

A SOLUTION TO HOLDOUTS IN THE NATIONAL FOOTBALL LEAGUE: HOW SALARY ARBITRATION CAN LIMIT A GROWING PROBLEM

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INTRODUCTION

Every year, many National Football League (hereinafter, “NFL”) players attempt to restructure their contracts to increase their salaries.¹ In many instances, an amicable salary decision is reached, and the players report to pre-season training camp as scheduled.² Unfortunately, if the renegotiations reach an impasse, players can refuse to accept their previously contracted salary.³ In an effort to gain leverage over their team’s General Manager, who is the authority on renegotiations of a player’s contract, these determined players do not report to preseason workouts and games. This practice is more commonly known as a holdout.⁴ On rare occasions, holdouts have extended into the regular season and been met with disappointing results.⁵ Holdouts are problematic regardless of their duration, and affect players, their teams, and most importantly the fans.

The practice of holding out is inefficient but remains the sole option for players attempting to demand a greater salary from their teams.⁶ In essence, holdouts result from the lack of a forum to

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¹ Tim Dahlberg, *NFL Holdouts a Rite of Summer for Many Teams*, NFL.COM (Nov. 18, 2010, 7:16PM), <http://www.nfl.com/news/story/09000d5d80994e19/article/nfl-holdouts-a-rite-of-summer-for-many-teams>; Kalani Simpson, *NFL Holdouts Need a Better Plan* (Sept. 1, 2010) Fox Sports, <http://msn.foxsports.com/nfl/story/NFL-Darrelle-Revis-holdouts-need-better-plan-2010-preseason>.

² Dahlberg, *supra* note 1; Simpson, *supra* note 1; see Mike Tanier, *Holdouts have a History in the NFL*, THE FIFTH DOWN, N.Y. TIMES N.F.L. BLOG (Aug. 17, 2010, 2:40PM), <http://fifthdown.blogs.nytimes.com/2010/08/17/holdouts-have-a-history-in-n-f-l>.

³ Dahlberg, *supra* note 1; see Simpson, *supra* note 1; Tanier, *supra* note 2.

⁴ See sources cited *supra* note 3.

⁵ Simpson, *supra* note 1; Tanier, *supra* note 2; Len Pasquarelli, *Deal Exceeds Russell’s Financial Goals, But Holdout Hinders Playing Time*, ESPN.COM (Sep. 13, 2007, 12:29AM), <http://sports.espn.go.com/nfl/news/story?id=3016693>.

⁶ Simpson, *supra* note 1; see Dahlberg, *supra* note 1; Tanier, *supra* note 2; Len Pasquarelli, *supra* note 5.

address salary disputes between players and their respective teams. Under the NFL's current Collective Bargaining Agreement (hereinafter, "CBA") with the NFL Players' Association, there is no system in place to deal with disputes between players and their teams over the renegotiation of player salaries.⁷ The previous CBA expired after the 2010-2011 NFL season and resulted in a 130-day lockout ending July 25, 2011.⁸ On that date, the current CBA was agreed upon and ultimately ratified August 4, 2011.⁹ The newly ratified CBA should have included a salary arbitration system modeled after that of Major League Baseball's (hereinafter, "MLB")¹⁰ to eliminate holdouts.

This Note will explore the intricacies of Major League Baseball's salary arbitration system, as established in the league's CBA with the MLB Players' Association (hereinafter, "MLBPA"),¹¹ in order to create a suitable and similar forum for the NFL. The MLB salary arbitration model is not perfectly transposed to the NFL, but can be slightly modified to reflect the differences between the sports. The primary difference is that the NFL establishes a salary cap that a team's payroll may not exceed, whereas

⁷ NAT'L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT 2011–2020, <http://nfl-labor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> (last visited Aug. 19, 2011) (hereinafter "NFL Collective Bargaining Agreement 2011-2020").

⁸ NAT'L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT 2006–2012, <http://static.nfl.com/static/content/public/image/cba/nfl-cba-2006-2012.pdf> (last visited Nov. 11, 2011) (hereinafter "NFL Collective Bargaining Agreement 2006-2012"); Adam Schefter, *Sources: Deal to End Lockout Reached*, ESPN.COM (July 25, 2011, 12:14AM), http://espn.go.com/nfl/story/_/id/6797238/2011-nfl-lockout-owners-players-come-deal-all-points-sources-say; *DeMaurice Smith Meets With Agents*, ESPN.COM (Feb. 25, 2011, 5:59PM), <http://sports.espn.go.com/nfl/news/story?id=6159004>; Roger Goodell, *Goodell's Letter to the Fans*, AZCARDINALS.COM (Jan. 7, 2011), <http://www.azcardinals.com/news-and-events/article-2/Goodells-Letter-To-Fans/3bae906d-e532-4210-a5e5-49d960c2ca0a>; see also *Lockout Steps*, NFLPLAYERS.COM (Feb. 16, 2010), <http://www.nflplayers.com/articles/cba-news/lockout-steps>; John Clayton, *NFL Owners Vote Unanimously to Opt Out of Labor Deal*, ESPN.COM (May 5, 2008, 10:10PM), <http://sports.espn.go.com/nfl/news/story?id=3404596>.

⁹ Adam Schefter & Paul Kuharsky, *NFL Players Ratify New CBA*, ESPN.COM (Aug. 5, 2011, 11:04AM), http://espn.go.com/nfl/story/_/id/6834391/nfl-players-ratify-collective-bargaining-agreement-which-includes-hgh-testing-sources-say.

¹⁰ MAJOR LEAGUE BASEBALL, COLLECTIVE BARGAINING AGREEMENT 2007–2011, art. VI, http://mlb.mlb.com/pa/pdf/cba_english.pdf (last visited Feb. 20, 2011) (hereinafter "MLB Collective Bargaining Agreement art. VI"). At the time of this Note's final submission before publication, a new collective bargaining agreement was reached. *MLB Players, Owners Sign Agreement*, ESPN.COM (Nov. 23, 2011, 11:21AM), http://espn.go.com/mlb/story/_/id/7269300/major-league-baseball-players-owners-sign-new-labor-agreement. This new agreement is not yet available for examination and as such the provisions mentioned in this Note may be slightly altered.

¹¹ See *id.*

MLB teams can carry as big of a payroll as they want.¹² Though the salary cap raises several questions regarding salary arbitration rewards, this Note proposes that the existence of a cap is not so substantial as to prevent the NFL from adopting the MLB model of salary arbitration, and also offers viable alternatives to the current system. In practice, the NFL's salary cap system would curtail the increasingly excessive salaries that the MLB salary arbitration system has been said to cause in the MLB.¹³ This Note concludes that the application of the MLB salary arbitration system to the NFL is feasible, and would have a profound effect on limiting, if not eliminating, holdout players.

BACKGROUND

The NFL and the NFL Players' Association entered into the current CBA on August 4, 2011.¹⁴ All professional football players employed by a team are bound by the agreement.¹⁵ The CBA delineates the rights of players, the teams, and the league as a whole.¹⁶ In a nutshell, the CBA establishes the rules that govern the sport. Interestingly, the CBA mandates that many disputes arising from it must be settled through binding arbitration, including disputes between players and their organizations regarding player contracts.¹⁷ However, players demanding a higher salary from their teams are not treated as contract disputes, as evidenced by the existence of holdouts. There are no provisions in the CBA regarding salary disputes despite arbitration provisions for many other grievances.¹⁸

Though the previous CBA was initially set to expire following the 2012 season, it contained a clause that allowed the NFL teams

¹² NFL Collective Bargaining Agreement 2011–2020, *supra* note 7; *see generally* MLB Collective Bargaining Agreement, *supra* note 10; *see also* *Some Baseball Owners Call for Salary Cap*, ESPN.COM, (Jan. 14, 2009, 10:05PM), <http://sports.espn.go.com/espn/wire?section=mlb&id=3833674>.

¹³ Eldon L. Ham & Jeffrey Malach, *Hardball Free Agency—The Unintended Demise of Salary Arbitration in Major League Baseball: How the Law of Unintended Consequences Crippled the Salary Arbitration Remedy—and How to Fix It*, 1 HARVARD J. OF SPORTS & ENTERTAINMENT LAW 63, 84 (2010).

¹⁴ NFL Collective Bargaining Agreement 2011–2020, *supra* note 7.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

to opt out of the final year, or final two years, of the CBA's term.¹⁹ On May 20, 2008, all thirty-two NFL team owners voted to exercise that clause in order to opt out of the CBA for 2012.²⁰ Therefore, if a new CBA agreement was not reached following the 2010-2011 season, there would be a league wide work stoppage.²¹ In the months following the expiration of the previous CBA, little progress was made on drafting a new CBA, and a lockout was in full effect.²² During negotiations, the Players' Association felt that it had the upper hand following the Supreme Court's denial of anti-trust exemption to the NFL in *American Needle Inc. v. National Football League, et al.*;²³ at the same time, the NFL was preparing for a work stoppage by securing guaranteed contracts that were to be paid regardless of whether or not there was a lockout.²⁴

The lockout ended on July 25, 2011, approximately 130 days after it began, when the NFLPA recommended approval to the players of the CBA most recently agreed upon by the owners.²⁵ Players were allowed to report to camp two days later, and the regular preseason began.²⁶ The new, or current, CBA was fully ratified on August 4, 2011²⁷ and contains many of its predecessor's arbitration clauses.²⁸ However, it still does not have a salary arbitration clause. Though the negotiation process to establish the cur-

¹⁹ NFL Collective Bargaining Agreement 2006-2012, *supra* note 8; see *DeMaurice Smith Meets With Agents*, *supra* note 8; Clayton, *supra* note 8.

²⁰ Clayton, *supra* note 8.

²¹ *Id.*; NFL Collective Bargaining Agreement 2006-2012, *supra* note 8; *Lockout Steps*, *supra* note 8; *DeMaurice Smith Meets With Agents*, *supra* note 8; *NFL, NFLPA Agree to Enter Mediation*, ESPN.COM, (Feb. 18, 2011, 10:39AM), <http://sports.espn.go.com/nfl/news/story?id=6132690&campaign=rss&source=NFLHeadlines>; Goodell, *supra* note 8; Mark Murphy, *To Avoid an NFL Lockout, Let's Stop Breaking the Bank with Rookies*, THE WASHINGTON POST (Dec. 17, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/17/AR2010121702560.html>.

²² *Lockout Steps*, *supra* note 8; see *NFLPA Welcomes Supreme Court Decisions Against the NFL*, NFLPLAYERS.COM. (May 24, 2010), <http://www.nflplayers.com/articles/cba-news/nflpa-welcomes-supreme-court-decision-against-the-nfl>.

²³ *Am. Needle Inc. v. Nat'l Football League, et al.*, 130 S.Ct. 2201 (2010); see also *NFLPA Welcomes Supreme Court Decision Against the NFL*, *supra* note 22.

²⁴ *Lockout Steps*, *supra* note 8.

²⁵ Schefter, *supra* note 8.

²⁶ John Clayton, Chris Mortensen & Adam Schefter, *Roger Goodell: Football is Back*, ESPN.COM (July 26, 2011, 12:50PM), http://espn.go.com/nfl/story/_id/6799301/nflpa-oks-deal-roger-goodell-says-football-back.

²⁷ Schefter & Kuharsky, *supra* note 9.

²⁸ See generally NFL Collective Bargaining Agreement 2011-2020, *supra* note 7, at art. 2, sec. 4; see generally NFL Collective Bargaining Agreement 2006-2012, *supra* note 8, at art. III, sec. 2.

rent CBA was tenuous,²⁹ both the Players' Association and team owners could have agreed on the necessity of implementing a forum to deal with salary disputes.

THE HOLDOUT PROBLEM

At the completion of the season, some NFL players whose contracts expire can become free agents and negotiate a new contract with inquiring teams.³⁰ Players who are still under contract can attempt to enter into negotiations with their teams to create new, replacement contracts.³¹ These replacement contracts seek to increase the player's salary, specifically the amount of money guaranteed.³² Generally, NFL contracts are incentive-laden, and players are only guaranteed a small portion of the overall contract due to the high risk of significant injury.³³ The risk of a possible career-ending injury creates the incentive for players to maximize their earnings while they are still physically able to perform in order to offset the future losses of a shortened career. This creates the demand for ever-increasing contracts.³⁴ Conversely, the high risk of injury keeps the amount of guaranteed money that the team offers low.³⁵ To put the high risk of injury in perspective, 352 players were placed on the NFL's season-ending Injured Reserve this year, and missed on average 9.5 of the 16 games.³⁶ Those players could fill 6.4 of the NFL's 32 teams.

It could be difficult to reach a new agreement on salary, as a team has little incentive to offer more guaranteed money and the holdout player is already under contract.³⁷ Occasionally, a new agreement is reached with such a player.³⁸ However, if negotiations for a new contract reach an impasse, and the player demands

²⁹ *DeMaurice Smith Meets With Agents*, *supra* note 8.

³⁰ NFL Collective Bargaining Agreement 2011–2020, *supra* note 7, at art. 9, sec. 1–2.

³¹ See Dahlberg, *supra* note 1; Simpson, *supra* note 1; Tanier, *supra* note 2.

³² Dahlberg, *supra* note 1.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *NFL's 18-Game Proposal Is Hitch In Negotiations, Players Say*, NFL.COM, Jan. 11, 2011, <http://www.nfl.com/news/story/09000d5d81d9e630/article/nfls-18game-proposal-is-hitch-in-negotiations-players-say>.

³⁷ Dahlberg, *supra* note 1; Simpson, *supra* note 1.

³⁸ Dahlberg, *supra* note 1; Simpson, *supra* note 1; Tanier, *supra* note 2; *Deal Exceeds Russell's Financial Goals*, *supra* note 5.

a salary that the team refuses to meet, the player may engage in a holdout.³⁹

During a holdout, the player does not report to preseason games or training camp until a new contract is in place.⁴⁰ Missing a preseason is a serious risk since preseason is crucial to players to get back into ‘game shape’ and practice with their teams.⁴¹ By missing any portion of this time, the player delays the date at which he is 100% ready to perform at the highest level he is capable of.⁴² In essence, whenever the player ends his holdout, he will begin his own preseason, undoubtedly behind the progress of his teammates.⁴³ Should the holdout end quickly, the player and team will feel little impact. Conversely, the longer the holdout lasts the greater the negative effect it will have on the team and fan base.

The incentive for a player not to holdout is too weak to have a viable impact. NFL teams can impose a maximum fine of \$30,000 a day for players under contract who report to preseason camp late.⁴⁴ Though fines can quickly accumulate over the course of a holdout, the prospect of a multi-million dollar contract softens the financial blow that the fines deal to the player. For instance, Darrelle Revis of the New York Jets held out for thirty-six days prior to the 2010 season, resulting in fines totaling \$578,305.⁴⁵ His holdout ended when he signed a contract worth \$46 million.⁴⁶ In hindsight, the fines he incurred are paltry in comparison to the contract he signed.

Though holdouts generally are resolved in the preseason, there have been several high profile holdouts that continued through the beginning of the regular season, including a few players that held out for an entire season.⁴⁷ Sean Gilbert began his year-long holdout in 1997 when the Redskins refused to meet his

³⁹ Dahlberg, *supra* note 1; Simpson, *supra* note 1; Tanier, *supra* note 2.

⁴⁰ See sources cited *supra* note 38.

⁴¹ *Deal Exceeds Russell's Financial Goals*, *supra* note 5.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ NFL Collective Bargaining Agreement 2011–2020, *supra* note 7, at art. 42, sec. 1.

⁴⁵ Tim Bontemps, *Jets, Revis agree to Four-Year, \$46 Million Deal Ending Holdout*, NEW YORK POST (Sep. 6, 2010), http://www.nypost.com/p/sports/jets/jets_sign_darrelle_revis_sources_Vy5RZDyxPtFcDJ3dxFXSAI.

⁴⁶ *Id.*

⁴⁷ Dahlberg, *supra* note 1; Simpson, *supra* note 1; Tanier, *supra* note 2; *Deal Exceeds Russell's Financial Goals*, *supra* note 5; *Gilbert Back After Sitting Out Season*, N.Y. TIMES (April 22, 1998), <http://www.nytimes.com/1998/04/22/sports/plus-pro-football-carolina-gilbert-back-after-sitting-out-season.html>.

salary demands.⁴⁸ The Redskins had offered him a contract of \$20 million over five years, but Gilbert wanted \$22.5 million across that time span.⁴⁹ To prove his point, Gilbert sat out the entire 1997 season and, at its completion, signed instead with the Panthers for \$46.5 million across seven years.⁵⁰

Though Gilbert eventually got the payday he had hoped for, he was never the same player he was prior to his year-long holdout.⁵¹ Following the signing of his big contract with the Panthers, Gilbert's next years were injury-plagued.⁵² Similarly, his holdout also took a toll on the Redskins. He had been a key player for the Redskins the previous season, but then missed the entire 1997 season because the Redskins did not want to pay him an additional \$2.5 million.⁵³ The Redskins finished with a record of eight wins, seven losses, and one tie.⁵⁴ They finished second in their division behind the Giants without one of their star players.⁵⁵ Perhaps they could have been first if Gilbert never held out.

JaMarcus Russell is quite possibly the poster child for ridiculous holdouts. Drafted number one overall in the 2007 draft, Russell had never stepped on a professional football field before he began his battle for more money.⁵⁶ Russell wanted \$30 million in guaranteed money and the Raiders eventually met Russell's demands by giving him a record-breaking contract for a rookie with a maximum value of \$68 million and \$31.5 million in guaranteed earnings.⁵⁷ The holdout lasted the entirety of the preseason, and as a result, his development was so delayed that he only started four games during the 1997 season.⁵⁸ Three years after his holdout, Russell has still not established himself as a starting quarterback in the NFL, and is viewed as being one of the biggest draft "busts" in

⁴⁸ *Gilbert Back After Sitting Out Season*, *supra* note 47.

⁴⁹ Tanier, *supra* note 2.

⁵⁰ Tanier, *supra* note 2; *Gilbert Back After Sitting Out Season*, *supra* note 47.

⁵¹ See *Cowboys Sign Campbell, Ex-Giant*, N.Y. TIMES (March 11, 2003), <http://www.nytimes.com/2003/03/11/sports/plus-pro-football-cowboys-sign-campbell-ex-giant.html>.

⁵² *Id.*

⁵³ Tanier, *supra* note 2; *Gilbert Back After Sitting Out Season*, *supra* note 47.

⁵⁴ *Past Standings*, NFL.COM, <http://www.nfl.com/standings?category=div&season=1997-REG&split=Overall> (last visited Jan. 12, 2012).

⁵⁵ *Id.*

⁵⁶ Simpson, *supra* note 1; *Deal Exceeds Russell's Financial Goals*, *supra* note 5.

⁵⁷ *Deal Exceeds Russell's Financial Goals*, *supra* note 5.

⁵⁸ *Id.*; *JaMarcus Russell Stats*, ESPN.COM, <http://sports.espn.go.com/nfl/players/stats?playerId=10446> (last visited Jan. 12, 2010).

NFL history.⁵⁹ Not only does Russell serve as a prime example of what can happen when a player misses a significant amount of training time, his experience also raises the interesting question of how, or if, the salary arbitration system can deal with rookies.

THE HISTORY OF MLB'S SALARY ARBITRATION SYSTEM

The MLB's salary arbitration system was created in response to a string of events dating back to the late 1800s.⁶⁰ Following the creation of the sport in 1869, teams followed a self-governance policy.⁶¹ The team owners ultimately decided players' salaries and many believed they were not being paid their market value.⁶² As a result, "[p]layers began a practice referred to as 'revolving,' i.e., jumping from one team to another in order to create competition for their services, which resulted in higher salaries" and many teams going bankrupt.⁶³ In an effort to protect the financial health of their team and to keep certain players on the team, the team owners agreed to "reserve" five players that no other team could negotiate with.⁶⁴ Option clauses slowed the pace of salary increases, and by 1890 they were a part of every player's contract.⁶⁵

In 1922, option clauses were challenged in *Federal Baseball Club of Baltimore v. National League*.⁶⁶ The team argued that option clauses violated the Sherman Anti-Trust Act.⁶⁷ Specifically, they argued that option clauses were an illegal "contract, combination, or conspiracy in restraint of trade" and that the team owners "monopolize[d] or attempt[ed] or conspire[d] to monopolize

⁵⁹ Steve Wyche, *Russell Supplants Leaf Atop List of All-Time Draft Busts*, NFL.COM, <http://www.nfl.com/news/story?id=09000d5d817ff891&template=with-video-with-comments&confirm=true> (last visited Nov. 8, 2010); *NFL Draft BUSTS: 14 HUGE Draft Disasters of the Decade*, HUFFINGTONPOST.COM (April 22, 2010, 6:12AM), http://www.huffingtonpost.com/2010/04/22/nfl-draft-busts-13-huge-d_n_543475.html#s82214.

⁶⁰ Ham & Malach, *supra* note 13, at 66-69.

⁶¹ Melanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS L.J. 189, 196 (2003).

⁶² *Id.* at 196-97.

⁶³ *Id.* (citing DAVID PIETRUSZA, *The Business of Baseball*, in TOTAL BASEBALL 588 (John Thorn & Pete Palmer eds., 1995)).

⁶⁴ Jeffrey S. Moorad, *Major League Baseball's Labor Turmoil: The Failure of the Counter-Revolution*, 4 VILL. SPORTS & ENT. L.J. 53, 55-57 (1997).

⁶⁵ ANDREW ZIMBALIST, *BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME* 4 (1992).

⁶⁶ *Federal Baseball Club of Baltimore v. Nat'l League*, 259 U.S. 200 (1922).

⁶⁷ *Id.*

trade.”⁶⁸ The Supreme Court held that the business of baseball was not interstate commerce and was thereby exempt from the Sherman Act.⁶⁹ This verdict was a victory for the team owners. The decision in *Federal Baseball Club of Baltimore* was reexamined by the Supreme Court in *Toolson v. New York Yankees* in 1953.⁷⁰ At that point, though baseball games were broadcast nationally, the Supreme Court reaffirmed that the business of baseball did not constitute interstate commerce and was therefore exempt from the Sherman Act.⁷¹ By maintaining the MLB’s anti-trust exemption in *Toolson* and *Federal Baseball Club of Baltimore*, the Court reinforced the power of the owners.

The MLB Players’ Association was formed in 1966, which caused the owners to lose some of their power.⁷² Four years after its inception, the MLBPA had already negotiated its first Collective Bargaining Agreement (hereinafter, “MLB CBA”), and the additional right to have grievances between a player and their team heard by an independent arbitrator.⁷³ In 1973, a salary arbitration provision was added to the agreement, granting more power to the players.⁷⁴

MAJOR LEAGUE BASEBALL’S SALARY ARBITRATION IN PRACTICE

The MLB CBA establishes strict rules on when players are eligible to enter salary arbitration.⁷⁵ If the player has at least three but less than six years of Major League service, the player can elect to go to salary arbitration without seeking the consent of his team.⁷⁶ Outside of that time frame, both the player and the team would need to consent to go to final and binding arbitration.⁷⁷ If a player has two but less than three seasons of Major league service, he is eligible to enter salary arbitration if he has “accumulated at

⁶⁸ 15 U.S.C.A. §§ 1-2

⁶⁹ *Federal Baseball Club of Baltimore*, 259 U.S. 200.

⁷⁰ *Toolson v. New York Yankees*, 346 U.S. 356 (1953)

⁷¹ *Id.*

⁷² *MLBPA Info: History of the Major League Baseball Players Association*, MLB.COM., <http://mlb.mlb.com/pa/info/history.jsp> (last visited Jan. 12, 2010).

⁷³ *Id.*

⁷⁴ Ed Edmonds, *A Most Interesting Part of Baseball’s Monetary Structure—Salary Arbitration In Its Thirty-Fifth Year*, 20 MARQ. SPORTS L. REV. 1, 3 (2009).

⁷⁵ MLB Collective Bargaining Agreement art. VI, *supra* note 10.

⁷⁶ *Id.* § F(1).

⁷⁷ *Id.*

least 86 days of service during the immediately preceding season; and . . . he ranks in the top seventeen percent (17%) (rounded to the nearest whole number) in total service” among the other players who also have two years of service with at least 86 days of service during the preceding season.⁷⁸

If a player is eligible and elects to proceed to arbitration, he must notify the MLBPA, which in turn sends written notice on behalf of the player to the designated representative of the Major League Baseball Labor Relations Department (hereinafter, “LRD”).⁷⁹ Within three days after the submission, the MLBPA and the LRD exchange the salary figures that they obtained from the player and the team, respectively.⁸⁰ Submission of proposals must occur between January 5th and 15th.⁸¹ The proposed salary that the team may offer cannot be less than 80% of the player’s salary for the previous year, including earned bonuses, and at least 70% of his salary and earned bonuses in the past two years.⁸² Should the player wish to withdraw from arbitration, he may do so within seven days after receipt of the team’s offer.⁸³ Similarly, if the player and team reach an agreement on the player’s salary prior to the arbitration decision, the matter is considered to be withdrawn from arbitration.⁸⁴

The MLBPA and LRD handpick a panel of three arbitrators prior to January 1st to preside over the hearings that are scheduled between February 1st and 20th.⁸⁵ The hearings are held at an agreed-upon location, giving preference to Los Angeles, Tampa/Orlando, or Phoenix.⁸⁶ Decisions should be rendered within 24 hours of the closing of the hearing, with no written opinion, ensuring that all decisions are rendered prior to preseason.⁸⁷ The panel is limited to selecting one of the proposals put forth by the parties, and the decision is not subject to appeal.⁸⁸

Hearings are conducted on a “private and confidential basis.”⁸⁹ Each party is limited to an hour for initial presentation, and

⁷⁸ *Id.*

⁷⁹ *Id.* § F(3)(a).

⁸⁰ *Id.*

⁸¹ MLB Collective Bargaining Agreement art VI, *supra* note 10, at § F(5).

⁸² *Id.* § F(3)(c)(i).

⁸³ *Id.* § F(4).

⁸⁴ *Id.*

⁸⁵ *Id.* § F(7).

⁸⁶ *Id.* § F(8).

⁸⁷ MLB Collective Bargaining Agreement art VI, *supra* note 10, at § F(5).

⁸⁸ *Id.*

⁸⁹ *Id.* § F(9)-(10).

a half hour for rebuttal and summation, though limitations may be extended for good cause.⁹⁰ There are no continuances or adjournments of the hearings, though hearings may be postponed upon a showing of substantial cause.⁹¹

The arbitration panel uses the following criteria to determine which party's proposal to accept:

The criteria will be the quality of the Player's contribution to his Club during the past season (including but not limited to his overall performance, special qualities of leadership and public appeal), the length and consistency of his career contribution, the record of the Player's past compensation, comparative baseball salaries . . . the existence of any physical or mental defects on the part of the Player, and the recent performance record of the Club including but not limited to its League standing and attendance as an indication of public acceptance. . . Any evidence may be submitted which is relevant to the above criteria, and the arbitration panel shall assign such weight to the evidence as shall appear appropriate under the circumstances.⁹²

Particular attention is given to the contracts of other players with similar service time when the arbitration-eligible player has less than five years of service.⁹³ However, this focus does not preclude the player from arguing the relevance of such information based on the player's special accomplishments.⁹⁴ To aid the arbitration panel during the hearings, it is given tables of all Major League players, their contracts, and service time.⁹⁵ However, the arbitration panel determines the weight of such figures in comparison to the player.⁹⁶ Evidence of the financial position of the player and team, press comments/testimonials, offers prior to arbitration, the cost to the parties of their representatives, and salaries in other sports/occupations are inadmissible.⁹⁷

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* § F(12)(a).

⁹³ MLB Collective Bargaining Agreement art VI, *supra* note 10, at § F(12)(a).

⁹⁴ *Id.*

⁹⁵ *Id.* § F(13).

⁹⁶ *Id.* § F(12)(a).

⁹⁷ *Id.* § F(12)(b).

THE NECESSARY CHANGES TO MLB'S SALARY ARBITRATION
SYSTEM TO FIT THE NFL

It is necessary to make minor changes to the baseball salary arbitration model in order to apply it to the NFL and eliminate holdouts. Firstly, player eligibility requirements would need to be altered. Specifically, the MLB's provision for a player being able to elect to go to arbitration without the team's consent should be expanded beyond the "more than three seasons, but less than six" language in the MLB CBA.⁹⁸ Though baseball players essentially have a two or three year window to be arbitration-eligible, there is a much smaller risk of career ending injury in baseball than football. The heightened risk of injury in football is what encourages players to attempt to get as much money as possible while they are still physically able to play. In contrast, the diminished risk of injury in baseball creates a heightened sense of job security than in the NFL, as baseball teams are willing to guarantee a larger portion of their players' contract values. Since baseball players receive the guaranteed salaries that football player's desire, an arbitration eligibility ceiling in the MLB is not as potentially harmful as it would be in the NFL. Maintaining the eligibility window would leave the non-eligible players with no method to address salary disputes other than negotiation. In effect, if the NFL were to keep the MLB salary arbitration window, then players who are not arbitration eligible would still hold out.

To eliminate holdouts, the ceiling of arbitration eligibility should be abolished. Doing so allows for players to continually attempt to increase their salaries while they are still physically able to play. Establishing such a rule eliminates the need for players to hold out, since it provides a forum in which salary disputes may be resolved prior to preseason. This forum benefits the team as well because the salary issues are dealt with prior to preseason and the team has the chance to obtain the proposed salary it selected.⁹⁹ Though eliminating the arbitration eligibility ceiling could in theory lead to ballooning salaries across the league, the NFL-imposed team salary cap would curb any excesses.

In drafting a new eligibility requirement tailored to service time, the NFL should impose the requirement of having a minimum number of seasons and no maximum. Implementing a mini-

⁹⁸ *Id.* § F(1).

⁹⁹ MLB Collective Bargaining Agreement art VI, *supra* note 10, at § F(5).

mum would protect against the danger of players earning a lot of money through arbitration after a limited period of performance. More importantly, such a minimum would guard against situations with players like the previously noted JaMarcus Russell, who had no experience in the NFL but believed he deserved more money than the Raiders offered.¹⁰⁰ Another method of controlling rookie salaries is the rookie salary cap, which will be examined further in this Note.

However, establishing a wide range of arbitration eligible players carries with it several problems. For instance, as a result of the large pool of arbitration-eligible players, the arbitration panel could have an extremely large amount of hearings. Nonetheless, the time constraints imposed by this system ensure that complaints are dealt with prior to the preseason. The specific dates that the MLB system imposes as a timetable for submissions would obviously need to change, as those dates coincide with the NFL Playoffs.¹⁰¹ However, such a shift can be easily made. Therefore, as long as the submission dates are at least a few months in advance of the NFL preseason, there should be enough time to conduct all the hearings. As evidenced by the number of submissions for salary arbitration, if the NFL deems that the number of players submitting claims to arbitration is overwhelming, it would have plenty of time to hire additional arbitration panels.

IMPLEMENTING A ROOKIE SALARY CAP AND MANDATORY CONTRACT LENGTHS AS A MEANS OF ELIMINATING HOLDOUTS

One of the few points the NFL and Players Association could agree on during the CBA negotiations was that rookie players are paid too much, and that the problem has worsened each year.¹⁰² In the current CBA, the NFL implemented new rules for rookie contracts.¹⁰³ While these rules help to establish predictability amongst rookie contracts by guaranteeing contract lengths at perhaps lower salaries, they also help to curb holdouts by eliminating the possibil-

¹⁰⁰ See *Deal Exceeds Russell's Financial Goals, But Holdout Hinders Playing Time*, *supra* note 5.

¹⁰¹ MLB Collective Bargaining Agreement art. VI, *supra* note 10, at § F(5).

¹⁰² See Jason La Canfora, *Bradford's Epic Deal Ensures Next CBA Will Have Rookie Cap*, NFL.COM, (Aug. 4, 2010, 2:16PM), <http://www.nfl.com/trainingcamp/story/09000d5d81984bee/article/bradford-epic-deal-ensures-next-cba-will-have-rookie-cap>.

¹⁰³ NFL Collective Bargaining Agreement 2011–2020, *supra* note 7, at art. 7.

ity of renegotiation until a determined time.¹⁰⁴ Additionally, the new rookie contract rules may save the teams money that could be spent by giving veterans salary increases, thereby also limiting the chance of a holdout.

The necessity of rules to limit rookie contracts stemmed from the ever-increasing rookie contracts of the past several years.¹⁰⁵ In many cases, the players in the elite tier of drafted rookies are given contracts that far exceed their veteran, all-star counterparts.¹⁰⁶ For instance, Matthew Stafford, the top draft pick of the 2009 NFL Draft, was given a multi-year contract worth \$41.7 million in guaranteed salary before he ever touched a NFL field.¹⁰⁷ During the 2009 season, Stafford was paid \$26.9 million.¹⁰⁸ In contrast, Peyton Manning, arguably the greatest Quarterback of all time and eleven-time all-star, made \$15.8 million.¹⁰⁹ These elite rookies are able to sign contracts with the guaranteed salaries that veterans desire due to their bargaining position.

When a veteran player wants more money and holds out, he is already under contract with his team. However, rookies are not burdened by a contract. Instead, contracts are drafted as part of the negotiation process. If no contract can be agreed upon, a rookie could then become an Undrafted Rookie Free Agent, who has the ability to sign with any team.¹¹⁰ This gives rookies a bargaining power that veterans do not have. The disadvantage of a veteran holdout is the time the player will sacrifice practicing and playing. Additionally, because the player is under contract, the team can institute punitive measures against the player. The same is not true for rookie holdouts. If a rookie holds out prior to signing his first contract, like JaMarcus Russell did, the team can do nothing but continue to negotiate, or fail to sign the player.¹¹¹ It is in the best interest of the team to sign the player at all costs because failing to do so means that it has wasted one of its few precious draft picks that year. Rookie negotiations are largely one-sided since once a player is drafted, the team is practically desperate to sign him. As a result, the rookies negotiate greater amounts

¹⁰⁴ *Id.* at 28.

¹⁰⁵ La Canfora, *supra* note 102.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Jonah Freedman, *The 50 Highest-Earning American Athletes*, SPORTS ILLUSTRATED (2010), <http://sportsillustrated.cnn.com/specials/fortunate50-2010/index.html>.

¹⁰⁹ *Id.*

¹¹⁰ NFL Collective Bargaining Agreement 2011–2020, *supra* note 7, at art. 6, sec. 4.

¹¹¹ *See Deal Exceeds Russell's Financial Goals*, *supra* note 5.

of guaranteed salary in their contracts than veterans do. Clearly, the salary system has become somewhat uneven, favoring the elite rookies. The new rookie contract rules attempt to close the gap between rookie and veteran contracts.

The most basic new rule for rookie contracts is the mandatory contract length.¹¹² The unalterable length of the contract is determined by the round/method in which the rookie was drafted.¹¹³ For instance, if a rookie was drafted in the first round of the NFL Draft, they would have a mandatory four year contract, with a team option for a fifth year; if he is drafted in any of the remaining rounds of the draft he gets a four year contract; and if he is an undrafted rookie he would receive a three year contract.¹¹⁴ Normally, NFL contracts can be renegotiated at any time, and hence players can hold out at any time. However, the current CBA establishes that a drafted rookie who received a four-year contract can only attempt to renegotiate his contract after the final regular season game of his third year.¹¹⁵ Similarly, an undrafted free agent who received a three-year contract can only attempt to renegotiate his contract after the final regular season game of his second year.¹¹⁶ This is extremely helpful in limiting holdouts as no rookie contracts can be altered before the established time. However, it does nothing to stop holdouts from players who have yet to sign their first, or rookie, contract, like the aforementioned JaMarcus Russell.¹¹⁷

The current CBA also establishes team-specific caps for first year rookie salaries and total rookie contract values.¹¹⁸ These caps are determined by the use of a confidential formula that takes into account the number, round, and position of the team's draft choices, as well as a portion of the "undrafted rookie reservation" fund, which is a specific amount teams can use to sign undrafted rookies.¹¹⁹ In a sense, this is a rookie salary cap. Though the amount teams are allotted to spend on rookies will be drastically lower than teams have willingly given to rookies in previous years, it is difficult to foresee what, if any, impact this will have on holdouts. The CBA explicitly states that particular draft positions will

¹¹² NFL Collective Bargaining Agreement 2011–2020, *supra* note 7, at art. 7, sec. 3.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *See Deal Exceeds Russell's Financial Goals*, *supra* note 5.

¹¹⁸ NFL Collective Bargaining Agreement 2011–2020, *supra* note 7, at art. 7, § 3.

¹¹⁹ *Id.*

be valued, but that the individual draft position's value (or the methodology in coming up with the team's rookie salary cap) will remain hidden from the team, the player, and his agent.¹²⁰ Surely this will create some confusion in valuating players, as the determined salary amount will be no longer about that individual's value to the team, but their value with respect to a much smaller pool of funds that multiple players are to get contracts from. The confusion and uncertainty of this new system could lead to a greater number of holdouts prior to signing their contract. Additionally, the idea of mandating contracts for up to four years and allowing contract renegotiations after three years is counterintuitive, since it essentially renders the last year of the contract useless. After three years, rookies would flock to renegotiate their contracts, and many of them would receive substantial increases in pay or, alternatively, hold out. If rookie contracts exist for the purpose of decreasing rookie/player salaries, then it only makes sense to make the contract mandatory for its entire duration.

Implementing the rookie salary cap and mandatory length contracts in the NFL would further help eliminate holdouts when it is coupled with the MLB salary arbitration system. When the rookie contract ends (or players are allowed to renegotiate their contracts) salary arbitration eligibility should begin. Effectively, the number of years the rookie contract governs a player's salary should be the same period of time as the service eligibility minimum related to salary arbitration. This system would leave no gap in time where players and their teams only have negotiation to solve their salary disputes. The rookie salary cap and mandatory contract length alone can only limit holdouts for the service time it covers. Certainly, freeing up funds that would have been paid to rookies allows the teams to possibly use them to resolve other salary disputes, but the team is free to invest that money however it chooses. By combining the rookie salary cap, mandatory length contracts, and a salary arbitration system, the NFL could more effectively limit, or eliminate, holdouts.

¹²⁰ *Id.*

THE SALARY CAP AND SALARY ARBITRATION:
HOW THEY CAN WORK TOGETHER

The NFL imposes a salary cap every year that all teams' total payroll cannot exceed.¹²¹ Each year the cap rises and the amounts are recorded in the CBA for all years the agreement is applicable.¹²² Adapting a salary arbitration system to a league with a salary cap may appear daunting. However, in practice the cap would curb the excesses that the salary arbitration system is criticized for.¹²³ Due to the cap, evidentiary rules of the MLB system would need to slightly be altered. In baseball's model of salary arbitration, information regarding the franchises' finances is not admissible.¹²⁴ In importing this system to the NFL, such information is needed for arbitrators to ensure that the team adheres to the salary cap. Regardless of the players' desires in arbitration, their salaries cannot put the team over the cap. Though this limits the amount that players can possibly be awarded, it also gives players the incentive to be more selective when electing to submit claims to arbitration. Thus, the cap incentivizes players to seek salary arbitration only when the team has more money to spend under the cap.

The salary cap also poses the issue of how a team's remaining cap room gets divided if multiple players on the team elect to pursue salary arbitration. Under the MLB salary arbitration system, teammates are heard independently to prevent undue comparisons by the arbitration panel and accord the players a full and fair opportunity to be heard.¹²⁵ In adapting this salary arbitration system to the NFL, football players should also have their claims heard independently. However, the panel of arbitrators should be made aware of the number of players on each team electing to pursue hearings. With that information, the only fair method of evaluating a maximum possible award for each player would be to divide the amount of money the team has left under the cap by the number of a team's players electing to pursue arbitration. This methodology for determining maximum awards prevents the following scenario:

Players A, B, and C are teammates that have filed salary arbitration claims for an additional \$500,000 each. Their team, the Grays, has \$1.2 million left to spend under the salary cap. Play-

¹²¹ *Id.* at art. 1, 12-14.

¹²² *Id.*

¹²³ See Ham & Malach, *supra* note 13, at 84.

¹²⁴ MLB Collective Bargaining Agreement art VI, *supra* note 10, at § F(12)(b).

¹²⁵ *Id.* § F(9).

ers A and C are young players who have had minor accomplishments in their careers, while player B is an accomplished football player who has won several awards for outstanding play. Player A is scheduled first for a hearing, and is followed by player C and lastly player B. Players A and C were awarded their proposed increase of \$500,000 each from their hearings. However, player B could only be awarded \$200,000 because A and C had been granted the majority of the Grays remaining funds.

By not determining an equal maximum for teammates raising salary arbitration claims, an unfair system is created that favors scheduling over merit. Though players do not have to be awarded their desired salary increase, there is the potential for the earliest scheduled players to be awarded the remainder of their teams' funds left under the salary cap. A different method of determining maximum salary awards would be to create a sliding scale of maximum awards for each team's arbitration electing players. This method would be extremely difficult, if not impossible, to create because it must take into account players of varying abilities, accolades, and service time. Ultimately, such a method would be unfair to the average player. Though the seasoned veteran boasting numerous accomplishments is more deserving of a higher total salary than an average veteran player, it is not true that the decorated veteran is deserving of a greater maximum increase than the average player. Setting aside inflated rookie salary issues, the decorated veteran most likely has a higher salary entering arbitration than an average player as a result of the accolades he achieved. Assuming these two players are on the same team, they are asking for their salary increases to come from the same amount of funds left under the salary cap. Is it fair to the average veteran for the decorated player to receive 70% of that sum for continuing to excel when he already makes double the average veteran's salary? The decorated veteran is already paid a greater salary to excel, and should be entitled to no more than the same increase the average veteran could receive from the same team. Instead, the decorated player's excellence makes him more likely to receive his desired increase because accolades and excellence are factors taken into account by the arbitration panel in determining whether or not to grant the player's proposed increase.¹²⁶ Therefore, out of fairness to the average player, awards should not exceed the sum left under

¹²⁶ *Id.* § F(12)(a).

the cap divided by the number of players on that team that are filing for arbitration.

Although each player may not necessarily get the maximum amount under that approach, or anything at all if the player's team is awarded so, it is the only fair way to proceed when multiple players from the same team pursue arbitration. This scheme benefits all parties involved, as players still have the ability to affect the earning potential of their teammates, and teams aren't placed in the unfortunate position of having to trade players in order to stay under the salary cap if awards are too high. This process also creates incentive for players to be more selective in pursuing arbitration, so as to maximize their potential award when fewer players file for a hearing.

An additional problem is created during an "adjusted" salary cap year. If the total cost of all the league's players is less than 47% of the NFL's total revenue for the year, then the next season's salary cap will be "adjusted" with an increase of the exact percentage that the total player cost fell short of 47% of the NFL's total revenue the previous year.¹²⁷ For instance, if the total player cost was 46.1% of the league's total revenue, then the following year the salary cap will be increased by .9% of the league's total revenue. However, following an adjustment, if the player cost is greater than 47% of the NFL's total revenue, the league can "recapture" an amount of cap room that would lower the percentage to 47%.¹²⁸ However, this "recapture" cannot be greater than the amount of the adjustment.¹²⁹

The adjustment and recapture provisions of the NFL CBA can be problematic under a salary arbitration system. Certainly, adjustment periods could provide greater arbitration awards than a normally capped season. However, a player may receive an award so large that the team could only afford to keep him until the adjustment is recaptured, thus forcing the team to trade the player. Players that are motivated by their salaries alone may not have a problem with this; but players seeking to win the Super Bowl will be upset to be potentially traded from a playoff contender to a last place team just because the latter can afford his contract. Even without a salary arbitration system, teams must think twice about how they spend their money during an adjustment year. Financial irresponsibility could damage the team as soon as recapture occurs.

¹²⁷ NFL Collective Bargaining Agreement 2011–2020, *supra* note 7, at art. 12, § 3.

¹²⁸ *Id.*

¹²⁹ *Id.*

Additionally, the potential for excesses during an adjustment year are greater if coupled with a salary arbitration system. The risk of harm to the team is simply too great. For that reason, players should not be allowed to enter salary arbitration in an adjustment year. Alternatively, the arbitration panel could not take into account the adjustment, and treat the remaining cap space the same as if it were a non-adjustment year. That is, value the league's maximum player expenditure as an unchanging 47% of the NFL's total revenue for the year. This would grant the teams some security moving forward that even if the adjustment is recaptured, the funds used to give players arbitration awards will not be removed. However, it may be simpler just to disallow contract renegotiation during adjustment years.

If salary arbitration were to be allowed in adjustment years, players could request sums of money that would still be within the range of the increased salary cap, but would necessitate the use of funds that could be recaptured, forcing the team to trade the salary arbitration-electing player or other players in the event of recapture. Also, the increase in space under the salary cap would become a salary arbitration feeding frenzy, allotting the extra funds to some, or all, of a team's arbitration eligible. Instead, the adjustment should be a way for teams to try and make themselves more competitive by signing more, or better, players. The extra cap room may also allow some players who would've been traded due to previous cap concerns to stay with the team.

Allowing the cap adjustment to be subject to salary arbitration ultimately necessitates additional complexities for an arbitration panel. It would be impossible for the panel to consider the team's position without looking to the upcoming years, especially if a player has several years left on his contract. Further, it is impossible for them to predict whether these upcoming years will have a recapture, a greater adjustment, or no change at all. The lack of a method to properly weigh the interests of both the player and the team highlights the fact that salary arbitration during an adjustment year is improper. A salary arbitration system will always bring out the money hungry players, but the cap adjustment should be protected from them in an effort of fairness to the team.

CRITICISM OF THE MLB SALARY ARBITRATION MODEL AND
WHY THE NFL WOULD NOT BE HINDERED
BY THE SAME CONCERNS

The MLB salary arbitration system has been widely criticized for a number of reasons. The first is that the weight an arbitration panel assigns to admissible criteria is unpredictable, which leads to equally unpredictable results.¹³⁰ This concern is compounded by the fact that no written opinions are issued by the arbitration panel,¹³¹ which creates uncertainty as to which arbitration cases will succeed and which will not.¹³²

This uncertainty still exists, but is of minor concern, in the effort to eliminate holdouts in the NFL by applying the MLB's model. Salary arbitration is utilized because negotiations between a player and his organization reached an impasse. If the system had predictable outcomes, few claims would be brought to salary arbitration, as the pressure to settle in negotiations would be great. However, a more predictable system maintains the players' incentive to hold out, as players would attempt to gain any leverage over their organization should their award seem unlikely. In an unpredictable salary arbitration system, players will utilize the system to possibly get their salaries increased as opposed to holding out.

Another criticism of baseball's salary arbitration model is that the admissibility of similar players' contract information has, in effect, drastically increased the salaries of all baseball players.¹³³ This phenomenon makes sense, and can only be effectively explained by example. Assume that Player A and Player B are baseball players with similar service time, and production. The only difference is that Player A plays for the New York Yankees, the team with the highest payroll in 2010,¹³⁴ and that Player B plays for the Pittsburgh Pirates, the team with the lowest payroll in 2010.¹³⁵ With their endless supply of money, the Yankees give Player A a contract that pays him \$10 million a year for two years. The more meager Pittsburgh Pirates give Player B a contract that pays him \$5 million a year for two years. After a year, Player B decides to sub-

¹³⁰ Ham & Malach, *supra* note 13, at 79-83.

¹³¹ MLB Collective Bargaining Agreement art VI, *supra* note 10, at § F(5).

¹³² Ham & Malach, *supra* note 13, at 79-83.

¹³³ Edmonds, *supra* note 74.

¹³⁴ 2010 Baseball Payrolls, List, CBSSPORTS.COM, <http://www.cbssports.com/mlb/story/13162308/-baseball-payrolls-list> (last visited Feb. 24, 2011).

¹³⁵ *Id.*

mit to salary arbitration as the Pirates refuse to increase his salary for the final year of his contract to \$8.5 million. At the hearing, Player B introduces Player A's contract into evidence, citing the similarities between the players. The arbitration panel eventually finds for Player B, granting his request for \$8.5 million. However, the Pirates cannot afford the extra \$3.5 million, and are forced to trade Player B.

In essence, allowing the contracts of similar players to be admissible in the arbitration hearing ignores the financial status of the teams that negotiated the contracts.¹³⁶ Thus, all teams may be considered financially on par with the richest teams in the league, forcing the poorer teams to trade away their talent. The salary cap that exists in the NFL curbs this problem greatly. By maintaining the cap, individual salaries do not have much room to expand. Comparing contracts among similar players also would not be problematic as salaries would never be able to expand to the dimensions allowed in the MLB. Therefore, the cap not only ensures similar team salaries, but also similar player salaries amongst the positions. In light of these factors, the MLB has discussed adopting a similar salary cap.¹³⁷

There is another concern that salary arbitration creates an inefficient free agent market under the MLB model.¹³⁸ The system creates three classes of players: those not yet eligible for arbitration, those eligible for arbitration, and those who can become free agents.¹³⁹ The latter group is comprised of players who have accumulated more than six seasons of Major League service, and are no longer eligible for non-consenting salary arbitration.¹⁴⁰ In 2009, 23% of all MLB players were not eligible for free agency, creating an inefficient labor market as the number of players demanded did not equal the number of players available or supplied.¹⁴¹ This market inefficiency drives up the price of labor, as the amount of labor is fairly scarce.¹⁴² In other words, because there are more baseball players demanded in the open market than supplied, the necessary salary to hire those players increases. Though the NFL also has a labor market inefficiency, the salary cap acts as a regulatory mea-

¹³⁶ Ham & Malach, *supra* note 13, at 89-91.

¹³⁷ *Some Baseball Owners Call for Salary Cap*, *supra* note 11.

¹³⁸ Ham & Malach, *supra* note 13, at 83-86.

¹³⁹ *Id.*; MLB Collective Bargaining Agreement art. VI, *supra* note 10, at § F(1).

¹⁴⁰ Ham & Malach, *supra* note 13, at 83-86.

¹⁴¹ *Id.*

¹⁴² *See id.*

sure to curb individual players' salaries.¹⁴³ Further, the NFL has different service requirements in order to reach free agency.¹⁴⁴ Once a player has earned four or more accrued seasons in the NFL, they are eligible for unrestricted free agency.¹⁴⁵ Compared to the MLB's six years of required service, this four-year requirement alone would intuitively create less of a market inefficiency because a greater percentage of players would be arbitration eligible. Therefore, the salary cap and less restrictive service requirements for free agency allow the NFL to curb salary increases that result from an inefficient labor market created by salary arbitration in the MLB.

ARGUMENTS AGAINST THE ADOPTION OF THE MLB SALARY ARBITRATION SYSTEM

All arguments against the adoption of baseball's salary arbitration system center on the belief that both parties' interests are not fairly represented. The players could theoretically argue that adopting salary arbitration benefits the team owners more than the players because the system allows the teams to technically offer no salary increase, and should the team prevail in the hearing, the player is left with the contract he started with. However, this argument is weak. The player should exhaust any and all options within negotiations to increase his salary. Only if the negotiations reach an impasse should salary arbitration be utilized.

Conversely, the team owners could make the argument that the players hold more power by implementing salary arbitration. The owners would claim that negotiation is an adequate method of dealing with salary disputes and salary arbitration is just an additional method for players to squeeze more money out of their teams. As evidenced by the holdout problem, negotiations are not always sufficient. As previously noted, there is no predictable method of determining which party will prevail at the hearing, and the team certainly has the opportunity to do so. Further, the NFL and team owners should be glad that there would be a forum in place to address salary issues so that holdouts are limited, if not eliminated. Owners certainly have an interest in keeping every player on the field, be it during the regular season or preseason.

¹⁴³ See *id.*

¹⁴⁴ See NFL Collective Bargaining Agreement 2011–2020, *supra* note 7, at art. 9, § 1-3.

¹⁴⁵ *Id.*

A. *Adopting the National Hockey League's Salary Arbitration System Instead of the MLB System*

The National Hockey League (hereinafter, "NHL") utilizes a different form of salary arbitration than the MLB.¹⁴⁶ However, the MLB scheme would be more effective in limiting, or eliminating, holdouts in the NFL. In the NHL system, players are arbitration-eligible if they qualify as a restricted free agent¹⁴⁷ and did not sign an offer sheet¹⁴⁸ upon completion of their contract.¹⁴⁹ These eligibility requirements would be problematic if the NFL were to adopt the NHL's salary arbitration system. Waiting for a player's contract to expire prior to raising a salary arbitration claim does nothing to limit holdouts. With the exception of rookies, holdouts occur when a player is in contract.¹⁵⁰ Though the NHL limited its arbitration eligibility to restricted free agents, which similarly exists in the NFL, limiting arbitration eligibility to this service class fails to address the widespread holdout problem. Additionally, the implementation of a rookie salary cap may change the concept of restricted free agency in the NFL as the guaranteed contract lengths could last beyond the maximum service-time for restricted free agency. In order to limit holdouts, players must be able to raise arbitration claims while still under contract.

In the NHL, if a team wishes to retain a restricted free agent they must be tendered at least a one-year contract offer by the later of June 25 or the first Monday after the Entry Draft of the final year on the player's contract.¹⁵¹ The player can then reject the contract, accept the contract and the salary listed, or accept the contract and raise a salary arbitration claim.¹⁵² NHL salary arbitration proceedings are similar to the MLB scheme but differ in the

¹⁴⁶ NATIONAL HOCKEY LEAGUE, COLLECTIVE BARGAINING AGREEMENT 2005-2011, art. 12, <http://www.nhl.com/cba/2005-CBA.pdf> (last visited Feb. 16, 2011) (hereinafter "NHL Collective Bargaining Agreement").

¹⁴⁷ A restricted free agent is a player who has met the service requirements outlined in Article 10.2 of the NHL Collective Bargaining Agreement. If a restricted free agent wanted to sign a contract with a new team, his prior organization would either have to offer the player a one-year contract or receive draft picks from the acquiring team as compensation. *Id.*, at art. 10.2.

¹⁴⁸ An offer sheet contains the principal terms for a team to acquire a restricted free agent from another organization. Not signing an offer sheet indicates that the player would like to remain with his current team. *Id.*, at art. 10.3.

¹⁴⁹ *Id.*, at art. 10.4.

¹⁵⁰ Dahlberg, *supra* note 1; Simpson, *supra* note 1; Tanier, *supra* note 2.

¹⁵¹ NHL Collective Bargaining Agreement, *supra* note 147, at art. 10.2.

¹⁵² *Id.* at art. 10.2, 12.

decision-making process.¹⁵³ The arbitration panel in the MLB system can only choose from the parties' proposed salaries.¹⁵⁴ In contrast, the NHL arbitration panel is not limited to selecting either party's proposal but can determine any intermediary salary for the player.¹⁵⁵ A written explanation for the determined salary is also required.¹⁵⁶ This practice appears to establish predictability amongst potential salary arbitration claims. However, as previously noted, predictability would do little to limit holdouts in the NFL. If the salary arbitration system were predictable, then players who believed they had losing claims would still holdout instead of pursuing them in salary arbitration. In sum, the NFL should adopt the MLB system of salary arbitration instead of the NHL's system because the NHL system would not limit holdouts.

B. *Mediation as an Alternative to Salary Arbitration*

Opponents of salary arbitration could propose mediation as a method of curing salary disputes. Mediation is "a method of non-binding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution."¹⁵⁷ Specifically, federal law allows for government facilities, such as the Federal Mediation and Conciliation Service, to mediate salary disputes between employers and employees where a collective bargaining agreement exists.¹⁵⁸ However, mediating the NFL's salary disputes will not effectively limit holdout players. Since mediation is not binding, the parties could choose to disregard the mediator's decision with no repercussions.¹⁵⁹ In essence, should a player have been awarded a salary increase through mediation, his organization could choose to not pay him. Similarly if the player was not awarded a salary increase the player could hold out. Though mediation may be useful as a means of finding a middle ground in negotiations, its decisions do not carry the binding effect that is needed to limit holdouts as well as arbitration does.

¹⁵³ *Id.* at art. 10.2; MLB Collective Bargaining Agreement art. VI, *supra* note 10, at § F(5).

¹⁵⁴ MLB Collective Bargaining Agreement art. VI, *supra* note 10, at § F(5).

¹⁵⁵ *Aubut*, *supra* note 59, at 205.

¹⁵⁶ NHL Collective Bargaining Agreement, *supra* note 147, at art. 12.

¹⁵⁷ BLACK'S LAW DICTIONARY (9th ed. 2009).

¹⁵⁸ 29 U.S.C.A. § 171; *see also* Arin Karimian, *NFL and Players' Union Beginning Mediation*, USA TODAY (Apr. 12, 2011), http://www.usatoday.com/sports/football/nfl/2011-02-17-labor-mediation_N.htm.

¹⁵⁹ BLACK'S LAW DICTIONARY (9th ed. 2009).

CONCLUSION

Both the player and his team would have benefitted from the NFL's adoption of the MLB's salary arbitration system in the 2011 CBA. By implementing a forum to deal with salary disputes prior to the season, the NFL could effectively limit, if not eliminate, holdouts. Holdouts not only harm the individual player, but also the team, as well as the fans. Working in conjunction with the NFL's salary cap, the MLB salary arbitration system would serve as a viable method of addressing the salary disputes of the injury-concerned player, while avoiding trampling the interests of his team. Many owners within the MLB have realized the benefits of a cap system in conjunction with a salary arbitration system.¹⁶⁰ However, they do not have the added incentive of needing to eliminate holdouts, which are rare in the MLB. There is no question that at least part of the reason why that is true is that baseball players have a forum to address their salary concerns prior to the season. Should the NFL follow the MLB salary arbitration model with the above noted changes, holdouts can be avoided and teams could focus their energy on winning games.

¹⁶⁰ *Some Baseball Owners Call for Salary Cap*, *supra* note 12.