixing agreement in violation of Section 1 of the Sherman Act and would cause irreparable harm to all NFL players.[4] The *Brady* Plaintiffs further argued that the antitrust laws—not the labor laws—applied, as the non-statutory labor exemption and the NFL's resulting antitrust immunity ended when the NFLPA disclaimed and terminated its role as the collective bargaining representative of the NFL players on March 11, 2011.[5]

The NFL argued against the requested preliminary injunction on various grounds, all of which were rejected by the District Court.[6] The one argument on

2. Brady v. NFL, 779 F. Supp. 2d 992, 1003-04 (D. Minn. 2011), *stayed*, 640 F.3d 785 (8th Cir. 2011), *vacated*, 644 F.3d 661 (8th Cir. 2011).

3. *Id*. at 1004.

4. *Id*.

5. The Supreme Court in Brown v. Pro Football, Inc., 518 U.S. 231 (1996), specifically identified the "collapse of the collective-bargaining relationship, as evidenced by decertification of the union" as an "extreme outer boundar[y]" in which the non-statutory labor exemption would no longer apply. *Id*. at 250.

6. *Brady*, 779 F. Supp. 2d at 1042-43.

which the NFL ultimately prevailed was the claim that the Norris-LaGuardia Act, 29 U.S.C. § 101 deprived the court of the power to issue a preliminary injunction against the NFL's "lockout" as it applied to players under contract.[7] The Eight Circuit fumbled this argument.

In support of its contention, the NFL relied on Section 4 of the Norris-LaGuardia Act, which provides, in relevant part, as follows:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment[.][8]

Moreover, the NFL argued that its boycott of the players satisfied the definition in Section 13 of the Norris-LaGuardia Act of a "labor dispute," which provides as follows:

> (c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.[9]

The NFL alleged that its "lockout" either "involve[d]" or "gr[ew] out of" a "labor dispute," and that the Norris-LaGuardia Act prohibited the preliminary injunction granted by the District Court.[10] The *Brady* Plaintiffs contended that the antitrust laws—not the labor laws—applied, and that the Norris-LaGuardia Act did not shield the NFL's group boycott from preliminary injunctive relief.[11] This was the critical issue on appeal and the Eighth Circuit made the wrong call.

III. LET THEM PLAY!

On April 25, 2011, Federal District Court Judge Susan Richard Nelson preliminarily enjoined the NFL's "lockout" and concluded, among other things, that the NFL's "lockout" was likely a *per se* violation of Section 1 of the Sherman Act that caused immediate and irreparable harm to the NFL players and that the Norris-LaGuardia Act did not preclude the District Court from issuing the preliminary injunction.[12] With respect to the Norris-LaGuardia Act, Judge Nelson held that the Act did not apply since "the broad definition of a 'labor

7. Brady v. NFL, 644 F.3d 661, 680-82 (8th Cir. 2011).
8. 29 U.S.C. § 104(a).
9. *Id*. § 113(c).
10. *Brady*, 779 F. Supp. 2d at 1026.
11. *Id*. at 998, 1004-05.
12. *Id*. at 1022-43.

dispute' has uniformly been interpreted by the courts as a dispute between a union and employer" and the NFL players had ended their union through a disclaimer.[13] The NFL immediately sought a stay and appealed Judge Nelson's decision to the Eighth Circuit.

IV. THE EIGHTH CIRCUIT DROPS THE BALL

On July 8, 2011, the Eighth Circuit partially vacated the District Court's order enjoining the NFL's "lockout," holding that Section 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."[14] It extended this ruling, however, only to players under contract and remanded on the issue of whether an injunction could be issued in favor of free agent players and rookies.[15]

The Eighth Circuit's decision was contrary to the history, purpose, and plain text of the Norris-LaGuardia Act. It also was inconsistent with precedent and vastly expanded the reach of the Norris-LaGuardia Act to encompass antitrust disputes between employers and non-unionized employees.

A. The Norris-LaGuardia Act

In 1932, Congress enacted the Norris-LaGuardia Act to protect employees' rights to strike and utilize other collective self-help methods for employees that were previously subject to injunctive relief under the Sherman Act.[16] In 1914, Congress tried to achieve this end through the Clayton Act.[17] Federal judges, however, continued to grant anti-strike injunctions, and the Supreme Court in *Duplex Printing Press Co. v. Deering* held that the Clayton Act did not protect secondary boycotts by employees.[18] Through the Norris-LaGuardia Act, Congress "responded directly to the construction of the Clayton Act in *Duplex*, and to the pattern of injunctions entered by federal judges."[19]

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13. *Id*. at 1026, 1026-32. In rejecting the NFL's contention that the phrase "labor dispute" encompassed the NFL's "lockout" of individual, non-unionized employees, Judge Nelson stated: "To propose, as the NFL does, that a labor dispute extends indefinitely beyond the disclaimer of union representation is fraught with peril." *Id*. at 1027.

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

15. *Id*. at 681-82.

16. Brady v. NFL, 779 F. Supp. 2d 992, 1023 (D. Minn. 2011).

17. *E.g*., United States v. Hutcheson, 312 U.S. 219, 229-30 (1941) (explaining that the Clayton Act "withdrew from the general interdict of the Sherman Law specifically enumerated practices of labor unions by prohibiting injunctions against them"); *Brady*, 644 F.3d at 683 (Bye, J., dissenting) ("The Clayton Act was always understood as an attempt to assist the organized labor movement at the time its progress was impeded by judicial misuse of injunctions.").

18. 254 U.S. 443, 471-72 (1921).

19. Burlington N. R.R. v. Bhd. of Maint. of Way Employees, 481 U.S. 429, 438 (1987); *see also* Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 251 (1970) (explaining that the Norris-LaGuardia Act was adopted "to correct the abuses that had resulted from the interjection of the federal judiciary into union-management disputes on the behalf of management.").

Accordingly, the Norris-LaGuardia Act was expressly designed not to protect employers in their concerted actions against employees, but to implement the congressional policy of protecting labor unions and "established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation."[20] As the Supreme Court has observed, the Norris-LaGuardia Act "expresses a basic policy against the injunction of activities of *labor unions*."[21]

Based on both the history and policy underlying Norris-LaGuardia, there is simply no basis to support the assertion that the Act should apply where employees have decided not to be unionized. The Act was designed to protect the collective actions of organized labor, and thus cannot provide even a derivative protection to employers when no collective actions by a union are involved.

B. The Brady Action Was Not A "Labor Dispute" As Defined By The Norris-LaGuardia Act

For more than eighty years, courts have consistently held that the application of the Norris-LaGuardia Act is limited to disputes involving organized labor.[22] As the Supreme Court has repeatedly made clear, "[t]he Norris-LaGuardia Act removed the fetters upon trade union activities."[23] The Federal Appellate Courts, including the Eighth Circuit, have similarly confirmed, prior to *Brady*, that the application of the Norris-LaGuardia Act requires the presence of organized labor. In *Ozark Air Lines, Inc. v. National Mediation Board*, for example, the Eighth Circuit held that a claim by an employee to obtain a retirement benefit was not a "labor dispute" within the confines of the Norris-LaGuardia Act.[24] Although the retirement benefit was set forth in a labor agreement negotiated by a union, the Eighth Circuit concluded that the Norris-LaGuardia Act did not apply because "[n]o strike or other concerted labor activity [was] enjoined."[25] Similarly, the Sixth Circuit has explained that a "labor

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20. *Hutcheson*, 312 U.S. at 231.

21. *Burlington N. R.R.*, 481 U.S. at 437 (emphasis added) (quoting Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 772 (1961)).

22. As its primary support for the proposition that the Norris-LaGuardia Act bars injunctions in cases in which no union is involved, the Eighth Circuit relied on the Supreme Court's decision in *New Negro Alliance v. Sanitary Grocery Co*., 303 U.S. 552 (1938). The Supreme Court in *New Negro Alliance*, however, only addressed the question of whether racial discrimination could be the proper subject of a "labor dispute" and not whether the Norris-LaGuardia Act applies to employees who are not collectively organized. *Id*. at 560-61. In fact, the employees in *New Negro Alliance* were engaging in collective action equivalent to that of a union, but were prevented from unionizing due to discrimination based on their race. Brief for Petitioners at 25, 28 New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938) (No. 511).

23. *Hutcheson*, 312 U.S. at 231; *see also* NLRB v. City Disposal Sys. Inc., 465 U.S. 822, 834 (1984); Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 621-22 (1975); *Int'l Ass'n of Machinists*, 367 U.S. at 772.

24. Ozark Air Lines, Inc. v. National Mediation Board, 797 F.2d 557, 563-64 (8th Cir. 1986).

25. *Id*. Notably, in Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), the Eighth Circuit ad-

dispute" exists "where an employer and a union representing its employees are the disputants, and their dispute concerns the interpretation of the collective bargaining agreement that defines their relationship."[26]

As Judge Kermit Bye of the Eighth Circuit correctly noted in his lengthy dissent in *Brady*, "[o]rganized labor activity serves as the necessary limiting principle circumscribing the application of the NLGA."[27] Judge Bye thus aptly pointed out that "[w]ithout such [a] limiting principle, the Act would tie the courts' hands in granting injunctive relief in many routine cases where parties seek to enforce various aspects of individual employment contracts" and therefore, "reading of the term untethered to unionization and collective bargaining activity does not make sense."[28]

In addition, the unprecedented ruling in *Brady* that Section 4(a) bars injunctions against employer boycotts of non-unionized employees is inconsistent with the law of other Circuit Courts of Appeal. These courts have held that Section 4(a) does not apply to protect employer conduct directed at their employees.[29]

Indeed, interpreting Section 4(a) to apply to an employer lockout is contrary to the plain text of Section 4(a). Specifically, the phrase "[c]easing or refusing to perform any work" in Section 4(a) refers to employee conduct, as it is employees, not employers, who "perform" work.[30] It follows that the phrase "or to remain in any relation of employment" also refers to employee, not employer, conduct.[31] Notably, unlike Section 4(b) of the Norris-LaGuardia Act which expressly applies to both employers as well as employees, Section 4(a) makes no mention of employers, "highlight[ing] Congress's decision to limit" Section 4(a) of the Norris-LaGuardia Act to injunctions of *employee* activity.[32] Further,

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dressed the Norris-LaGuardia Act in the context of professional football, and expressly rejected the NFL's contention that the Norris-LaGuardia Act should bar an injunction against restraints in the player market. *Id*. at 623.

26. Int'l Union United Auto., Aerospace & Agric. Implement Workers v. Lester Eng'g Co., 718 F.2d 818, 823 (6th Cir. 1983); *see also* United Air Lines, Inc. v. Int'l Ass'n of Machinist & Aerospace Workers, 243 F.3d 349, 362 (7th Cir. 2001); Emery Air Freight, Corp. v. Int'l Bhd. of Teamsters, Local 295, 185 F.3d 85, 89 (2d Cir. 1999).

27. Brady v. NFL, 644 F.3d 661, 685 (8th Cir. 2011) (Bye, J., dissenting).

28. *Id*. at 685-86.

29. *See* Local 2750, Lumber & Sawmill Workers Union v. Cole, 663 F.2d 983, 985 (9th Cir. 1981) ("[S]ection 4(a) was not intended as a protection for employers, and . . . when employers were intended to be protected . . . they were specifically named.") (internal quotation marks omitted); De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 291 (1st Cir. 1970) (concluding that Section 4(a) "was not intended as a protection for employers"); Bhd. of Locomotive Eng'rs v. Balt. & Ohio R.R., 310 F.2d 513, 518 (7th Cir. 1962) ("[O]ur study of th[e] history and the language of the [Norris-LaGuardia] Act . . . convinces us that the purpose of Congress in this respect was to protect only employees and unions. We find nothing in the statement of policy to indicate any intention to deny jurisdiction to issue injunctions against employers . . . [aside from] isolated exceptions . . .").

30. 29 U.S.C. § 104(a).

31. *Id*.

32. *See* Abuelhawa v. United States, 129 S. Ct. 2102, 2107 n.4 (2009). Further, Section 3 of the Norris-LaGuardia Act explicitly refers to "[e]ither party" and to "employer[s]" and "labor."

the inapplicability of Section 4(a) to the NFL's "lockout" is also demonstrated by the fact that the NFL maintained that the more than 1,000 players who were under contract with an NFL Club at the time the NFL instituted its "lockout" were still bound by those contracts. Thus, the NFL Clubs were not refusing to "remain" in any employment relationship with the NFL players.

The limited scope of Section 4(a) to organized employee activity is not surprising given the clear legislative purpose of the Norris-LaGuardia Act. This purpose is expressly set forth in Section 2 of the Act, which mandates that it be "interpret[ed]" consistent with its purpose—to facilitate employees' rights to unionize—and that the scope of the Act should be limited to disputes involving "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[33]

V. TWO MINUTE DRILL

The Eighth Circuit's expansive interpretation of the Norris-LaGuardia Act in *Brady* is directly at odds with the history, purpose, and plain text of the Act as well as settled precedent. When the NFLPA ceased to be a union, the rationale for applying the Norris-LaGuardia Act to the NFL's "lockout" disappeared. At that point, labor law polices were no longer relevant and there was no basis to displace the full antitrust protection of the players, including their right to preliminary injunctive relief. Fortunately for NFL players and fans, the court's bad call did not change the outcome. Following the remand, the antitrust suit continued and ultimately resulted in a litigation settlement that provided a fair resolution for the players and the end of the NFL's boycott in time to save the 2011 NFL season.[34] The "ironic" ruling of the Eighth Circuit expansively applying the Norris-LaGuardia against the employees it was enacted to protect was thus not subject to rehearing or Supreme Court review and will have to wait to be revisited by another court on another day.

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29 U.S.C. § 103.

33. 29 U.S.C. § 102.

34. Faced with the possibility of enormous treble damage liability for the continuing "lockout," the NFL reached a litigation settlement with the *Brady* Plaintiffs, which set forth a modified version of the previous salary cap-free agency system that was agreeable to both players and owners. The *Brady* settlement was conditioned on the reformation of the NFLPA as a union and the negotiation of a new collective bargaining agreement, both of which subsequently occurred and led to the successful start of the 2011 NFL season without a single missed game.