

SUMMARY OF BRADY'S AND NFLPA'S LEGAL ARGUMENTS

By Daniel Wallach

A. LACK OF NOTICE

1. A longstanding jurisprudence of NFL arbitrations—the law of the shop under the CBA—provides that NFL players may not be subject to discipline without advance notice of what conduct might result in such discipline, and what the disciplinary consequences might be.

a. The CBA “law of the shop” requirement of notice was recently confirmed by Judge Barbara Jones in *Rice*, Judge David Doty in *Peterson*, and CBA Arbitrator Harold Henderson in *Hardy*.

1. Ray Rice: Former federal judge Barbara Jones (acting in her capacity as arbitrator) held that “even under the broad deference accorded to [Goodell] through Article 46, he could not retroactively apply the new presumptive policy to Rice” and that he “needed to be fair and consistent in his imposition of discipline.”

2. Adrian Peterson: Judge David Doty, citing Judge Jones’ ruling in *Rice*, vacated the Peterson arbitration award because it “simply disregarded the law of the shop” and therefore was contrary to the essence of the CBA. According to Judge Doty, the “law of the shop”—which included Judge Jones’ ruling in *Rice*, prohibited the NFL from retroactively applying Goodell’s new personal conduct policy to Peterson’s “pre-policy” conduct.

3. Bountygate: Former NFL Commissioner Paul Tagliabue (acting in his capacity as arbitrator), in vacating the NFL’s discipline of four New Orleans Saints’ players for, among other things, lack of notice, held that “a sharp change in discipline . . . can often be seen as arbitrary.”

b. Goodell himself testified in *Rice* that he could not retroactively discipline Rice under the NFL’s then-newly enacted Personal Conduct Policy because the NFL is “required to give proper notification” of player discipline.

c. The “law of the shop” includes not only past practices of the industry and the shop, but also prior arbitration awards.

2. The lack of prior notice also violates U.S. constitutional safeguards.

- a. Ex Post Facto Clause. The central concerns of the Ex Post Facto Clause “are the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.”
- b. Due Process Clause. The crux of a due process claim is the absence of fair notice.

3. In affirming Brady’s discipline, the Award disregards the CBA law of the shop requirement that players receive advance notice of potential discipline. The NFLPA argues that Brady has no notice of the disciplinary policies that would be applied to him, the disciplinary standards, or of the potential penalties.

4. **ARGUMENT #1: Brady had no notice of the “Competitive Integrity Policy” that was the source of the NFL’s punishment, because that Policy, by its terms, applies only to Clubs (and is not part of the Player Policies)**

- a. Brady only had notice of the applicable “Player Policies,” which provide that “First offenses will result in fines” for any equipment tampering—not suspensions.
- b. All witnesses at the hearing agreed that the Competitive Integrity Policy does not apply to players.
- c. The Player Policies actually given out and made applicable to players provide notice only for fines for first-time equipment violation offenses, including those aimed at obtaining a competitive advantage.
- d. There is thus no notice provided that a player could be suspended for a first offense of an equipment violation, and, according to the NFL, no player has ever been suspended for ball tampering.
- e. Because the Competitive Integrity Policy has never been given to players, no player in NFL history has ever been disciplined—or even investigated—for violating this Policy. Rather, only Clubs and Club personnel have been subject to discipline thereunder.

5. **ARGUMENT #2: Brady had no notice that he, or any other player, could be suspended for claimed “general awareness” of alleged misconduct by other persons, a disciplinary standard contrary to the express terms of the CBA and never before applied to players in the history of the NFL.**

- a. Brady was suspended for being “generally aware of the actions of the Patriots employees involved in the deflation of the footballs”—not for any alleged ball deflation committed or directed or even authorized by Brady himself.
- b. Yet no NFL policy or precedent notifies players that they might be disciplined for general awareness of misconduct by others.
- c. No player in NFL history has ever been suspended for being “generally aware” that another player was taking steroids or committing any other type of policy violation.
- d. Rather, recent precedent confirms that the NFL has historically refrained from disciplining players for being “generally aware” of alleged conduct detrimental by others. For example, in the New Orleans Saints Bounty case, Goodell did not discipline the entire Saints defense where they would all have been “generally aware” of the alleged “bounty” program.
- e. Instead, Goodell only imposed discipline on four Saints defenders based on their specifically alleged participation in the program—and even those suspensions were subsequently vacated by Commissioner Tagliabue because of, among other things, lack of adequate notice.
- f. Similarly, in the Richie Incognito bullying investigation conducted by Ted Wells and the Paul, Weiss law firm, Wells concluded that several members of the Miami Dolphins’ offensive line were generally aware of Incognito’s bullying of teammate Jonathan Martin, which constituted conduct detrimental. Yet, none of these other players were disciplined for “general awareness” of Incognito’s alleged misconduct.
- g. Goodell purports to sustain the suspension on factual conclusions that Brady participated in ball tampering—but those factual those factual conclusions appear nowhere in the Wells Report and were not the basis for the discipline imposed by Vincent. Judge Doty’s ruling in Peterson makes clear that an arbitrator lacks CBA authority to determine discipline de novo, and exceeds his authority by trying to justify discipline on a basis not found in the discipline being appealed. This was a second and independent ground for Judge Doty’s vacatur.
- f. The application to Brady of an unprecedented “general awareness” disciplinary standard—pulled from whole cloth without warning—warrants vacating the Award.

6. **ARGUMENT #3: Brady had no notice that he could be suspended for alleged “non-cooperation,” when a fine is the only penalty that has ever been upheld in such circumstances, and the law of the shop specifically prohibits suspensions for non-cooperation or even obstruction of a League investigation.**

- a. No player suspension in NFL history has been sustained for an alleged failure to cooperate with, or even for obstructing, an NFL investigation. Rather, before Brady, players had been subject only to limited fines for such conduct. For example, Goodell merely fined former NFL quarterback Brett Favre \$50,000 after finding that Favre “was not candid in several respects during the [NFL’s sexual harassment] investigation.”
- b. Although Goodell tried to suspend a player in Bountygate for noncooperation, Paul Tagliabue, serving as arbitrator, resoundingly rejected Goodell’s overreaching, holding that suspending a player for non-cooperation defied the CBA.
- c. Perhaps no one has a broader perspective on the NFL’s disciplinary history than Commissioner Tagliabue, and in his “forty years of association with the NFL,” he could not recall any suspension based on non-cooperation or obstruction and concluded that they were not permitted by the CBA.
- d. Accordingly, if the League wants the right to suspend a player for obstructing an investigation, it has to bargain for this right and obtain it from the Union. It cannot just decide to do this unilaterally, without notice.
- e. Although the Competitive Integrity Policy imposes a duty upon Clubs to cooperate with investigations under that Policy, the Policy does not apply to players and makes no reference to suspensions for Policy violations, let alone for failures to cooperate in investigations under the Policy. This lack of notice stands in contrast to the notice players do receive that they might be fined (not suspended) for failing to cooperate with investigations under the NFL Personal Conduct Policy, which is provided to players as part of the Player Policies.
- f. To reach the conclusion that Brady was “generally aware” of alleged ball tampering by Jastremski and McNally, Wells drew an adverse inference from the fact that Brady would not respond to the request for his texts and e-mails.
- g. But Wells admitted that he never informed Brady that there

could be any disciplinary consequences if he did not comply with the request for e-mails and texts.

- h. The arbitration record indisputably establishes that no one—including Wells—notified Brady that he could be punished for declining to produce his personal communications on his personal device to the NFL's outside law firm as part of its Competitive Integrity Policy investigation.
- i. The Wells Report's central conclusion regarding Brady—that he was "generally aware" of inappropriate conduct by others—was inextricably tied to the adverse inference drawn from Brady's decision not to produce his personal communications. The upshot—as the Award lays bare—is that the improper adverse inference based upon Brady's purported lack of cooperation infected the entirety of the suspension—yet, as the Bounty decision makes clear, the CBA requirement of notice precludes any player suspension on the ground of non-cooperation or obstructing a League investigation.

7. By ignoring each one of these notice failures, the Award—as in Peterson—utterly disregards the CBA's law of the shop and express terms and must be vacated for defying the essence of the CBA.

B. LACK OF "FAIR AND CONSISTENT" DISCIPLINE

1. A long line of CBA precedents holds that discipline under Article 46 must be "*fair and consistent*." (See Ray Rice decision by Judge Barbara Jones)

2. Where the imposition of discipline is not fair or consistent, an abuse of discretion has occurred and the discipline must be overturned.

3. **The Award ignores the undisputed law of the shop requirement of fair and consistent treatment by basing discipline on ball pressure "testing" that the NFL concedes did not generate reliable information because of the League's failure to implement any protocols for collecting such information.**

- a. At the time of the Colts game, the NFL had not implemented any procedures for measuring the air pressure ("PSI") of footballs and collecting other necessary information, such as temperature, timing and wetness, that would be essential to fairly and consistently assessing changes in PSI because such changes can occur naturally due to environmental conditions.
- b. More specifically, no one at the NFL knew there was something called the Ideal Gas Law explaining that balls would naturally

deflate when brought from a warm environment (i.e., the officials' locker room) to a cold environment (i.e., the field).

- c. As a consequence, the officials did not know to—and therefore did not—record critical information such as the temperature of the locker room where the footballs were tested, the specific gauge used to conduct the testing (here, multiple gauges were used with different calibrations, whether each of the balls were wet or dry (and how wet or dry), or the sequence or timing of the measurements (which was critical, as the balls heated up inside the room but were each measured at different times).
- d. Even the pressure at which the Patriots and Colts footballs began the game is not reliably known. The Wells Report found that although Referee Walt Anderson tested both teams' footballs before the game, he failed to record the PSI measurements or which of this two gauges he used to test and set the footballs—a failure of great significance because the two gauges measured PSI very differently.
- e. The undisputed reason for this failure to conduct proper ball testing was that, prior to the Wells Investigation, League officials had no understanding of the “Ideal Gas Law” and the fact that balls would naturally deflate when taken from a warm, dry locker room to a cold, wet field. For this reason, the various factors that impact natural deflation—such as timing and temperature and wetness—were not recorded.
- f. The League's admitted failure to timely implement any such data collection protocols caused the League's scientific and statistical consultants [Exponent] to make a multitude of unsupported assumptions and rendered their analysis utterly unreliable as a fair and consistent basis for imposing discipline.
- g. Even the Wells Report acknowledges that Exponent's work is inherently unreliable. The Report says “we are mindful that the analyses performed by our scientific consultants necessarily rely on reasoned assumptions and that varying the applicable assumptions can have a material impact on the ultimate conclusions.” Goodell's Award, by contrast, contains no such qualification, failing to acknowledge the limited probative value of Exponent's work, which even Wells acknowledged.

4. For Goodell to sustain unprecedented discipline on admittedly unreliable conclusions resting on mountains of unsupported assumptions—because the NFL failed to collect or record the necessary data—is not a fair or consistent

basis to impose player discipline and is thus contrary to the CBA law of the shop.

5. Further, less than one week ago—long after the conclusion of the AFC Championship Game and the issuance of the Wells Report—the NFL announced that it is finally implementing procedures for testing the pressure of footballs. This is an implied concession that the NFL had no procedures in place when the data on which Brady’s punishment was based was collected. In fact, it is hard to imagine a starker concession about the incurable flaws in the NFL’s failure to collect the necessary data concerning ball deflation than last week’s announcement of new protocols.

C. FUNDAMENTALLY UNFAIR PROCESS

1. Courts may vacate an arbitration award under Section 10(a)(3) of the Federal Arbitration Act (“FAA”) where, *inter alia*, “the arbitrators were guilty of [any] misconduct . . . by which the rights of any party have been prejudiced, thereby amount[ing] to a denial of [a party’s right to] **fundamental fairness** of the arbitration proceeding.” *NYKCool A.B. v. Pac. Fruit*, 507 Fed.Appx. 83, 85 (2d Cir. 2013) (quoting *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 19-20 (2d Cir. 1997)).

2. Brady and the NFLPA maintain that the arbitration hearing before Goodell “defied any concept of fundamental fairness.” For example, prior to the hearing, Goodell had ruled that Brady and the Union could not question essential witnesses, denied them access to the investigative files underlying the Wells Report (which were nonetheless available to the NFL’s counsel at the arbitration), and summarily rejected Brady’s unlawful delegation argument without considering any evidence (other than “facts” decreed by Goodell himself in his decision).

3. ARGUMENT #1: No Fair Ability to Challenge “Improper Delegation”. Under the CBA, the Commissioner has the exclusive authority to take disciplinary actions against players for conduct detrimental to the league. But, here, Goodell improperly abdicated his CBA role and delegated his exclusive disciplinary authority to NFL Executive Vice President Troy Vincent. The CBA does not allow for this.

- a. The NFLPA and Brady argue that Goodell failed to provide for “fair procedures” for adjudicating the delegation issue.
- b. Initially, the NFLPA and Brady moved for the recusal of Goodell as the arbitrator because Goodell had directed the unlawful delegation of his CBA disciplinary authority to Vincent. As arbitrator, Goodell would have to determine the facts and CBA legality of his own conduct. Moreover, Goodell was an essential witness on the delegation issue and could not lawfully serve as both arbitrator and fact witness in the same proceeding.
- c. But Goodell rejected the recusal motion out of hand, *before* the arbitration began, with *no* evidentiary record, denying the

NFLPA and Brady the opportunity to try to develop a record through document discovery and witness examination.

- d. In denying the Recusal Motion, Goodell proclaimed that he did not delegate his disciplinary authority to Vincent, “as if by royal decree.” Goodell relied on his own recitation of facts and his conclusion that his own conduct was permitted by the CBA.
 - e. But the purpose of the arbitration was for the NFLPA to *challenge* the League’s version of the facts—not for the Commissioner (the arbitrator) to simply assume his own conclusion.
 - f. Following the denial of the Recusal Motion, Commissioner Goodell also denied the NFLPA’s and Brady’s motion to compel the arbitration testimony of Goodell and Vincent, which was sought in order to develop a factual record for the NFLPA’s and Brady’s “improper delegation” argument on appeal.
 - g. Not only was this denial of Brady’s right to confront witnesses fundamentally unfair, it also contravened established law of the shop precedent that an Article 46 hearing officer has the duty to compel the testimony of relevant NFL witnesses.
 - 1. Ray Rice case. In *Rice*, Judge Jones compelled Goodell and other NFL executives to testify, so that the player and the Union could ask about their roles in the discipline.
 - 2. Bountygate. In this case, former Commissioner Tagliabue—serving as arbitrator—compelled numerous League and Club Personnel to testify (including Vincent) so that the NFLPA and the four Saints players appealing the discipline would have the ability to develop the arbitration record and to confront their accusers.
 - h. Goodell never gave the NFLPA or Brady any opportunity to challenge the purported “fact” that he did not delegate his disciplinary authority to Vincent and that, allegedly, Goodell merely concurred in Vincent’s recommendation and authorized him to communicate the discipline to Brady.
4. ARGUMENT #2: Lack of “Equal Access” to Investigative Files. Goodell ignored the CBA “law of the shop” in denying the NFLPA’s motion to compel the production of the investigative files underlying its factual conclusions.
- a. In both *Rice* and *Bountygate*, Article 46 arbitrators (Jones and

Tagliabue) compelled the League produce the investigative files underlying its factual conclusions so that the players being disciplined would have a fundamentally fair hearing.

- b. NFLPA and Brady sought the “interview notes” of the Paul Weiss law firm, which worked on the Wells Report.
- c. Because the Wells report’s conclusions formed the “sole basis” for the discipline, it was “critical” for Brady to have access to the investigative files in order to challenge the underlying facts.
- d. Compounding the fundamental unfairness as the fact that the Paul Weiss firm—which acted as defense counsel for the NFL at the arbitration—*did* have access to the investigative files.
- e. Indeed, Paul Weiss partner Lorin Reisner—who conducted most of the witness examinations at the hearing—was the co-lead partner in the investigation with Wells (in fact, he was a signatory to the Wells Report), and he, and his team, sat at counsel table for the NFL during the arbitration and were able to utilize the very information denied to Brady. This was a clear violation of Brady’s right to a fundamentally fair hearing.
- f. Reisner conducted the hearing while in possession of critical evidence—including interview summaries of key witnesses—that Brady had requested but the NFL refused to give him.
- g. Goodell denied Brady and the NFLPA access to this information after Wells asserted attorney-client privilege over his communications with the NFL in connection with the investigation.

5. ARGUMENT #3: Refusal to Compel Jeff Pash Testimony. Goodell contravened the CBA law of the shop—established in *Rice* and *Bountygate*—in denying the NFLPA’s and Brady’s motion to compel the testimony of co-lead investigator Jeff Pash (NFL Executive Vice-President and General Counsel).

- a. Judge Jones and former Commissioner Tagliabue set CBA precedents by conclusively establishing that players have a fundamental right, in Article 46 arbitrations, to “confront the investigators whose work forms the basis for the discipline.”
- b. Although Goodell granted the NFLPA’s motion to compel the testimony of Wells, the Commissioner denied the motion as to Pash, claiming that he did not play a significant role in the

investigation (despite an earlier NFL press release stating that “the investigation is being led jointly by NFL Executive Vice President Jeff Pash and Ted Wells . . .”)

- c. Given the NFL’s claim that the Wells Report findings were “independent,” and that Pash played no substantive role in the investigation, it was fundamentally unfair to deny Brady the opportunity to confront Pash about his changes to the Wells Report and his overall involvement as co-lead investigator.

6. The combination of all the actions set forth above rendered Brady’s appeal hearing “a kangaroo court proceeding, bereft of fundamentally fair procedures,” requiring that the Award be set aside.

D. GOODELL WAS AN “EVIDENTLY PARTIAL” ARBITRATOR

1. Federal courts also have authority to vacate an arbitration award if the arbitrator exhibited “evident partiality.” 9 U.S.C. § 10(a). To vacate an arbitration award on this basis in the Second Circuit, the challenging party has the burden of showing that “a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.” *Ometto v. ASA Bioenergy Holding A.G.*, 549 Fed.Appx. 41, 42 (2d Cir.), *cert. denied*, 134 S.Ct. 2877 (2014).

2. INDICIA #1: Goodell’s Denial of the NFLPA’s Recusal Motion. A central ground of Brady’s appeal was the issue of Goodell improperly delegating to Vincent his exclusive authority to discipline players for conduct detrimental to the NFL. Goodell and Vincent were thus essential fact witnesses at the arbitration, and any arbitrator hearing Brady’s appeal would have to consider the facts and adjudicate the legality of the Commissioner’s delegation.

- a. Goodell put himself in the position of ruling on the legality of his own improper delegation of authority (a delegation which itself violated the express terms of the CBA)
- b. Goodell had directed the unlawful delegation of his CBA disciplinary authority to Vincent. Thus, as arbitrator, Goodell would have to determine the facts and CBA legality of his own conduct.
- c. “It is hard to imagine any person in Goodell’s position even attempting to serve as arbitrator under these circumstances, but that is exactly what he did. He denied the NFLPA’s Recusal Motion and simultaneously (and summarily) rejected the designation argument—trying to pave his own path to stay on as arbitrator of Brady’s appeal.

- d. “This conduct shows not merely evident partiality but actual bias, rendering Goodell unfit to serve as arbitrator under any standard.

3. INDICIA #2: Publicly Lauding the Wells Report. Prior to serving as hearing officer, Goodell publicly lauded the Wells Report—the issue at the very heart of the appeal. By doing so, he made it impossible to serve as arbitrator in any proceeding challenging the conclusions of the Wells Report. And, unsurprisingly, his eventual Award declared the Wells Report unassailable in every respect.

- a. Goodell’s choice to make these comments locked him into supporting the Wells Report and rendered him incapable of reaching a contrary conclusion in Brady’s appeal, as doing so would undermine his own competency as Commissioner.
- b. The Award itself proves this point—it is just a recycling of the conclusions of the Wells Report.
- c. Applicable labor law and arbitral standards simply do not permit an arbitrator to publicly comment on the very subject matter he has been called upon to arbitrate and to then continue to serve as arbitrator.

4. PRIOR AGREEMENT DOESN’T MATTER. Although the NFLPA agreed that the Commissioner or his designee could serve as the arbitrator for Article 46 disciplinary appeals, the NFLPA did not agree that the Commissioner could do so under circumstances where, as here, the Commissioner’s own conduct is at issue.

- a. The case law, including that in the Second Circuit, holds that even when a sports league commissioner has specifically been delegated to serve as arbitrator of parties’ disputes, the Commissioner may not arbitrate a particular dispute in which his own conduct and actions are called into question.
- b. Joe Morris and Julius Erving cases:
 - 1. *Morris v. N.Y. Football Giants*, 575 N.Y.S.2d 1013, 1016-17 (N.Y. Sup. Ct. 1991) (removing NFL Commissioner as arbitrator because of his “evident partiality and bias . . . with respect to this specific matter.”)
 - 2. *Erving v. Virginia Squires Basketball Club*, 349 F. Supp. 716, 719 (E.D.N.Y. 1972) (disqualifying Commissioner from sitting as arbitrator due to his relationship to the specific dispute)