

Reading 3



3.1 LEAGUES, UNIONS, AND GOVERNING BODIES

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3.1.1 Unions

As individuals, athletes are powerful economic engines in their own rights – some more than others, of course – capable of generating millions of dollars in salaries and endorsements. As a collective unit, however, they wield an even more enormous amount of influence and bargaining power; an influence that dwarfs the leverage of any single individual, no matter how powerful he or she may be.

As a result, players in the major American sports leagues have banded together to pool their power and influence in the form of unions, an organization that is appointed by employees in a particular trade – in this case, athletes – to represent their interests, legally, financially and otherwise. These unions, which are highly protected by United States labor laws and cannot be disbanded or interfered with by the leagues, spend years negotiating the workplace conditions applicable to their respective sports. Once agreed-upon, those parameters are then memorialized in painstakingly detailed collective bargaining agreements, which become binding on both parties for an agreed-upon period of time (e.g., the NFL collective bargaining agreement has a term of 10 years and is 316 pages long). Unions are best known for their ability to organize player strikes, which can bring a league’s entire operation to a halt at a moment’s notice. On numerous occasions throughout the course of American sports history, players’ unions have called strikes in an attempt to secure more favorable workplace conditions. In 1994, a 232-day strike in Major League Baseball resulted in the cancellation of the entire post-season, including the World Series.

In Europe, unions and trade associations play an important, but less prominent role than their counterparts in the United States. As noted by prominent sports business professors Scott Rosner & Kenneth Shropshire, “[p]layers’ unions exist within European sports leagues, but their role has little overall financial effect because it tends to be focused on protecting players against harsh disciplinary measures (usually by the league rather than an individual club) and securing appropriate compensation in the event of career-threatening injury. There have been no incidents of strike action in recent years.” (Rosner, Shropshire, 2011, p. 432)

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3.1.2 Leagues and Governing Bodies

On the other side of the athletes are a host of associations, unions, governing bodies, or federations. These bodies are generally beholden to somebody or something other than the athletes (e.g., team owners, Olympic committees, universities, etc.). Their job is typically to act as stewards of the sport, while also maximizing revenue. To do so, they often pool together some or all of their sport's television rights and sell them on behalf of teams, allocating revenues according to an agreed-upon formula (e.g., RFEF in Spain, NFL, NBA, NHL and MLB in the U.S., Formula 1, etc.). On occasion, teams are permitted to sell their own television rights, subject to national exceptions. Others, like the NFL and EPL, pool together all of their game broadcast rights and sell them exclusively as a League. This revenue, in turn, is used to compensate players, sometimes on a mandatory basis according to a specific formula.

Players unions, on the other hand, advocate for the financial interests of their players, often at the expense of clubs and governing bodies. They can sell group licensing rights (e.g., video games), regulate agents (and cap their fees), represent players in disciplinary proceedings (e.g., banned substances proceedings), and negotiate workplace protections for the players (e.g., limiting practice times, retirement and player assistance funds, game safety initiatives, etc.).

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3.1.3 Basic Governance in Sport

Although they are often the owners and/or operators of their respective sports, leagues and teams are not unfettered in their discretion, nor is the system anarchic in nature. To the contrary, they are governed by a detailed and complex set of rules with which they must comply. While the primary governing documents are bestowed with different titles across the international landscape of sport – “Constitution and By-Laws” in most American sports, “Memorandum of Association” in the English Premier League, and “Estatutos Sociales de la Liga Nacional de Fútbol Profesional” in Spain’s La Liga – they are similar in that they are long, complex legal documents that lay out the basic functions, governance and structure of the respective league. As a general matter, these core governance documents are subsequently supplemented by memos and mandates from time-to-time.

In the United States and other countries in which players and leagues engage in collective bargaining, leagues, clubs and players are also bound by their respective collective bargaining agreements. These long, detailed agreements set forth matters such as player compensation and transfer guidelines (e.g., salary caps, salary floors, trade and transfer rules and restrictions, tampering policies), workplace rules and regulations, disciplinary guidelines, and much more.

Whether being grounded in collective bargaining agreements, league charters, or otherwise, the disciplinary guidelines that govern player behavior are often harsh and unforgiving, with leagues – often through a single designee, such as a League Commissioner – afforded significant latitude to discipline players, from suspensions to lifetime bans, with often limited appellate recourse for the athlete.

As explained in the English Premier League Handbook, the rules and guidelines promulgated, and the consequences levied when they are violated, are effectuated with a single overarching purpose: a “commitment and aim to run [the sport] to the highest possible standards in a professional manner and with the utmost integrity.” The Football Association Premier League Limited, 2016-17.

Although the language may differ slightly by sport, most leagues and governing bodies have adopted and set forth similar policy goals in their respective governing documents, and, it is in furtherance of these objectives that players,

coaches, executives and employees become subject to discipline in a private system with limited recourse to the public courts.

Furthermore, although players and leagues often disagree on the severity of the sanctions, they share a mutual desire to “resolve differences between each other without recourse to law,” acknowledging that the certainty of a system that has been meticulously bargained-for the uncertainty of the courtroom.

Consider this excerpt from an Associated Press story that ran in March 2013:

Greek soccer player Giorgos Katidis has been banned from his national team for life after giving a Nazi salute while celebrating a goal in the topflight league.

Greece's soccer federation said Sunday in a statement that the AEK Athens midfielder's gesture "is a deep insult to all victims of Nazi brutality."

The 20-year-old Katidis gave a Nazi salute after scoring the go-ahead goal Saturday in AEK's 2-1 victory over Veria in the Greek league. He pleaded ignorance of the meaning of his gesture — right arm extended and hand straightened. He claimed on his Twitter account that he detests fascism. Associated Press Wire. Business Insider, 2013, <http://goo.gl/peQeH6>

The pendulum swings even farther in the favor of the league in Major League Baseball, where the Commissioner has broad latitude to do what he deems to be “in the best interests of baseball,” from banning 8 players for life, to prohibiting the transfer of an all-star player, to requiring a team to install lights in its stadium. (Hirlsey, 2004, <https://goo.gl/SpuJqf>)

Other league commissioners have similar latitude, making them the de facto disciplinarians in their respective sports, and consequently, often putting them at odds with players, unions, and even teams, as was the case with the “Deflategate” case, in which the NFL investigated allegations that the New England Patriots utilized deflated footballs to give their team an advantage, which investigation resulted in lost draft picks and a four game suspension of the team’s star quarterback. Paul et al., 2015, <https://goo.gl/DKmlUj>

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3.1.4 The Tom Brady “Deflategate” Scandal

Please note that the opinion excerpted below has been abridged for teaching purposes. As you read through the case, you’ll see references to a Joint Appendix, a Dissenting Opinion, and other sources. Those are simply references to facts and quotes contained in the record that the parties presented to the appellate court and are not substantive in nature (e.g, Joint App, Appellee’s Br., etc.). Do not be confused; these citations are simply there for the reader to be able to identify the source of the reference. For purposes of this reading assignment, you may ignore the citations and focus on the substance of the decision.

Query and analyze the following issues while reading:

- 1 Should the players association have agreed to allow the NFL Commissioner to act as an arbitrator in player discipline matters?
- 2 If not, how should such matters be handled? Should player discipline appeals be handled in arbitration or in the courts? By a set of neutral arbitrators? Why?
- 3 What changes should be made in the next collective bargaining agreement to address the “fundamental fairness” issues complained of by Tom Brady in this case?
- 4 Courts around the world tend to be very deferential to the decisions of arbitrators and, as a general matter, will only conduct a limited review and overturn their decisions in the event of an egregious error. For example, the court states that the standards of review “do not require perfection in arbitration awards.” Should courts be more involved in reviewing the decisions of arbitrators? Keep in mind that one of the strongest arguments in favor of arbitration is efficiency and reducing the strain on the court system.
- 5 As noted by the court, alleged destruction of evidence and efforts to inhibit the investigation were cited as reasons for the discipline imposed on Brady. Do you think that conduct related to the integrity

of an investigation (as opposed to the integrity of the sport) should be punishable to the same degree, and be subject to the same disciplinary process, as violations relating to the integrity of the sport?

6

Do you think that the Commissioner's decision to compare Brady's tampering with steroid use was appropriate to justify the length of the suspension?

7

You'll note that the parties did not engage in formal discovery, which led to allegations by Brady that information available to the NFL was withheld from him. If you were the Commissioner, how would you have addressed discovery (i.e., the exchange of information) in this arbitration?

NFL Management Council v. NFL Players Association,

820 F.3d 527 (2nd Cir. 2016)

This case involves an arbitration arising from New England Patriots quarterback Tom Brady's involvement in a scheme to deflate footballs used during the 2015 American Football Conference Championship Game to a pressure below the permissible range. Following an investigation, the NFL suspended Brady for four games. Brady requested arbitration and League Commissioner Roger Goodell, serving as arbitrator, entered an award confirming the discipline. The parties sought judicial review and the district court vacated the award, reasoning that Brady lacked notice that his conduct was prohibited and punishable by suspension, and that the manner in which the proceedings were conducted deprived him of fundamental fairness. The League has appealed and we now reverse.

The basic principle driving both our analysis and our conclusion is well established: a federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential—indeed, among the most deferential in the law. Our role is not to determine for ourselves whether Brady participated in a scheme to deflate footballs or whether the suspension imposed by the Commissioner should have been for three games or five games or none at all. Nor is it our role to second-guess the arbitrator's procedural rulings. Our obligation is limited to determining whether the arbitration proceedings and award met the minimum legal standards We must simply ensure that the arbitrator was “even arguably construing or applying the contract and acting within the scope of his authority” and did not “ignore the plain language of the contract.” *United Paperworks Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). These standards do not require perfection in arbitration awards. Rather, they dictate that even if an arbitrator makes mistakes of fact or law, we may not disturb an award so long as he acted within the bounds of his bargained-for authority.

Here, that authority was especially broad. The Commissioner was authorized to impose discipline for, among other things, “conduct detrimental to the integrity of, or public confidence, in the game of professional football.” In their collective bargaining agreement, the players and the League mutually decided many years ago that the Commissioner should investigate possible rule violations, should impose appropriate sanctions, and may preside at arbitrations challenging his discipline. Although this tripartite regime may appear somewhat unorthodox, it is the regime bargained for and agreed upon by the parties, which we can only presume they determined was mutually satisfactory.

Given this substantial deference, we conclude that this case is not an exceptional one that warrants vacatur. Our review of the record yields the firm conclusion that the Commissioner properly exercised his broad discretion to resolve an intramural controversy between the League and a player. Accordingly, we REVERSE the judgment of the district court and REMAND with instructions to confirm the award.

BACKGROUND

On January 18, 2015, the New England Patriots and the Indianapolis Colts played in the American Football Conference Championship Game at the Patriots' home stadium in Foxborough, Massachusetts to determine which team would advance to Super Bowl XLIX. During the second quarter, Colts linebacker D'Qwell Jackson intercepted a pass thrown by Brady and took the ball to the sideline, suspecting it might be inflated below the allowed minimum pressure of 12.5 pounds per square inch. After confirming that the ball was underinflated, Colts personnel informed League officials, who decided to test all of the game balls at halftime. Eleven other Patriots balls and four Colts balls were tested using two air gauges, one of which had been used before the game to ensure that the balls were inflated within the permissible range of 12.5 to 13.5 psi. While each of the four Colts balls tested within the permissible range on at least one of the gauges, all eleven of the Patriots balls measured below 12.5 psi on both.

On January 23, the National Football League announced that it had retained Theodore V. Wells, Jr., Esq., and the law firm of Paul, Weiss, Rifkind, Wharton & Garrison to conduct an independent investigation into whether there had been improper ball tampering before or during the game. That investigation culminated in a 139–page report released on May 6, which concluded that it was “more probable than not” that two Patriots equipment officials—Jim McNally and John Jastremski—had “participated in a deliberate effort to release air from Patriots game balls after the balls were examined by the referee.” Joint App. at 97.2 Specifically, the Report found that McNally had removed the game balls from the Officials Locker Room shortly before the game, in violation of standard protocol, and taken them to a single-toilet bathroom, where he locked the door and used a needle to deflate the Patriots footballs before bringing them to the playing field.

In addition to videotape evidence and witness interviews, the investigation team examined text messages exchanged between McNally and Jastremski in the months leading up to the AFC Championship Game. In the messages, the two discussed Brady's stated preference for less-inflated footballs. McNally also referred to himself as "the deflator" and quipped that he was "not going to espn . yet," and Jastremski agreed to provide McNally with a "needle" in exchange for "cash," "newkicks," and memorabilia autographed by Brady. Joint App. at 99–102. The Report also relied on a scientific study conducted by Exponent, an engineering and scientific consulting firm, which found that the underinflation could not "be explained completely by basic scientific principles, such as the Ideal Gas Law," particularly since the average pressure of the Patriots balls was significantly lower than that of the Colts balls. Joint App. at 104–08. Exponent further concluded that a reasonably experienced individual could deflate thirteen footballs using a needle in well under the amount of time that McNally was in the bathroom.

The investigation also examined Brady's potential role in the deflation scheme. Although the evidence of his involvement was "less direct" than that of McNally's or Jastremski's, the Wells Report concluded that it was "more probable than not" that Brady had been "at least generally aware" of McNally and Jastremski's actions, and that it was "unlikely that an equipment assistant and a locker room attendant would deflate game balls without Brady's" "knowledge," "approval," "awareness," and "consent." Joint App. at 112, 114. Among other things, the Report cited a text message exchange between McNally and Jastremski in which McNally complained about Brady and threatened to overinflate the game balls, and Jastremski replied that he had "[t]alked to [Tom] last night" and "[Tom] actually brought you up and said you must have a lot of stress trying to get them done." Joint App. at 112. The investigators also observed that Brady was a "constant reference point" in McNally and Jastremski's discussions about the scheme, Joint App. at 112, had publicly stated his preference for less-inflated footballs in the past, and had been "personally involved in [a] 2006 rule change that allowed visiting teams to prepare game balls in accordance with the preferences of their quarterbacks," Joint App. at 114.

Significantly, the Report also found that, after more than six months of not communicating by phone or message, Brady and Jastremski spoke on the phone for approximately 25 minutes on January 19, the day the investigation was announced. This unusual pattern of communication continued over the next two days. Brady had also taken the "unprecedented step" on January 19 of inviting Jastremski to the quarterback room, and had sent Jastremski several text messages that day that were apparently designed to calm him. The Report added that the investigation had been impaired by Brady's refusal "to make available any documents or electronic information (including text messages and emails)," notwithstanding an offer by the investigators to allow Brady's counsel to screen the production. Joint App. at 116.

In a letter dated May 11, 2015, NFL Executive Vice President Troy Vincent, Sr., notified Brady that Goodell had authorized a four-game suspension of him pursuant to Article 46 of the Collective Bargaining Agreement between

the League and the NFL Players Association (the “Association” or the “NFLPA”) for engaging in “conduct detrimental to the integrity of and public confidence in the game of professional football.” Joint App. at 329.4 The disciplinary letter cited the Wells Report's conclusions regarding Brady's awareness and knowledge of the scheme, as well as his “failure to cooperate fully and candidly with the investigation, including by refusing to produce any relevant electronic evidence (emails, texts, etc.) despite being offered extraordinary safeguards by the investigators to protect unrelated personal information.” Joint App. at 329.

Brady, through the Association, filed a timely appeal of the suspension, and the Commissioner exercised his discretion under the CBA to serve as the hearing officer. The Association sought to challenge the factual conclusions of the Wells Report, and also argued that the Commissioner had improperly delegated his authority to discipline players pursuant to the CBA. Prior to the hearing, the Association filed several motions, including a motion to recuse the Commissioner, a motion to compel NFL Executive Vice President and General Counsel Jeff Pash to testify regarding his involvement in the preparation of the Wells Report, and a motion to compel the production of Paul, Weiss's internal investigation notes.

The Commissioner denied the motions in decisions issued on June 2 and June 22, 2015. He reasoned that his recusal was not warranted because he did not “delegate [his] disciplinary authority to Mr. Vincent” and did “not have any first-hand knowledge of any of the events at issue.” Special App. at 67–68. The Commissioner also declined to compel Pash's testimony, saying that Pash did not “play a substantive role in the investigation,” and that the Wells Report made clear that it was “prepared entirely by the Paul Weiss investigative team.” Special App. at 63. The Commissioner offered to revisit his ruling “should the parties present evidence showing that the testimony of [Pash] is necessary for a full and fair hearing,” Special App. at 64, but the Association never asked him to reconsider. As to the Paul, Weiss investigation notes, the Commissioner ruled that the CBA did not require their production and, in any event, the notes played no role in his disciplinary decision.

On June 23, the Commissioner held a hearing involving nearly ten hours of sworn testimony and argument and approximately 300 exhibits. Shortly before the hearing, it was revealed that on March 6—the same day that he was to be interviewed by the Wells investigative team—Brady had “instructed his assistant to destroy the cellphone that he had been using since early November 2014, a period that included the AFC Championship Game and the initial weeks of the subsequent investigation,” despite knowing that the investigators had requested information from the phone several weeks before. Special App. at 42. Although Brady testified that he was following his ordinary practice of disposing of old cell phones in order to protect his personal privacy, he had nonetheless retained phones that he had used before and after the relevant time frame.

On July 28, the Commissioner issued a final decision affirming the four-game suspension. Based upon the newly revealed evidence regarding the destruction of the cell phone, the Commissioner found that Brady had not only failed to cooperate with the investigation, but “made a deliberate effort to ensure that investigators would never have access to information that he had been asked to produce.” Special App. at 54.

The Commissioner consequently drew an adverse inference that the cell phone would have contained inculpatory evidence, and concluded:

1

Mr. Brady participated in a scheme to tamper with the game balls after they had been approved by the game officials for use in the AFC Championship Game and

2

Mr. Brady willfully obstructed the investigation by, among other things, affirmatively arranging for destruction of his cellphone knowing that it contained potentially relevant information that had been requested by the investigators.

Special App. at 54. Finally, the Commissioner analogized Brady's conduct to that of steroid users, whom he believed seek to gain a similar systematic competitive advantage, and consequently affirmed that, in his view, the four-game suspension typically imposed on first-time steroid users was equally appropriate in this context.

The League commenced an action the same day in the United States District Court for the Southern District of New York (Berman, J.), seeking confirmation of the award under the LMRA. The Association brought an action to vacate the award in the United States District Court for the District of Minnesota, which was subsequently transferred to the Southern District.

On September 3, the district court issued a decision and order granting the Association's motion to vacate the award and denying the League's motion to confirm. *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 125 F.Supp.3d 449 (S.D.N.Y.2015). The court reasoned that Brady lacked notice that he could be suspended for four games because the provisions applicable to his conduct provided that only fines could be imposed. The court also held that the award was defective because the Commissioner deprived Brady of fundamental fairness by denying the Association's motions to compel the production of Paul, Weiss's internal notes and Pash's testimony regarding his involvement with the Wells Report. The League timely appealed, and we now reverse.

STANDARD OF REVIEW

We review a district court's decision to confirm or vacate an arbitration award de novo on questions of law and for clear error on findings of fact. *Wackenhut Corp. v. Amalgamated Local 515*, 126 F.3d 29, 31 (2d Cir.1997). Because this dispute involves the assertion of rights under a collective bargaining agreement, our analysis is governed by section 301 of the LMRA. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001).

The LMRA establishes a federal policy of promoting “industrial stabilization through the collective bargaining agreement,” with particular emphasis on private arbitration of grievances. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). The Act embodies a “clear preference for the private resolution of labor disputes without government intervention.” *Int'l Bhd. of Elec. Workers v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 714 (2d Cir.1998).

Under this framework of self-government, the collective bargaining agreement is not just a contract, but “a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.” *Warrior*, 363 U.S. at 578. Collective bargaining agreements are not imposed by legislatures or government agencies. Rather, they are negotiated and refined over time by the parties themselves so as to best reflect their priorities, expectations, and experience. Similarly, the arbitrators are chosen by the parties because of their expertise in the particular business and their trusted judgment to “interpret and apply [the] agreement in accordance with the ‘industrial common law of the shop’ and the various needs and desires of the parties.” *Alexander v. Gardner–Denver Co.*, 415 U.S. 36, 53, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). The arbitration process is thus “part and parcel of the ongoing process of collective bargaining.” *Misco*, 484 U.S. at 38.

Our review of an arbitration award under the LMRA is, accordingly, “very limited.” *Garvey*, 532 U.S. at 509. We are therefore not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement, but inquire only as to whether the arbitrator acted within the scope of his authority as defined by the collective bargaining agreement. Because it is the arbitrator's view of the facts and the meaning of the contract for which the parties bargained, courts are not permitted to substitute their own. *Misco*, 484 U.S. at 37–38. It is the arbitrator's construction of the contract and assessment of the facts that are dispositive, “however good, bad, or ugly.” *Oxford Health Plans LLC v. Sutter*, —U.S. —, —, 133 S.Ct. 2064, 2071, 186 L.Ed.2d 113 (2013). Contrary to our dissenting colleague, we do not consider whether the punishment imposed was the most appropriate, or whether we are persuaded by the arbitrator's reasoning. In short, it is not our

task to decide how we would have conducted the arbitration proceedings, or how we would have resolved the dispute.

Instead, our task is simply to ensure that the arbitrator was “even arguably construing or applying the contract and acting within the scope of his authority” and did not “ignore the plain language of the contract.” *Misco*, 484 U.S. at 38. Even failure to “follow arbitral precedent” is no “reason to vacate an award.” *Wackenhut*, 126 F.3d at 32. As long as the award “ ‘draws its essence from the collective bargaining agreement’ and is not merely the arbitrator’s ‘own brand of industrial justice,’ ” it must be confirmed. *Niagara Mohawk*, 143 F.3d at 714 (quoting *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)); see also *Garvey*, 532 U.S. at 509; *187 Concourse Assocs. v. Fishman*, 399 F.3d 524, 527 (2d Cir.2005).⁵ If the arbitrator acts within the scope of this authority, the remedy for a dissatisfied party “is not judicial intervention,” but “for the parties to draft their agreement to reflect the scope of power they would like their arbitrator to exercise.” *United Bhd. of Carpenters v. Tappan Zee Constr., LLC*, 804 F.3d 270, 275 (2d Cir.2015) (internal quotation marks omitted) (quoting *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 345 (2d Cir.2010)). Against this legal backdrop, we turn to the decision below and the arguments advanced on appeal.

DISCUSSION

Article 46 of the CBA empowers the Commissioner to take disciplinary action against a player whom he “reasonably judge[s]” to have engaged in “conduct detrimental to the integrity of, or public confidence in, the game of professional football.” Joint App. at 345, 353.⁶ A disciplined player is entitled to appeal to the Commissioner and seek an arbitration hearing, and the Commissioner may appoint either himself or someone else to serve as arbitrator. Article 46 does not articulate rules of procedure for the hearing, except to provide that “the parties shall exchange copies of any exhibits upon which they intend to rely no later than three (3) calendar days prior to the hearing.” Joint App. at 346.

On this appeal, the Association does not contest the factual findings of the Commissioner. Nor does the Association dispute that the Commissioner was entitled, under Article 46, to determine that Brady’s “participat[ion] in a scheme to tamper with game balls” was “conduct detrimental” worthy of a four-game suspension. The parties disagree, however, as to whether other aspects of the CBA and the relevant case law require vacatur of the award.

The district court identified three bases for overturning Brady’s suspension: (1) the lack of adequate notice that deflation of footballs could lead to a four-game suspension, (2) the exclusion of testimony from Pash, and (3) the denial of access to the investigative notes of the attorneys from Paul, Weiss who prepared the Wells Report. We

conclude that each of these grounds is insufficient to warrant vacatur and that none of the Association's remaining arguments have merit.

I. Lack of Adequate Notice

The parties agree that the “law of the shop” requires the League to provide players with advance notice of “prohibited conduct and potential discipline.” The district court identified several grounds for concluding that Brady had no notice that either his conduct was prohibited or that it could serve as a ground for suspension.

A. The Player Policies

The Association's chief ground for vacatur, relied upon by the district court, is that the Commissioner improperly suspended Brady pursuant to the “conduct detrimental” clause of Article 46 because Brady was only on notice that his conduct could lead to a fine under the more specific “Discipline for Game-Related Misconduct” section of the League Policies for Players (the “Player Policies”). These Policies, which are collected in a handbook distributed to all NFL players at the beginning of each season, include a section entitled “Other Uniform/Equipment Violations.”

The Association argues that the Commissioner was not permitted to impose a four-game suspension under Article 46 because the Player Policies mandated only a fine for equipment infractions. The Association further contends that the award is additionally defective because the Commissioner failed to make findings as to the applicability or interpretation of the Player Policies. See *Clinchfield Coal Co. v. Dist. 28, United Mine Workers*, 720 F.2d 1365, 1369 (4th Cir.1983) (“Where the arbitrator fails to discuss critical contract terminology, which terminology might reasonably require an opposite result, the award cannot be considered to draw its essence from the contract.”).

This argument by the Association has a tortured procedural history. During arbitration, the Association disclaimed the applicability of the Player Policies, saying “we don't believe this policy applies either, because there is nothing here about the balls.” Joint App. at 956. This change of position is itself grounds for rejecting the Association's argument. See *York Research Corp. v. Landgarten*, 927 F.2d 119, 122 (2d Cir.1991) (“[A] party ‘cannot remain silent, raising no objection during the course of the arbitration proceeding, and when an award adverse to him has been handed down complain of a situation of which he had knowledge from the first.’ ” (quoting *Cook Indus., Inc. v. C. Itoh & Co. (Am.) Inc.*, 449 F.2d 106, 107–08 (2d Cir.1971))). We nonetheless exercise our discretion to address it. We conclude that the equipment provision does not apply and, in any event, the punishments listed for equipment violations are minimum ones that do not foreclose suspensions.

1. Applicability of the Player Policies

The Association primarily relies on a statement in the “Other Uniform/Equipment Violations” section, which provides that “First offenses will result in fines.” It argues that equipment violations include “ball or equipment tampering” and “equipment tampering such as ball deflation.” But the Association finds language in the “Other Uniform/Equipment Violations” provision that we cannot locate. The provision says nothing about tampering with, or the preparation of, footballs and, indeed, does not mention the words “tampering,” “ball,” or “deflation” at all. Moreover, there is no other provision of the Player Policies that refers to ball or equipment tampering, despite an extensive list of uniform and equipment violations ranging from the length of a player's stockings to the color of his wristbands.

On the other hand, Article 46 gives the Commissioner broad authority to deal with conduct he believes might undermine the integrity of the game. The Commissioner properly understood that a series of rules relating to uniforms and equipment does not repeal his authority vested in him by the Association to protect professional football from detrimental conduct. We have little difficulty in concluding that the Commissioner's decision to discipline Brady pursuant to Article 46 was “plausibly grounded in the parties' agreement,” which is all the law requires. See *Wackenhut*, 126 F.3d at 32.

2. 2014 Schedule of Fines

Even were the district court and the Association correct, and they are not, that Brady could be punished only pursuant to the Player Policies and its “Other Uniform/Equipment Violations” provision, it would not follow that the only available punishment would have been a fine. While the Player Policies do specify that, with regard to “Other Uniform/Equipment Violations,” “[f]irst offenses will result in fines,” the 2014 Schedule of Fines, which appears five pages later and details the fines for these violations, makes clear that the “[f]ines listed below are minimums.” Joint App. at 384, 389. The Schedule of Fines goes on to specify that “[o]ther forms of discipline, including higher fines and suspension may also be imposed, based on the circumstances of the particular violation.” Joint App. at 389. Read in conjunction, these provisions make clear that even first offenders are not exempt from punishment, and serious violations may result in suspension. But even if other readings were plausible, the Commissioner's interpretation of this provision as allowing for a suspension would easily withstand judicial scrutiny because his interpretation would be at least “barely colorable,” which, again, is all that the law requires. See *In re Andros Compania Maritima, S.A.*, 579 F.2d 691, 704 (2d Cir.1978).

B. Steroid Comparison

The district court also took issue with the comparison drawn by the Commissioner between Brady's conduct and that of steroid users. In his arbitration award, the Commissioner noted that the four-game suspension typically imposed on first-time steroid users was a helpful point of comparison because, like Brady's conduct, "steroid use reflects an improper effort to secure a competitive advantage in, and threatens the integrity of, the game." Special App. at 57. Finding such a comparison inappropriate, the district court held:

[N]o player alleged or found to have had a general awareness of the inappropriate ball deflation activities of others or who allegedly schemed with others to let air out of footballs in a championship game and also had not cooperated in an ensuing investigation, reasonably could be on notice that their discipline would (or should) be the same as applied to a player who violated the NFL Policy on Anabolic Steroids and Related Substances.

Nat'l Football League, 125 F.Supp.3d at 465.

The Association approaches this comparison somewhat differently, contending that the Commissioner's failure to punish Brady pursuant to the Player Policies "is only underscored by his reliance on the Steroid Policy." Appellees' Br. 45.

We are not troubled by the Commissioner's analogy. If deference means anything, it means that the arbitrator is entitled to generous latitude in phrasing his conclusions. We have little difficulty concluding that the comparison to steroid users neither violated a "right" to which Brady was entitled nor deprived him of notice. While he may have been entitled to notice of his range of punishment, it does not follow that he was entitled to advance notice of the analogies the arbitrator might find persuasive in selecting a punishment within that range.

The dissent contends that we must vacate the award because the Commissioner failed to discuss a policy regarding “stickum,” which the dissent views as “a natural starting point for assessing Brady's penalty.” Dissenting Op. at 7. We do not believe this contention is consistent with our obligation to afford arbitrators substantial deference, and by suggesting that the stickum policy is the more appropriate analogy, the dissent improperly weighs in on a pure sports question—whether using stickum by one player is similar to tampering with footballs used on every play. And even if the fine for stickum use is the most appropriate analogy to Brady's conduct, nothing in the CBA or our case law demands that the arbitrator discuss comparable conduct merely because we find that analogy more persuasive than others, or because we think the analogy the arbitrator chose to draw was “flawed” or “inapt.” Nor does the CBA require the arbitrator to “fully explain his reasoning,” Dissenting Op. at 6; it merely mandates that the hearing officer render a “written decision,” Joint App. at 346. The Commissioner not only did just that, but he also explained why he found the analogy to steroid use persuasive. Not even the Association finds defect in the award on this point—this argument was never raised by the Association, either below or on appeal. While we appreciate that our dissenting colleague might view the penalty meted out to Brady as harsh, we do not believe that view supplies a sufficient basis to warrant vacatur.

Accordingly, we believe the Commissioner was within his discretion in drawing a helpful, if somewhat imperfect, comparison to steroid users. In any event, we believe this issue is much ado about very little because the Commissioner could have imposed the same suspension without reference to the League's steroid policy.

C. General Awareness

The district court also concluded that the award was invalid because “[n]o NFL policy or precedent provided notice that a player could be subject to discipline for general awareness of another person's alleged misconduct.” Nat'l Football League, 125 F.Supp.3d at 466. This conclusion misapprehends the record. The award is clear that it confirmed Brady's discipline not because of a general awareness of misconduct on the part of others, but because Brady both “participated in a scheme to tamper with game balls” and “willfully obstructed the investigation by . . . arranging for destruction of his cellphone.” Special App. at 54.

The Association takes a somewhat different tack and argues that the Commissioner was bound to the Wells Report's limited conclusion that Brady was at least “generally aware” of the inappropriate activities of Patriots equipment staff. But the Association offers no persuasive support for its contention that the universe of facts the Commissioner could properly consider was limited by the Wells Report. Nothing in Article 46 limits the authority of the arbitrator to examine or reassess the factual basis for a suspension. In fact, in providing for a hearing, Article 46 strongly suggests otherwise. Because the point of a hearing in any proceeding is to establish a complete factual record, it would be

incoherent to both authorize a hearing and at the same time insist that no new findings or conclusions could be based on a record expanded as a consequence of a hearing.

Additionally, it was clear to all parties that an important goal of the hearing was to afford the Association the opportunity to examine the findings of the Wells Report, and the Association availed itself of that opportunity. See Joint App. at 952 (“[W]e are about to tell you why we think [sic] the Wells report is wrong.”; “[W]e believe you are going to conclude when you hear [Brady’s testimony] that he is not somebody who was responsible for anything.”), 953 (“What it turns out is there are so many unknowns which are in the Wells report.”). In light of Brady’s effort to challenge the factual conclusions of the Wells Report by presenting exculpatory evidence, it would make little sense to accept the Association’s contention that the introduction and consideration of inculpatory evidence violates the Commissioner’s broad authority to manage the hearing.

The issue before the Commissioner was whether the discipline imposed on Brady was warranted under Article 46, and that was the issue he decided. The Commissioner did not develop a new basis for the suspension, nor did he deprive Brady of an opportunity to confront the case against him. We see nothing in the CBA that suggests that the Commissioner was barred from concluding, based on information generated during the hearing, that Brady’s conduct was more serious than was initially believed.

Moreover, the Wells Report did not limit itself to a finding of “general awareness.” It also found that “it is unlikely that [McNally and Jastremski] would deflate game balls without Brady’s knowledge and approval” or that they “would personally and unilaterally engage in such conduct in the absence of Brady’s awareness and consent.” Joint App. at 114. The Commissioner’s shift from “knowledge and approval” to “participation” was not, as the Association argues, a “quantum leap,” but was instead a reasonable reassessment of the facts that gave rise to Brady’s initial discipline, supplemented by information developed at the hearing.

Unprompted by the Association, our dissenting colleague contends that because the Wells Report “never concluded that it was ‘more probable than not’ that the gifts Brady provided were intended as rewards or advance payments for deflating footballs in violation of League Rules,” Dissenting Op. at 3, the Commissioner deprived Brady of notice by concluding that he “provided inducements and rewards in support of [the] scheme,” Special App. at 51.

But the Wells Report was clear that its conclusion was “significantly influenced by the substantial number of communications and events consistent with [its] finding, including that [McNally] . received valuable items autographed by Tom Brady the week before the AFC Championship Game.” Joint App. at 108. With specific regard to Brady’s involvement, the Wells Report noted that “Brady [was] a constant reference point in the discussions

between McNally and Jastremski about . items to be received by McNally.” Joint App. at 112–13. And as the dissent admits, the Association questioned Brady at the hearing on this very point, and the Commissioner determined that Brady’s testimony was not credible. The record establishes that Brady was on notice from the outset that the Wells Report’s conclusions were “significantly influenced” by his providing McNally with autographed memorabilia, the Association confronted this allegation at the hearing, and the Commissioner rejected Brady’s explanation. Brady knew that the factual predicates of his discipline (the text messages, the phone calls, the autographed memorabilia, etc.) would be at issue in the arbitration. That he chose to focus on some more than others simply reflects his own tactical decision as to how to present his case. And again, the Association never put forth this contention, either before us or in the district court below.

We therefore find that the Commissioner was within his discretion to conclude that Brady had “participated in a scheme to tamper with game balls.” Because the parties agree that such conduct is “conduct detrimental,” the district court erred in concluding that the Commissioner’s deviation from the Wells Report’s finding of general awareness was a ground for vacatur.

D. Discipline for Non-cooperation

The district court held and the Association contends that Brady’s suspension cannot be sustained on the grounds that he obstructed the Commissioner’s investigation. The court reasoned that “[n]o player suspension in NFL history has been sustained for an alleged failure to cooperate with—or even allegedly obstructing—an NFL investigation.” Nat’l Football League, 125 F.Supp.3d at 465 (internal quotation marks omitted). The League, on the other hand, argues that not only is the deliberate obstruction of a league investigation “conduct detrimental” within the meaning of Article 46, but also the destruction of the cell phone permitted the Commissioner to draw an adverse inference against Brady that supported the finding that he participated in the deflation scheme.

The Association’s argument is essentially procedural. The Association does not dispute that the Commissioner properly used the destruction of the cell phone to draw an adverse inference against Brady. In the face of this concession, the Association insists that because the award is invalid in light of the Commissioner’s failure to discipline Brady under the Player Policies, the award cannot be salvaged on the alternative theory that Brady could have been suspended for his obstruction of the investigation. Specifically, the Association contends that “once it becomes clear that Brady’s non-cooperation led to the adverse inference about ball tampering, it’s back to square one: The only penalty of which Brady had notice was the collectively bargained fine for equipment violations.” Appellees’ Br. 51. This argument fails for the simple reason that, as we have explained, the Player Policies are inapplicable and, in any event, suspensions may be imposed for violations of the League’s equipment policies.

At oral argument, the Association contended, for the first time, that Brady had no notice that the destruction of the cell phone would even be at issue in the arbitration proceeding. Ordinarily, an argument such as this that is not raised in the briefs is waived and thus not appropriate for consideration on appeal. *Littlejohn v. City of New York*, 795 F.3d 297, 313 n. 12 (2d Cir.2015). However, because the parties discussed this issue at length during oral argument, we exercise our discretion to address it.

For a number of reasons, the Association's assertion that Brady lacked notice that the destruction of the cell phone would be an issue in the arbitration has no support in the record. The League's letter to Brady notifying him of his suspension pointed to Brady's "failure to cooperate fully and candidly with the investigation, including by refusing to produce any relevant electronic evidence (emails, texts, etc.)." Joint App. at 329. Having been given clear notice that his cooperation with the investigation was a subject of significant interest, we have difficulty believing that either Brady or the Association would have been surprised that the destruction of the cell phone was of importance to the Commissioner. The notion that Brady was unfairly blindsided by the Commissioner's adverse inference is further belied by the opening statement of the Association's counsel at the arbitration, who defended Brady's handling of electronic evidence:

We are also going to put in a declaration from a forensic person who dealt with the issue of e-mail and texts. And you know from your decision that [this] was an aspect of the discipline.

[T]here were no incriminating texts being withheld or e-mails, and there never have been any incriminating texts or emails. And now he has gone through and produces exactly what Ted Wells had asked for at the time that existed at the time and exists today. He was following the advice of his lawyers and agents at the time. (Joint App. at 953).

Counsel for the Association later went further, directly acknowledging the destruction of the cell phone and referencing an expert declaration submitted in support of Brady. Whatever it may say now about its expectations for the hearing, the Association had at least enough notice of the potential consequences of the cell phone destruction to retain an expert in advance of the arbitration to assist counsel in explaining why an adverse inference should not be drawn.

At oral argument, the Association further contended that the Commissioner was improperly punishing Brady for destroying his cell phone because he was required to institute a new disciplinary action (so that Brady could then appeal any determination that he had destroyed his cell phone). This argument fails because, as set forth in the original disciplinary letter, Brady was punished for failing to cooperate, and it is clear from the Commissioner's decision that Brady's cell phone destruction was part and parcel of the broader claim that he had failed to cooperate. Further, as we stated with regard to general awareness, nothing in Article 46 limits the arbitrator's authority to reexamine the factual basis for a suspension by conducting a hearing. Additionally, the Commissioner did not increase the punishment as a consequence of the destruction of the cell phone—the four-game suspension was not increased. Rather, the cell phone destruction merely provided further support for the Commissioner's determination that Brady had failed to cooperate, and served as the basis for an adverse inference as to his participation in the scheme to deflate footballs.

Finally, any reasonable litigant would understand that the destruction of evidence, revealed just days before the start of arbitration proceedings, would be an important issue. It is well established that the law permits a trier of fact to infer that a party who deliberately destroys relevant evidence the party had an obligation to produce did so in order to conceal damaging information from the adjudicator (citations omitted). These principles are sufficiently settled that there is no need for any specific mention of them in a collective agreement, and we are confident that their application came as no surprise to Brady or the Association.

E. Competitive Integrity Policy

The final ground for vacatur due to inadequate notice identified by the district court was Brady's purported lack of notice of the Competitive Integrity Policy, which authorized the initial investigation. The district court reasoned that Brady was improperly suspended pursuant to the Competitive Integrity Policy, which is distributed only to teams, and not to players. This conclusion is incorrect because, as we have seen, Article 46 properly supplied the basis for the suspension.

Tellingly, the Association does not defend the district court's analysis on appeal. The League in its initial punishment and the Commissioner in his arbitration award were both clear that Brady was being disciplined pursuant to Article 46, not the Competitive Integrity Policy.¹¹ The Competitive Integrity Policy, which says nothing about disciplining players, merely supplied the Commissioner with the authority to conduct an investigation and to require the Patriots' cooperation. The operative question for notice, as the parties agree, is whether Brady was aware that his conduct could give rise to a suspension. Article 46 put him on notice prior to the AFC Championship Game that any action deemed by the Commissioner to be “conduct detrimental” could lead to his suspension.

II. Exclusion of Testimony from NFL General Counsel

Prior to the commencement of arbitration proceedings, the Commissioner denied the Association's motion to call NFL General Counsel Jeff Pash to testify at the arbitration concerning his role in the preparation of the Wells Report. The Commissioner did so on the grounds that Pash did not “play a substantive role in the investigation” and the Wells Report made clear that it was “prepared entirely by the Paul Weiss investigative team.” Special App. at 63. As an independent ground for vacatur, the district court held that it was fundamentally unfair to exclude Pash from testifying because “it is logical that he would have valuable insight into the course and outcome of the Investigation and into the drafting and content of the Wells Report.” *Nat'l Football League*, 125 F.Supp.3d at 471. Again, we cannot agree with this conclusion.

It is well settled that procedural questions that arise during arbitration, such as which witnesses to hear and which evidence to receive or exclude, are left to the sound discretion of the arbitrator and should not be second-guessed by the courts. *Misco*, 484 U.S. at 40. Arbitrators do not “need to comply with strict evidentiary rules,” and they possess “substantial discretion to admit or exclude evidence” (citations omitted).

III. Denial of Access to Investigative Files

The district court's third and final ground for vacatur is that Brady was entitled under the CBA to the interview notes and memoranda generated by the investigative team from Paul, Weiss, and that the denial of those notes amounted to fundamental unfairness. The League argues that this is not a ground for vacatur because the CBA does not require the exchange of such notes.

We agree. Article 46 specifies that “[i]n appeals under Section 1(a), the parties shall exchange copies of any exhibits upon which they intend to rely.” Joint App. at 346. The Commissioner reasonably interpreted this provision to not

require more extensive discovery. Significantly, the parties agreed in the CBA to permit more comprehensive discovery in other proceedings, such as those under Article 15, Section 3, which allows “reasonable and expedited discovery upon the application of any party.” Special App. at 65.

The Commissioner further concluded that Brady was not deprived of fundamental fairness because the Commissioner “did not review any of Paul, Weiss’ internal interview notes or any other documents generated by Paul, Weiss other than their final report,” and the League had already “produced all of the NFL documents considered by the investigators.” Special App. at 65. The Commissioner pointed out that the Association had not even “identified any material factual dispute that Paul, Weiss’ internal work product would help to resolve.” Special App. at 66.

In making these findings, the Commissioner was, at the very least, “arguably construing or applying the contract” . . . and he reasonably concluded that he would not require the production of attorney work product he had not relied on, or even seen. Had the parties wished to allow for more expansive discovery, they could have bargained for that right. They did not, and there is simply no fundamental unfairness in affording the parties precisely what they agreed on.

B. Evident Partiality

The Association’s final contention is that the Commissioner was evidently partial with regard to the delegation issue and should have recused himself from hearing at least that portion of the arbitration because it was improper for him to adjudicate the propriety of his own conduct. This argument has no merit.

We may vacate an arbitration award “where there was evident partiality . in the arbitrator[].” 9 U.S.C. § 10(a) (2). “Evident partiality may be found only ‘where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration’ ” (citation omitted).

Here, the parties contracted in the CBA to specifically allow the Commissioner to sit as the arbitrator in all disputes brought pursuant to Article 46, Section 1(a). They did so knowing full well that the Commissioner had the sole power of determining what constitutes “conduct detrimental,” and thus knowing that the Commissioner would have a stake both in the underlying discipline and in every arbitration brought pursuant to Section 1(a). Had the parties wished to restrict the Commissioner’s authority, they could have fashioned a different agreement.

CONCLUSION

For the foregoing reasons, we REVERSE the judgment of the district court and REMAND with instructions for the district court to confirm the arbitration award.

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