

Armageddon II: An Analysis of the Issues Surrounding the NHL Lockout

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The National Hockey League locked out its players for the second time in seven years after losing the entire 2004-05 season in an effort to obtain a salary cap that was touted as the panacea for financial stability and profitability to its member teams. However, the league maintains that two-thirds of the teams lost money during the 2011-12 season, despite a 50% increase in total league revenue since 2005. This article will analyze a number of key issues between the parties and discuss the importance and potential resolution of each one during negotiations for a new Collective Bargaining Agreement.

INTRODUCTION

On June 22, 2009, after twenty-six years as the Executive Director of the Major League Baseball Players' Association (MLBPA), Donald Fehr announced his retirement ("Fehr Leaving Post," 2009). Fehr's tenure as head of the MLBPA was marked by extreme highs—the average player salary increased from \$289,194 to an average of nearly \$3 million during his tenure—and lows—the 1994 World Series was cancelled after the players went on strike in August of that year (Anderson, 2010; Brown, 2010a).

Shortly after announcing his retirement from the MLBPA, Fehr agreed to assist the National Hockey League Players' Association (NHLPA) in revamping its constitution and finding a new executive director (Piercy, 2009; "Players Hope," 2010). For much of its existence, the NHLPA was the antithesis of the MLBPA. Hockey players were beset with incompetent and corrupt leadership that had done little over the years to protect them from the owners (Anderson, 2010; Campbell, 2009; "Players Hope," 2010). They enjoyed fewer benefits and earned less than their counterparts in the other three major league team sports: football, baseball, and basketball.

After a year as an unpaid adviser to the NHLPA, Fehr was elected as the union's executive director (Gross, 2009; Piercy, 2009). The timing could not have been more fortuitous for the players. Their current Collective Bargaining Agreement (CBA), the only one the players and the league have had since the end of the 2004-05 lockout that cost the sport the entire season, was set to expire on September 15, 2012 (Custance, 2011; "Donald Fehr," 2010). With Fehr at the helm, the players have an experienced and battle-tested labor executive to lead them for the first time in union history. This note will point out a number of key issues that are likely to top the union's agenda in negotiations with the owners, discuss how Fehr might approach those issues, and predict how those issues will eventually be resolved.

Fehr's initial remarks after the announcement of his election gave little insight into how he will prioritize bargaining issues for the next round of negotiations with the owners. However, he was bullish

that the two sides will be able to avoid a labor stoppage (Klein, 2010a). Not surprisingly, when pressed by the media, Fehr was tightlipped and failed to “reveal [any] specifics” of what he and his membership considered as key negotiating issues for the next CBA (Brehm, 2010, para. 14). When asked directly what the players have for concerns, Fehr demurred, saying:

I think what's fair to say is there are a lot of things that they would like to see examined with the way things are working now and then following that, try to make a judgment on if they want to try to change them, and if so, to what... It would be unfair at this point to go beyond that (Brehm, 2010, para. 15).

No one expected Fehr to provide full disclosure and tip his hand even before the negotiating process with management began, but some of the material issues to be addressed by the next CBA can be easily identified, including (A) revenue sharing, (B) escrow payments, (C) international player participation, (D) the salary cap, (E) roster sizes and guaranteed contracts, (F) unrestricted free agency, (G) player safety, (H) division realignment, (I) long-term, front-loaded contracts, (J) Fehr's successor, and (K) negotiating strategy.

A. Revenue Sharing

A major issue in the 2012 negotiations revolves around revenue sharing. The league has flourished financially since the 2004-05 lockout. League revenues have progressively increased from one season to the next and, with the much fought-over salary cap and floor being tied to league revenues, player salaries have also steadily risen since the lockout (Badenhausen, Ozanian, & Settimi, 2010). While player costs have increased at a similar rate for each NHL franchise, revenues for individual teams have not increased in lockstep with payroll. This imbalance in team revenue is becoming a major topic of discussion among owners as the next CBA looms.

One solution to this imbalance is to increase revenue sharing among teams. The major opposition to this approach may not come from the NHLPA, but rather from infighting between large and small market teams (Badenhausen et al., 2010). Proponents of increased revenue sharing are likely to find strong resistance from owners of marquee teams that enjoy the highest local revenues, such as the New York Rangers, Montreal Canadiens, and Toronto Maple Leafs (Badenhausen et al., 2010). Fehr embraced the broad revenue sharing model adopted in baseball, perhaps in response to the MLBPA's adamant opposition to a salary cap in Major League Baseball (MLB). He may wish to do the same in hockey.

It should be noted that less total revenue exists in hockey than in baseball, \$2.8 billion to \$7 billion in the 2010-11 NHL season and the 2010 MLB season, respectively (“Best-Ever Business,” 2011; Lackey, 2010; Mickle, 2010). The dearth of national revenues in hockey in comparison to other major league team sports, and a wide local revenue disparity among NHL teams virtually guarantees that increased revenue sharing will be a major topic of discussion in the upcoming CBA negotiations (Badenhausen et al., 2010; Bradbury, 2010).

While revenue sharing could prove to be a more contentious topic among the owners, it is an issue that has consequences for both owners and players. The players are likely to embrace an expansion of revenue sharing in an effort to allocate greater resources to teams that are struggling to meet the payroll floor (the salary floor for the 2010-11 season was \$43.4 million and increased to \$48.3 million for the 2011-12 season) (Gretz, 2011; “NHL Salary Cap,” 2010).

Those organizations, along with a number of teams in small markets, are likewise expected to support an expansion of revenue sharing. The 2005 CBA prevents teams that are either (1) in a market with a minimum of 2.5 million television homes, or (2) are among the top fifteen clubs with the highest gross revenues, from participating in revenue sharing (CBA between NHL and NHLPA at 164-66, 2005, “CBA FAQs,” n.d.). Thus, franchises such as the New York Islanders, New Jersey Devils, and Anaheim Ducks cannot participate in the revenue sharing process because their respective markets are too large (Botta, 2010; “CBA FAQs,” n.d.). Even so, all of those teams claim to be losing money (“Badenhausen & Ozanian, 2010).

In an interview with SNY Point Blank in December of 2010, Deputy NHL Commissioner Bill Daly said the revenue sharing system would be addressed in the negotiations on the next CBA (Botta, 2010). The elimination of a number of teams from the revenue sharing system is “‘probably a technicality, although it’s an intentional technicality of how the revenue sharing system was originally constructed under the CBA,’ Daly suggested” (Botta, 2010, para. 2). “The concept was that, if you play in a large media market...you should not qualify for revenue sharing in part because of what your local media rights opportunities are” (Botta, 2010, para. 2). The parties who fashioned the current CBA did not contemplate the great recession that began in 2008. Now, the parties may hold a different opinion on how the revenue sharing provision should be crafted.

While some owners are desperate for a change in the revenue sharing provision to allow less wealthy teams to compete with the large market teams, a number of owners may view a change in the revenue sharing “technicalities” as a matter of rewarding teams for incompetence, in effect, welfare for those who fail to maximize their local revenue generating opportunities. Therefore, although players may find support from a number of owners on the topic of revenue sharing, the issue may end up being more of a battle pitting owner against owner rather than players against owners, something Fehr encountered during his role with the MLBPA. Look for the parties to ultimately compromise on the issue, allowing clubs who struggle even in large markets to participate in revenue sharing at some level as a means to remain competitive for player services.

B. Escrow

Under the current CBA, players receive 57% of league revenues, which means that unlike the situation that exists in MLB, the amount allocated to player salaries in the NHL is a function of league revenue (CBA between NHL and NHLPA at 193-97, 2005). To ensure that salaries do not exceed the agreed upon percentage of league revenues and to hedge against lower than expected revenue projections, players are required to place a percentage of their biweekly paychecks in escrow (CBA between NHL and NHLPA at 195, 2005; “NHL Hoping,” 2011). Escrow payments were 17% of each paycheck at the beginning of the 2010-11 season, although that figure was later reduced to 13.5% based on actual revenue receipts (CBA between NHL and NHLPA § 49.5(d), 2005; Dupont, 2011).

Although league revenues have increased each year since the lockout, players have repeatedly voiced their dislike of the escrow arrangement (Gross, 2011). They view the escrow system as forcing them to return money to the league “because some teams overspent and the difference has to be made up by taxing the players” (“Fehr Could Play,” 2010, “Salary Cap Issues,” para. 2). Despite this frustration with the escrow system, the NHLPA cannot argue that members have not benefitted from increased player salaries as a result of steadily rising league revenues. The salary cap has risen from \$39 million dollars in 2005-06, the year coming out of the lockout, to \$64.3 million in 2011-12, a nearly 65% increase in six years (“2009-10 Salary Cap,” 2009; “NHL Salary Cap,” 2011). The escrow system was implemented as part of the salary cap, which is linked to league revenues. Therefore, escrow cannot be viewed in a vacuum.

It is unclear how Fehr views escrow and how much importance his union will place on revising the system in the upcoming CBA. Even so, the league will undoubtedly seek to maintain the escrow system in some fashion in the new agreement. Escrow serves as protection from a potential revenue shortfall that, in its absence, might otherwise force teams to recover salary from players individually. The escrow system may also act as a security blanket which allows teams to spend more freely on player payroll without fear of exceeding the salary cap, a mindset which may contribute to increased player salaries.

C. Player Participation in International Competition

Another issue that will undoubtedly be addressed in the negotiations is the participation of NHL players in the 2014 Olympics in Sochi, Russia. The current CBA contained commitments for NHL players to play in the 2006 and 2010 Winter Olympics, along with the annual IIHF World Championships (CBA between NHL and NHLPA § 24, 2005). All future international contests appear to be open for negotiation at the discretion of the two sides. Most players seem to favor such participation, but the

league has remained non-committal (Campbell, 2010; Morreale, 2010). One reason for the NHL's uncertainty may be the widespread disagreement among owners on how much Olympic hockey exposure benefits the league. This disagreement is further complicated when weighed against the financial loss incurred by the league and its member franchises when the NHL is required to shut down for a period of two weeks to accommodate the Olympics (Morreale, 2010).

The excitement and interest in Olympic hockey is obvious; but the question remains whether the enthusiasm generated by the tournament is transferrable to NHL games. Put another way, it is unclear whether the NHL can convert the casual Olympic fan who tunes in for these quadrennial contests into a loyal, money spending, NHL fan. In large part, much of the excitement generated by Olympic hockey is due to nationalism rather than to a great passion for professional hockey or specific NHL teams. Differences also exist between the Olympic and NHL game. The brand of hockey played in the Olympics—a larger ice surface, less physical play, and more wide-open style—is different from the game that is played on NHL rinks—a smaller ice surface, more physical style of play, and tighter checking. Therefore, fans of Olympic-style hockey may not transfer their interest to the NHL, and it may not be worth the NHL's financial risk – not to mention the risk of player injury—to allow player participation in such tournaments.

D. The Salary Cap

While players will address their key issues during bargaining on the next CBA, owners are also expected to look for a number of concessions from the players. One area of interest to owners may be revisions to the salary cap system. Although the owners forfeited an entire season to obtain a hard salary cap, not all teams have been profitable since the lockout. As many as eighteen NHL franchises are reportedly still losing money despite a CBA containing a salary cap, a device that was touted as a means to create “cost certainty” (Badenhausen & Ozanian, 2010; Abrams, 2003). One reason the CBA is not achieving the level of cost certainty desired by owners may be due to the system the league uses to allocate revenues. Currently, 57% of NHL revenues are guaranteed to the players, an amount used to calculate the salary cap (CBA between NHL and NHLPA § 50.4(d), 2005; “CBA FAQs,” n.d.). In an effort to reduce the tide of red ink, owners can be expected to seek a reduction in the percentage of league revenue used to calculate the salary cap, which, if achieved, will also slow the increase to the league's salary floor.

As mentioned, franchises have seen substantial increases in the salary cap and floor since the post lockout 2005-06 NHL season (“NHL Salary Cap,” 2011). This dizzying increase has, for the most part, occurred in the midst of the worst recession in decades (“Hefty Rise,” 2011). Management may argue that substantial changes must be made to the CBA that are designed to prevent some teams from wild spending in order to reach the salary floor (“Hefty Rise,” 2011). Despite this, a number of hockey insiders predict that the salary cap will fall at some point, which would require some teams to shed salary (“Hefty Rise,” 2011). In that event, the owners' perceived disparity between the salary cap and the salary floor may no longer be an issue. Of course, any reduction in the percentage of league revenue that goes to the players may lead to lower average salaries. That possibility suggests Fehr and the union will be very reluctant to capitulate on this issue. While it is unlikely that Fehr will oppose the continuation of a hard salary cap in the next CBA, he may agree to a revision of the salary cap system if the players receive concessions from owners on other key issues. One such compromise may include an adjustment between the salary cap and the floor. If the percentage of revenue going to the players is reduced, and a corresponding increase in the salary floor is agreed to, the highest paid players may take a hit while the salaries of lower paid players may actually increase. Such an adjustment, if tied to increased revenue sharing, may be palatable to a majority of owners. How to address that issue will undoubtedly be on the agenda for both parties during the next CBA negotiation. In addition, after the NFL and the NBA were successful in rolling back the percentage of league revenues allocated to player salary in their respective new CBAs, NHL owners will likely attempt to accomplish the same thing in negotiations with their players (Coon, 2011; Mortensen, 2011). Even so, it took a lockout in both the NFL and NBA, with the

loss of almost twenty percent of the 2011-12 NBA season, to convince the players to accept less revenue (“Heat, Mavericks,” 2011).

A related issue is what constitutes the base in the NHL, defined as “hockey-related revenue,” which is used to compute the portion of revenue allocated to player salaries. In every league where players receive a percentage of league revenues in salary, a certain amount of revenue is excluded from the computation. In 2011, the NHLPA exercised its right to conduct an audit of select clubs for the first time (Brooks, 2011). Reports indicate that union auditors discovered unreported revenues from the previous season. In addition, the owners and players disagree on whether the \$25 million paid to the league by Glendale, Arizona each of the past two years to keep the Phoenix Coyotes in town should be considered hockey-related revenue (Brooks, 2011). The dispute delayed the issuance of escrow refunds to the players as well as the distribution of additional revenue sharing to teams that qualified for it.

E. Roster Sizes and Guaranteed Contracts

Other issues that owners are likely to raise during negotiations, and the union will undoubtedly be prepared to respond to, are roster sizes and guaranteed contracts. A number of teams hardly use a fourth line in today’s game, and eliminating three players from the roster could both save teams money and increase the average salary of the remaining players. The union is unlikely to be receptive to such a move, however, because it would cost some players their jobs. The same is true for guaranteed contracts. The only major league professional sport without guaranteed contracts is football. Fehr’s experience in baseball, where all contracts are guaranteed, suggests that the union would highly contest a move that would eliminate guaranteed contracts.

F. Unrestricted Free Agency

Teams may also seek to adjust the age for unrestricted free agency. Currently, players are eligible for unrestricted free agency once they reach age twenty-seven or after having spent seven years in the league (CBA between NHL and NHLPA § 10.1, 2005). Teams receive no compensation for losing an unrestricted free agent. Those rules are arguably more favorable to the players in the NHL than the free agent rules in existence in MLB, where some teams may be entitled to compensation for the loss of a free agent. That holds true despite the fact that baseball players can be unrestricted free agents after only six years of Major League service. Another issue involving player compensation that ownership may wish to revise is salary arbitration, which has helped escalate player salaries in the NHL, although not to the extent that it has in MLB (Carroll, 2001).

G. Player Safety

Both sides may use these upcoming negotiations to address additional player safety issues. One safety issue that has recently taken center stage concerns “blind side hits” and targeted blows to the head, which are becoming increasingly common in professional hockey (Cole, 2011; Klein, 2011a; NHL Suffering Loss,” 2011). In recent seasons, the league has seen a growing number of skilled players miss significant time due to brutal hits delivered to the receiving player’s head. One costly example of this trend is, perhaps the best player in the league, Pittsburgh Penguins center Sidney Crosby, who missed significant time due to headshots he sustained back in early 2011 (LeBrun, 2009; Molinari, 2011). In response to this trend, the league adopted a new rule that includes a specific “major” penalty for such hits (“Rule 48,” n.d.). The league’s new chief disciplinarian, Brendan Shanahan, has sought to aggressively enforce the new rule in an effort to discourage players from engaging in conduct which, because it has sidelined some of the league’s most skilled players, has the potential to negatively affect the game’s marketability (Klein, 2011b). Time will tell if this new rule on hits, “Rule 48,” will be effective in legislating headshots and blind side hits out of the game or if collective bargaining is necessary to resolve the issue.

An emerging issue that is almost as polarizing as headshots is the physical and psychological toll that fighting seems to take on NHL players (“Hazards, Risk,” 2011). Fighting became a more pressing issue after three former NHL enforcers passed away within a four-month period in 2011; each player’s death was presumably linked to the physical and mental impact fighting had on the player over his career

(Branch, 2011a; Branch, 2011b; Gregory, 2011). While fighting is unlikely to be legislated out of the game, the physical and mental hazards of being an “enforcer” may lead to discussions between labor and management concerning post career treatment and benefits to players. An outright ban on fighting could potentially erase a roster spot currently allocated to a fighter, something the union would undoubtedly oppose.

H. Division Realignment

Another issue was raised in December of 2011 after the league’s owners approved a radical realignment plan that was designed to relieve the travel burden on teams in the central and western time zones. The league approved a four-division configuration, two with eight teams and two with seven teams (“NHL Approves,” 2011). In announcing the plan, NHL Commissioner Gary Bettman was adamant that the change did not require union approval (“NHL Approves,” 2011). However, a union spokesperson was equally as adamant that realignment does require an agreement between the league and the NHLPA (“NHL Approves,” 2011). Such is, in fact, the case in the MLB, where the MLBPA must approve any realignment, and Fehr may wish to include an ironclad clause in the next CBA that will leave no doubt as to the union’s role in future NHL realignment (Olney, 2011).

I. Long-Term, Front-Loaded Contracts

An additional issue likely to be addressed in the upcoming 2012 negotiations concerns the attempt on the part of some teams to circumvent the league’s salary cap. This subject became an issue when teams began signing players to front-loaded, long-term contracts that stretched out a large sum over many years, lowering the average yearly salary and allowing teams to remain below the salary cap (LeBrun, 2009; “Luongo Signs,” 2009; “NHL Investigating,” 2009). Using this approach, teams could still pay top dollar to attract talent, but the immense wage being paid to a player during the prime of his career could be spread out over the length of the contract. In some instances, these wages would amount to an excess of eight million dollars per year at the peak of the contract. This resulted in lowering the average cap hit to a relatively manageable level. In practice, however, it was highly unlikely that the player would play throughout the contract’s entire term.

The issue of long-term contracts came to a head in July 2010 when the New Jersey Devils signed franchise free agent sniper, Ilya Kovalchuk, to a stunning seventeen-year, \$102 million deal (Yerdon, 2009). The contract, if completed in full, would keep Kovalchuk in uniform until he was forty-two years old, an incredibly advanced age for a professional hockey player (Yerdon, 2009). The Kovalchuk deal, which was the fourth blockbuster deal of its kind in the NHL salary cap era, failed to gain league approval (“NHL Rejects Kovalchuk Contract,” 2010). In rejecting the contract, the NHL claimed it was merely a circumvention of the salary cap (“NHL Rejects Kovalchuk Deal,” 2010). The NHLPA then filed a grievance over the NHL’s decision (“NHLPA Files Kovalchuk,” 2010). Ultimately, the two sides reached an agreement on the structure of long-term deals in the NHL (“NHL, NHLPA,” 2010). Despite the agreement, such contracts may continue to be an issue in the future (Mirtle, 2011). Therefore, expect the sides to incorporate language into the next CBA that memorializes the rules governing long-term player contracts and salary cap compliance.

J. Fehr’s Successor

An internal union issue certain to be on Fehr’s agenda is the designation of his successor as head of the NHLPA. Based on his public comments following his election, Fehr is likely to retire once the next CBA is in place (Klein, 2010b). Ideally, Fehr will be looking for someone with a hockey and labor background to succeed him. If no perfect candidate exists, Fehr could instead select a former NHL player who has shown an interest in and a commitment to union affairs to serve as his understudy during CBA negotiations. Union membership could select that individual to succeed Fehr, but even if another person were elected as executive director, an individual experienced in the CBA process, one who was at Fehr’s side throughout the 2012 negotiations, would be available in union headquarters to assist the new executive director. One potential candidate to succeed Fehr as Executive Director of the NHLPA is

former NHL defenseman Mathieu Schneider, who has served as Fehr's special assistant since February 2011 ("Mathieu Schneider," 2011).

Given the amount of time, effort, and emotion that Fehr has invested in the NHLPA to date, it is unlikely that he will leave the selection of his successor to chance. It would also make sense for Fehr's successor to serve with him in order to learn the nuances of labor law and the same negotiating tactics that Fehr learned from former MLBPA Executive Director Marvin Miller while Fehr served as counsel to the MLBPA prior to succeeding Miller as executive director.

Another of Fehr's likely goals before he leaves the NHLPA is to create a relationship with the owners similar to the one he left behind when he retired from the MLBPA. Fehr is associated with multiple work stoppages in baseball during his time at the union, most notably the 1994 strike that resulted in the cancellation of the 1994 World Series ("1994 Strike," 2004; "History of the Major," n.d.). Despite this, one must also note that he retired from the MLBPA after sixteen years of uninterrupted labor peace, something that many observers thought was impossible to achieve during the early years of labor unrest in MLB ("Fehr Leaving Post," 2009). After the 1994 strike, a labor stoppage that cost the owners an estimated one billion dollars in lost revenues and the players hundreds of millions in lost wages, Fehr helped create an environment of cooperation from which both parties have continued to prosper ("1994 Strike," 2004). Baseball revenues increased from \$1.3 billion in 1995 to over \$7 billion in 2010. (Brown, 2010; Levin, Mitchell, Volker & Will, 2000).

In hockey's salary cap era, NHL owners and players must exhibit the same level of cooperation that has been displayed by MLB and its players since the 1994 strike. The fact that players receive a fixed percentage of league revenues in the NHL serves to create a partnership between the parties: the greater the league revenues, the greater the player salaries. Therefore, it behooves both sides to bargain cooperatively in the next round of CBA talks with the ultimate goal being to grow league revenues around the globe.

K. Negotiating Strategy

The tone of these negotiations may be different from the one that led to the 2004-05 lockout and subsequent owner-friendly CBA. Although the union's executive director during the lockout, Bob Goodenow, was arguably the best leader the NHLPA ever had, he has been rightfully criticized for taking a hardline approach with the owners without a viable alternative negotiating strategy (Bernstein, 2004). On the defensive from almost the onset of negotiations, he staked his entire strategy during the 2004-05 lockout on a no salary cap platform (Liebman, 2009). He had no apparent "Plan B" that might have salvaged a portion of the season and a portion of his membership's lost wages (Gross, 2009).

Fehr is unlikely to make the same mistake in his negotiating strategy with the owners. Based on his track record with the MLBPA, Fehr is likely to have had a number of options and scenarios prepared on each issue prior to embarking on negotiations with the league.

CONCLUSION

Today, the NHLPA finds itself in a position not unlike that of the MLBPA in 1966 when Marvin Miller agreed to represent the fledgling baseball players' union. The NHLPA finally has the stable, competent and knowledgeable leader it has yearned for since its inception and Fehr has one more opportunity to cement his legacy as a labor leader. If Fehr can accomplish for hockey players even a fraction of what Miller was able to accomplish for baseball players, he will have done them a great service in addition to enhancing his reputation as one of the greatest, if not the greatest, sports labor leaders of all time.

It remains to be seen how much Fehr can accomplish on behalf of hockey players in the brief time he is expected to represent them as Executive Director. There are many issues that the league and players must resolve without endangering the impressive growth the NHL has enjoyed since the end of the 2004-05 lockout. Nevertheless, given his successful track record with the MLBPA, it seems certain that the

NHLPA and the players will be better off when Fehr leaves the union than they were when he first agreed to assist them as an unpaid volunteer.

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