Nos. 15-1438

United States Court of Appeals for the Eighth Circuit

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION,
ON BEHALF OF ADRIAN PETERSON,
PLAINTIFF-APPELLEE

v.

NATIONAL FOOTBALL LEAGUE, NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA CASE NO. 14-4990 (DSD/JSM), THE HONORABLE DAVID S. DOTY, PRESIDING

BRIEF FOR PLAINTIFF-APPELLEE (REDACTED)

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SUMMARY OF THE CASE

This case arises from the NFL's crusade to show the world it has suddenly become "tough on crime" by disciplining players without regard for their collectively bargained rights. Here, the NFL indefinitely suspended Minnesota Vikings running back Adrian Peterson pursuant to an August 2014 disciplinary policy (the "New Policy") not enacted until months *after* Peterson's misconduct occurred.

The parties' collective bargaining agreement ("CBA")—and the industrial "law of the shop" interpreting that agreement—categorically prohibit such retroactive discipline. Moreover, NFL Commissioner Roger Goodell testified that he was "required" by the CBA to apply the New Policy only prospectively. But the evidently partial arbitrator who heard Peterson's appeal disregarded both the binding law of the shop and Goodell's testimony en route to denying the appeal.

As Judge Doty recognized, this is the exceptional case in which an arbitral award must be vacated. By disregarding the law of the shop, the award defied "the essence of the CBA." Further, the arbitrator exceeded his limited CBA authority by deciding an issue he had no power to consider: whether Peterson's discipline would be proper under the *previous* Policy, discipline that the NFL never imposed. Although the district court did not reach the issues, vacatur is also warranted because of the arbitrator's evident partiality and the award's fundamental unfairness.

The NFLPA joins the NFL's request for 20 minutes of argument per side.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1A, Appellee National Football League Players Association hereby certifies that it is a non-profit corporation organized under the laws of the Commonwealth of Virginia, that it has no parent corporation, and that no publicly held corporation owns ten percent or more of its stock.

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INTRODUCTION

This case arises out of an arbitration decision affirming National Football League Commissioner Roger Goodell's decision to discipline Minnesota Vikings running back Adrian Peterson retroactively—under a "New Policy" first announced several months *after* Peterson engaged in the conduct that Goodell found to violate the League's rules. It is undisputed that, while players disciplined for first-time domestic violence under the previous Policy were consistently suspended for no more than two games, the New Policy dramatically upped the penalty to a presumptive suspension of six games. ADD003-ADD004. And although Goodell repeatedly admitted—publicly and in sworn testimony—that he could not apply the New Policy retroactively, he did just that to Peterson.

Faced with excoriating public criticism for failing to impose harsher discipline on another player, Ray Rice of the Baltimore Ravens, for domestic violence, Goodell abandoned the fundamental principle—embodied in numerous NFL arbitration decisions—that the governing collective bargaining agreement ("CBA") barred retroactive discipline. In fact, Goodell violated this principle just days after testifying in the *Rice* arbitration that he was "'required to provide proper notification'" to players and "could not retroactively apply the new presumptive penalty." A052, A061; *see* ADD013. In short, "the Commissioner ha[d] acknowledged that he did not have the

power to retroactively apply the New Policy," and yet he "retroactively applied [it] to Peterson." ADD014, ADD013.

The National Football League Players Association ("NFLPA" or "Union"), the players' union, grieved Peterson's discipline. Goodell in turn tapped Harold Henderson—a former senior NFL executive and the League's longtime chief labor negotiator—to serve as arbitrator, over the Union's objection to Henderson's evident partiality. Henderson affirmed the Commissioner's actions, but without "directly address[ing] the NFLPA's retroactivity argument" or Goodell's testimonial admissions that he could not impose retroactive discipline. ADD009. Instead, Henderson reframed the issue as whether "the New Policy was consistent with its prior iterations," concluding that it was and thus that Peterson's discipline "did not require advance warning." *Id.*

The NFLPA petitioned the district court to set aside the award. In a careful opinion by Judge Doty, the court vacated the award on two independent grounds. First, the court held that "the award fails to draw its essence from the CBA because it ignores established law of the shop," which "necessarily includes prior arbitration awards." ADD012. Specifically, both *Rice* and several "prior NFL arbitration decisions" had "unequivocally recognized that [new disciplinary policies] cannot be applied retroactively, notwithstanding the Commissioner's broad discretion in met-

ing out punishment under the CBA." ADD013 & n.4. "Even leaving the *Rice* decision aside," Judge Doty noted, "it is not seriously contested that the Commissioner understood he was constrained to apply the New Policy prospectively." ADD014. But in failing to engage these decisions or Goodell's admissions, Henderson "disregarded the law of the shop" and "failed to meet his duty under the CBA." ADD013, ADD014.

Second, the court held that Henderson "strayed beyond the issues submitted by the NFLPA and in doing so exceeded his authority." ADD015-ADD016. As Judge Doty recognized, courts "must look … to the submission of the issue to the arbitrator to determine his authority," which authorizes him "to decide *that* issue" alone. ADD015 (emphasis in original).[1] Here, however, "[n]othing in the record supports a finding that the NFLPA asked Henderson to determine whether the discipline imposed was consistent with the previous Policy." *Id.* Rather, Henderson acknowledged that, "[a]s framed by the player's counsel, 'what we have here is the *pure legal issue* as to whether it is permissible … for the league *to retroactively apply the new policy*.'" ADD020.

Instead of adjudicating that "pure legal issue," however, Henderson decided "that the New Policy was consistent with its prior iterations and that the discipline

[1] Unless otherwise indicated, emphases herein are added, and internal quotations and citations are omitted.

imposed 'fits either or both'"—thus "exceed[ing] his authority." ADD009, ADD015-ADD016. As the district court explained, moreover, "Henderson's conclusion that the New Policy is consistent with the previous Policy is contradicted by the Commissioner's own statements in which he acknowledged that the New Policy included 'changes' to the Policy." ADD015. Indeed, "Henderson acknowledged that the discipline imposed was greater than in previous cases under the old Policy." ADD009.

Faced with an undisputed record containing devastating admissions and a thorough district court decision providing two independent grounds for vacating Henderson's award, the NFL principally argues for reversal based on the Commissioner's broad authority over discipline and the substantial deference that courts accord to labor arbitrations. Remarkably, however, the NFL—like Henderson—never engages with the actual essence of the agreement and law-of-the-shop issues presented by this case. The NFL mentions "the law of the shop" only *once* in its entire brief, and only when summarizing Judge Doty's decision. Br. 17. Under longstanding precedent, however, "law of the shop" decisions interpreting a collective bargaining agreement are "equally a part of the [agreement] although not expressed in it." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). Moreover, the NFL—again, like Henderson—never grapples with Commissioner Goodell's admissions—both to the public and in sworn testimony—that the New

Policy made significant changes to the previous Policy and could not be applied retroactively.

As we will show, Judge Doty's decision to set aside Henderson's award was unassailably correct on both grounds. The award lacks "the hallmarks of an honest judgment that drew its essence from the agreement"—it neither "consulted decisions interpreting similar contracts" nor "squarely addressed the parties' arguments." *Alcan Packaging Co. v. Commc'n Conference, Int'l Bhd. of Teamsters & Local Union No. 77-P*, 729 F.3d 839, 842 (8th Cir. 2013).

Moreover, although it would be more appropriate to remand the issues of Henderson's evident partiality and the fundamental unfairness of the proceedings for resolution in the first instance by the district court, the record supports affirmance on those alternative grounds too.

The district court's judgment should be affirmed.

ISSUES PRESENTED FOR REVIEW

1. Whether an arbitration award is enforceable when it disregards both the parties' binding law of the shop prohibiting retroactive discipline, and testimonial admissions to the same effect, in contravention of the essence of the collective bargaining agreement.

   - *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960)
   - *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960)
   - *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416 (8th Cir. 1986)
   - *Rice v. NFL*, Art. 46 Appeal Decision (Nov. 28, 2014) (decided by former U.S. District Judge Barbara S. Jones)

2. Whether an arbitration award is enforceable when the arbitrator exceeds his authority by deciding an issue that the collective bargaining agreement does not empower him to consider and was not presented to him by the parties.

   - 9 U.S.C. § 10(a)(4)
   - *John Morrell & Co. v. Local Union 304A of the United Food & Commercial Workers*, 913 F.2d 544 (8th Cir. 1990)
   - *N. States Power Co. v. Int'l Bhd. of Elec. Workers*, 711 F.3d 900 (8th Cir. 2013)
   - *Mo. River Servs., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848 (8th Cir. 2001)
   - *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416 (8th Cir. 1986)

3. Whether, if the Court reaches the issues without remanding for further factual development, it should affirm on the alternative grounds that:

A. the arbitrator, a longtime senior NFL executive, could not impartially assess the credibility and prior statements of his longtime colleagues on the central issue—whether retroactive discipline was barred.

- 9 U.S.C. § 10(a)(2)
- *Bank of Am., N.A. v. UMB Fin. Servs., Inc.*, 618 F.3d 906 (8th Cir. 2010)
- *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972)
- *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99 (2d Cir. 2013)
- *Morris v. N.Y. Football Giants*, 575 N.Y.S.2d 1013 (N.Y. Sup. Ct. 1991)

B. the award, in sanctioning Peterson's retroactive discipline, violates the most basic notions of fundamental fairness.

- 9 U.S.C. § 10(a)(3)
- *BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 667 (8th Cir. 2002)
- *Hoteles Condado Beach v. Union De Tronquistas Local 901*, 763 F.2d 34 (1st Cir. 1985)
- *Gulf Coast Indus. Workers Union v. Exxon Co., USA*, 70 F.3d 847 (5th Cir. 1995)
- *Int'l Union, United Mine Workers v. Marrowbone Dev. Co.*, 232 F.3d 383 (4th Cir. 2000)

STATEMENT OF THE CASE

A. The parties' relationship

The NFLPA is the exclusive collective bargaining representative for present and future players in the NFL. The NFL comprises 32 member Clubs, who in turn are represented in collective bargaining by the National Football League Management Council ("NFLMC"). The parties' relationship is governed by an August 2011 CBA.

Adrian Peterson, a member of the NFLPA, is a running back employed by the Minnesota Vikings.

B. Player discipline under the CBA

The CBA provides a comprehensive system governing player discipline and the arbitration of player disciplinary appeals. Moreover, because "[t]he processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement," arbitration decisions interpreting and applying the CBA become "law of the shop"—*i.e.*, part and parcel of the CBA itself. *Warrior & Gulf*, 363 U.S. at 581. This law of the shop "is equally a part of the [CBA] although not expressed in it." *Id.* at 582.

Within the CBA-prescribed disciplinary system, the NFL Commissioner has exclusive authority to discipline players for conduct detrimental to the League. That authority, however, is circumscribed by the CBA and the law of the shop. The source of the Commissioner's authority to discipline players—who are employed by

the teams, not the League—is the collectively-bargained Standard Player Contract. CBA, Art. 4;[2] A012-A020. Under Paragraph 15 of the Player Contract, a player may be disciplined for "conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football." A017. Punishments, however, are explicitly limited: they may "only" include "fine[s]," "suspen[sions]," or "terminat[ion]" of the player's contract. *Id.*

The procedures that "exclusively" govern the Commissioner's authority to impose "conduct detrimental" discipline—and the system for arbitrating appeals of such discipline—are set forth in Article 46 of the CBA. A009-A011 §§ 1(a), 2, et al. "[A]fter consultation with the Executive Director of the NFLPA," the Commissioner may designate a hearing officer to arbitrate the appeal. *Id.* § 2(a). This arbitrator may not impose discipline himself; he may only review the discipline imposed by the Commissioner. A427 (*Rice* 396:17-25) [redacted].

As the district court recognized (ADD013-ADD014), the CBA, the law of the shop, and settled case law have established an incontrovertible body of player rights in connection with the imposition of discipline. Most relevant here, players have an undisputed right to "fair and consistent" treatment, which includes a prohibition

[2] All 2011 CBA provisions cited herein are *available at* https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf; *see* NFL Br. 3.

against "retroactively apply[ing]" new disciplinary policies. *E.g.*, A061, A053 (*Rice v. NFL*, Art. 46 Appeal Decision (Nov. 28, 2014) (Jones, Arb.)).

C. The NFL Constitution & Bylaws

The NFL makes much of the NFL's Constitution & Bylaws ("NFL Constitution"), but it has little relevance to this appeal. The NFL Constitution is an agreement between the NFL and its Clubs, not a collectively bargained agreement with the NFLPA. By its own terms, the NFL Constitution is subordinate to the CBA and does not empower the Commissioner to discipline players in a manner that conflicts with the CBA. A104 ("Provisions of the Constitution relating to players … remain subject to the provisions of the Collective Bargaining Agreement."). The CBA's provisions expressly "supersede any conflicting provisions in … the NFL Constitution and Bylaws, … the NFL Rules, or any other document affecting terms and conditions of employment of NFL players." Art. 2 § 1. The NFL Constitution's only significance here is that member Clubs therein cede to the Commissioner their power, as employers, to discipline players for conduct detrimental to the League. A111-A116.

D. The Commissioner's Personal Conduct Policies

Since 2007, Commissioner Roger Goodell has issued several iterations of his so-called Personal Conduct Policies. The principal function of these Policies is to provide players (and NFL and Club employees) with the requisite advance notice of

what the Commissioner considers "conduct detrimental" to the League, and of the potential discipline for such conduct. Indeed, numerous decisions confirm that the players' right to advance notice of changes in disciplinary policies is the settled law of the shop. *Infra* at 36-42; A061 (*Rice*) (recognizing that the New Policy could not be "retroactively appli[ed]"); A142, A146 (*Langhorne* (1994) (Kasher, Arb.) (setting aside discipline based on a new policy because the player "was entitled" to "notice" and "reasonable certainty" concerning "what results will occur if [he] breach[ed] established rules")); A297, A299, A303 (*Brown* (2010) (Beck, Arb.) (vacating discipline under a new rule for lack of notice; "[a] rule must clearly and unambiguously establish the scope of prohibited conduct, *as well as the consequences of violations*, in order to be enforceable")); A241, A245 (*Coles* (2009) (Townley, Arb.) (vacating discipline for "the absence of clear notice"; the NFL "may not rely on any language similarity between prior rules and new rules as a basis for adequate notice")).

It is undisputed that any punishment of players under the Commissioner's Personal Conduct Policies must be imposed in a manner consistent with the CBA.

E. The public excoriates the NFL for its handling of Ray Rice's discipline

In July 2014, the Commissioner imposed a two-game suspension without pay, plus a one-game fine, on Ray Rice for a highly publicized act of domestic violence involving his then-fiancée. Rice, like Peterson, was a first-time offender under the

NFL's Personal Conduct Policy, and his two-game suspension was the maximum by virtue of the requirement of fair and consistent treatment and the law of the shop. Indeed, as of Rice's arbitration, at least *21* CBA arbitrations had established that "the likely maximum punishment for any conduct categorized as domestic violence was two games." A050 n.4 (*Rice*) (citing 21 precedents involving one- or two-game suspensions). "No prior domestic violence cases reviewed by [Commissioner Goodell] had resulted in discipline of more than two games." A050 (*Rice*).

"The public and media," however, "excoriated the Commissioner for failing to impose harsher penalties." ADD003 n.1; *see* A047 (*Rice*); *see, e.g.*, *NFL Doesn't Take Spousal Abuse Seriously*, MINNEAPOLIS EXAMINER (July 29, 2014);[3] *Ray Rice: Roger Goodell Gives Wrist Slap to a Wife Beater*, TWIN CITIES (July 25, 2014).[4] The public's outrage over "the NFL's perceived lenity" (ADD003 n.1) led to calls for Goodell's resignation and an overhaul of the NFL's approach to domestic violence. *E.g.*, *Keith Olbermann calls for NFL commissioner Roger Goodell to resign*, USA TODAY (A819); *Is Goodell Good Enough to Lead the NFL?* NPR (A810); *Shot From the Hip: Goodell is no good for NFL*, SIFTINGS HERALD (A817); *It's Time For Roger*

[3] http://www.examiner.com/article/nfl-doesn-t-take-spousal-abuse-seriously.

[4] http://www.twincities.com/sports/ci_26215045/ray-rice-roger-goodell-gives-wrist-slap-wife.

Goodell To Resign, ESQUIRE (A823); *NFL needs consciousness-raising campaign on domestic abuse, say Stanford experts*, STANFORD REPORT (Sept. 9, 2014).[5]

Initially, Goodell defended his two-game suspension of Rice as required by CBA precedent, stating: "We have to remain consistent. We can't just make up the discipline. It has to be consistent with other cases, and it was." *Roger Goodell defends Ray Rice ban*, ESPN (Aug. 2, 2014).[6] Similarly, Goodell's counsel, NFL Senior Vice President of Labor Policy & Government Affairs, Adolpho Birch, explained: "[W]e are bound in large part by precedent in prior cases, decisions that have been heard on appeal in the past, and notions of fairness and appropriateness," and "we have to make decisions that are fair and consistent with both the prior case law and the prior precedent," so players "understand the standards of conduct expected of them." *An NFL Executive Failed Miserably When Trying to Explain The Length of Ray Rice's Suspension*, SPORTS NEWS INT'L (A800).

As "the firestorm over Rice's discipline" intensified (ADD003 n.1), however, Goodell backtracked, declaring that his extant Personal Conduct Policy and decisions thereunder were "mistake[s]." A879-A880, A882.

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[5] http://news.stanford.edu/news/2014/september/nfl-domestic-abuse-090914.html.

[6] http://espn.go.com/nfl/story/_/id/11296028/roger-goodell-defends-suspension-ray-rice-baltimore-ravens-running-back.

F. The Commissioner announces a new policy

On August 28, 2014, the Commissioner announced that he would overhaul the Personal Conduct Policy and enhance player punishment for domestic violence, stating: "I take responsibility both for the [Rice] decision and for ensuring that our actions in the future properly reflect our values. I didn't get it right. Simply put, we have to do better. And we will." A027.

Goodell later explained that the New Policy was in fact *new*: It made substantive "changes to [the NFL's] policies" and "changes to [its] discipline." A879. In short, "the Commissioner's own statements … acknowledge that the New Policy included 'changes.'" ADD015.

As the district court observed, "[i]t is undisputed that under the previous Policy, first-time domestic violence offenders faced a likely maximum suspension of two games." ADD004. Under the New Policy, by contrast, first-time domestic violence offenders face a presumptive six-game suspension—a dramatic increase over the one- or two-game suspensions (sometimes less) imposed under similar circumstances. *Compare* A029, A031 (New Policy) *with* A050 & n.4 (*Rice*).

Moreover, the most recent version of the New Policy purports to allow the Commissioner summarily to suspend players without pay by placing them on the Commissioner's "Exempt List" if they are merely "suspected of a violation"—*i.e.*, before any finding that the player has actually engaged in conduct detrimental, and

in violation of a player's CBA right to a hearing. *Compare* A778-A779 ("[i]n cases in which a violation relating to a crime of violence is suspected but further investigation is required, the Commissioner may determine to place a player or other employee on leave with pay") *with* A017 (Player Contract) (discipline may be imposed "only after" the player is given a hearing with the right to counsel).[7]

G. The Commissioner testifies that the New Policy cannot be retroactively applied

When the Commissioner first announced the New Policy, he expressly recognized he could not apply it retroactively. [redacted] it didn't impact on him, [redacted]. He was given his discipline and we moved forward. A452 (*Rice* 101:14-102:9).

Thus, Goodell knew that prior CBA arbitral decisions, constituting the law of the shop, prevented retroactive application of the New Policy to any player whose alleged misconduct predated its announcement. *Infra* at 42.

[7] The NFLPA is currently challenging several aspects of the most recent version of the New Policy (announced in December 2014) in a grievance before another arbitrator. That challenge is not before this Court.

H. The Commissioner tries unsuccessfully to increase Rice's suspension above two games

On September 8, 2014, a previously unseen video of Rice's act of domestic violence was released, reigniting—and amplifying—public outrage towards the NFL and Goodell. Although the video did not reveal anything about Rice's conduct that the Commissioner did not already know (*infra* at 17), he seized the opportunity to try to bolster the NFL's public image by increasing Rice's two-game suspension to an indefinite suspension. A837. This increase in discipline, however, could not survive arbitral review under the CBA.

The NFLPA and Rice appealed his indefinite suspension, maintaining that it constituted impermissible double discipline, that the New Policy could not be retroactively applied to Rice, and that the increased suspension violated the historical two-game maximum suspension under the prior Policy. Former Southern District of New York Judge Barbara Jones was appointed as the hearing officer, heard the appeal, and vacated Rice's indefinite suspension. A062.

Judge Jones found that, contrary to the NFL's arguments, the Commissioner already had all the information necessary to determine Rice's discipline before the release of the September 8 video, and that "any failure on the part of the League to understand the level of violence was not due to Mr. Rice's description of the event." A047, A061-A062. Moreover, "[b]ecause Rice did not mislead the Commissioner and because there were no new facts on which the Commissioner could base his

increased suspension," Judge Jones "f[ound] that the imposition of the indefinite suspension was arbitrary" and vacated it under the CBA. A062.

In addition, as Judge Jones explained, under the prior Personal Conduct Policy, *21 CBA arbitrations* established that "the likely maximum punishment for any conduct categorized as domestic violence was two games," and that "[n]o prior domestic violence cases reviewed by [Commissioner Goodell] had resulted in discipline of more than two games." A050 & n.4. [redacted] *E.g.*, A519 (*Rice* 368:5-13); A472 (*Rice* 179:12-19). Judge Jones thus held that two games was the maximum suspension that the NFL could impose under the prior Personal Conduct Policy. A050 n.4, A061-A062.

Most importantly for this appeal, Judge Jones ruled—consistent with the settled law of the shop—that, as the Commissioner recognized, "even under the broad deference afforded to him through Article 46, he could not retroactively apply the new presumptive penalty to Rice." A061. The Commissioner testified under oath that "[he] needed to be fair and consistent in his imposition of discipline" (*id.*), that the NFL was "required to provide proper notification" of any changes in "discipline" (A452 (*Rice* 99:21-100:15)), and that this was why [redacted]

[redacted] (A452-A453 (*Rice* 101:7-102:13))—it could not be retroactively applied. A052, A061.

The NFL relies on Judge Jones's statement (in dictum) that if the Commissioner had suspended Rice for a longer period in the first place, an arbitrator "would be hard pressed to find that the Commissioner had abused his discretion." Br. 16 (citing A061-A062). But the NFL omits language in the very next paragraph of Judge Jones's opinion, which explains that "even under the broad deference afforded to [the Commissioner] through Article 46, *he could not retroactively apply the* [*N*]*ew* [*Policy's*] *presumptive penalty to Rice*." A061. That is why "the Commissioner called Rice to ensure him that his punishment would remain unchanged." *Id.* That ruling—which tracks a host of prior NFL arbitration decisions—summarizes the law of the shop underpinning the district court's vacatur of the award here.

I. Adrian Peterson's May 2014 corporal punishment incident and the NFL's initial response

On September 11, 2014, a Texas grand jury indicted Adrian Peterson for felony reckless or negligent injury to a child following an act of corporal punishment on May 18, 2014. A667.[8]

[8] Neither the NFLPA nor Peterson disputed that this incident constituted "conduct detrimental" to the League, justifying discipline, provided the discipline imposed was non-retroactive and fair and consistent under the CBA.

After the indictment, the Vikings deactivated Peterson for the September 14 game against the New England Patriots. On September 18, the NFLPA and Peterson reached a non-precedential letter agreement with the NFL, pursuant to which Peterson was placed on the Commissioner's Exempt List. This negotiated status removed Peterson from games and team activities, but permitted him to receive his salary until the pending criminal charges were resolved. A420-A421. Peterson ultimately missed seven games under this agreement.

On November 4, Peterson pleaded *nolo contendere* to a reduced charge of misdemeanor assault. A423-A424. The Texas court issued a deferred adjudication order under which Peterson's misdemeanor charge will be expunged if he complies with a court-ordered counseling program. *Id.*

After the plea, Peterson and the NFLPA understood that Peterson would be removed from the Commissioner's Exempt List and that the Commissioner would determine whether to impose "conduct detrimental" discipline. Instead, the Commissioner ordered that Peterson remain on the Exempt List until the discipline was imposed—in effect punishing Peterson with a further suspension before any disciplinary decision was made. A589.[9] Peterson was ultimately forced to miss two

[9] The NFLPA challenged Peterson's involuntary status on the Commissioner's Exempt List as a breach of the parties' letter agreement, arguing in a grievance that the letter agreement required the Commissioner to remove Peterson from that list after his crim-

weeks and an additional game before the Commissioner determined what his discipline would be, and three more games before his arbitration appeal was decided.

J. NFL Executive Vice President Vincent informs Peterson he can be disciplined only under the prior Personal Conduct Policy, and thus suspended only for two games

Before the Commissioner imposed any discipline, Peterson was contacted by NFL Executive Vice President of Football Operations Troy Vincent. Two of their phone conversations were recorded, and the audio recordings and transcripts are part of the record. A601-A639.

Vincent, who was simultaneously conferring with the Commissioner, informed Peterson that he could be disciplined only under the previous Policy, stating: "[S]o remember this, A.P … today, you're not subject to the new personal conduct policy.… [B]ecause of when this occurred, … they're looking at how they would treat this in the old, like the current policy—not the new, the current." A623-A624. As a result, Vincent explained, Peterson could be suspended for only two games—*i.e.*, the maximum for a first-time domestic violence offender under the previous Policy. Indeed, Vincent even identified the games for which Peterson would be suspended. *E.g.*, A637 ("It was really like this weekend and next weekend.") (Vincent);

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inal charges were resolved. A590. The arbitrator in that proceeding denied the grievance, but expressly limited his holding to interpreting the letter agreement. He did not rule on the validity, under the CBA, of the Commissioner's use of the Exempt List to impose an additional suspension before there was any hearing to determine whether, and how much, discipline should be imposed. A742. That issue is not presented here.

A607 ("N]ow this is the two games, one would be—that includes this weekend."); A608 (same); A636 (same).

K. The Commissioner repudiates his own testimony, Vincent's statements, and the law of the shop, and retroactively disciplines Peterson under the New Policy

Unwilling to face the additional public criticism that might have accompanied a maximum two-game suspension under the Policy in effect at the time of Peterson's misconduct, the Commissioner suspended Peterson indefinitely *under the New Policy*. On November 18, the Commissioner applied the New Policy retroactively and suspended Peterson for "at least the remainder of the 2014 season" (six games), with a loss of six games' pay. ADD028. The Discipline Letter unambiguously states, and the NFL does not dispute, that the Commissioner applied the New Policy: "The modifications to the Personal Conduct Policy that were announced on August 28 establish a baseline discipline of a suspension without pay for six games for certain offenses …. A number of those circumstances are present here." ADD027.

L. The Commissioner designates longtime NFL chief labor executive Harold Henderson to be the Hearing Officer for Peterson's arbitration

The NFLPA and Peterson appealed under Article 46 of the CBA, presenting "the pure legal issue as to whether or not it is permissible, whether it is fair and consistent for the League to retroactively apply the new policy to the May conduct that took place beforehand." A072 (*Peterson* 22:16-20); *see* ADD014-ADD015.

Because it was clear that an NFL-connected arbitrator could not impartially review the conduct and credibility of the Commissioner and other League officials who were involved in the decision to retroactively apply the New Policy to Peterson, the notice of appeal asked the Commissioner to appoint a hearing officer who had no connection to the NFL. A042. Unhappy with the adverse ruling by the impartial arbitrator in *Rice*, the Commissioner refused this request.

Instead, the Commissioner chose Harold Henderson to hear the appeal. The Commissioner made this designation even though, from 1991 to 2012, Henderson served first as the NFL's Executive Vice President for Labor Relations and then as Chairman of Appellant NFLMC's Executive Committee. As chief of labor relations, Henderson was responsible for implementing all NFL labor policies and bargaining against the NFLPA. Since 2012, Henderson has continued to work for the NFL, as President of the NFL Player Care Foundation.[10]

M. The NFLPA unsuccessfully moves to recuse Henderson

Because it was difficult to imagine the selection of a more partial arbitrator under the unique circumstances of Peterson's appeal, the NFLPA moved for Henderson's recusal on the grounds of evident partiality. Specifically, the NFLPA pointed out that Henderson would be required to assess the credibility and effect of

[10] From 2009 to 2012 alone, Henderson received more than $2.5 million in compensation from the NFL. A185, A250, A313, A345.

Goodell's testimony in *Rice* that the New Policy could not be applied retroactively —despite his about-face in applying the New Policy retroactively to Peterson—as well as the propriety of the Commissioner taking this action in response to public pressure calling for his removal. A943-A944.

The NFLPA further pointed out that Henderson would have to adjudicate the effect of NFL Executive Vice President Vincent's representations to Peterson that the New Policy could not be applied retroactively, and whether the NFL imposed the higher penalties of the New Policy in retaliation for Peterson's exercise of his right not to attend a pre-disciplinary meeting with NFL advisors—in violation of the CBA. *Id.* As the recusal motion put it, "unlike in a typical Article 46 appeal, [Henderson] will be called upon to adjudicate issues involving the credibility of both Commissioner Goodell and Mr. Vincent," and the governing evident impartiality test could not be satisfied in those circumstances. A944; A071 (*Peterson* 18:3-19:3). Henderson denied the recusal motion.

N. Arbitrator Henderson's decision ignoring the essence of the CBA

At the hearing, the NFLPA argued that the New Policy could not be retroactively applied to Peterson under the unequivocal law of the shop, which was part of the CBA. A071 (*Peterson* 22:16-20). The Union cited numerous NFL arbitration decisions, including *Rice*, that established this clear law of the shop. *See supra* at

11. The Union further relied on Goodell's sworn testimony in *Rice* that he is "required to provide [players] proper notification" of new disciplinary policies before applying them, and could only apply the New Policy [redacted] A452 (*Rice* 100:13-15; 101:7-13). The NFLPA also submitted recordings and transcripts of NFL Executive Vice President Vincent's statements to Peterson that he could not be disciplined under the New Policy because his conduct predated it. A623-A624.

On December 12, 2014, Henderson issued an award denying Peterson's appeal and upholding the retroactive application of the New Policy. ADD008-ADD010; ADD018-ADD025. Henderson disregarded the established law of the shop and declined to follow Judge Jones's dispositive ruling in *Rice* that the New Policy could not be retroactively applied, claiming only that "[t]hat case differs from this one in that it turned on a second, later discipline." ADD022. Henderson did not address the admissions of Commissioner Goodell and NFL Vice President Vincent that the New Policy could not be applied retroactively. Nor did he analyze the NFL arbitral precedent that predated *Rice*, which established the bar on retroactive discipline.

In addition, Henderson exceeded his authority by deciding an issue not authorized by the CBA or presented by the parties: whether Peterson's discipline could be sustained had it been imposed under the previous Personal Conduct Policy. ADD022. Specifically, his decision sustains the discipline under the previous Policy

even though Commissioner Goodell disciplined Peterson under the New Policy. ADD022. In effect, Henderson imposed his own discipline on Peterson under the previous Policy, even though the CBA gives the Commissioner alone the authority to impose discipline. A526 (*Rice* 396:17-25) (Birch) [redacted].

O. The district court's decision

On December 15, 2014, the NFLPA petitioned the district court to vacate the award. The NFLPA argued that the decision disregarded the essence of the CBA as established by the law of the shop; that Henderson exceeded his authority under the CBA; that Henderson was evidently partial; and that Henderson's award was fundamentally unfair. The case was assigned to Judge David Doty.

In February 2015, following briefing and argument, Judge Doty vacated the arbitration award. He began by noting that courts give the decisions of labor arbitrators "substantial deference," and will not overturn them if "the arbitrator is even arguably construing or applying the [CBA] and acting within the scope of his authority." ADD010. Nonetheless, Judge Doty found that this case involved the unusual situation in which the arbitral award must be set aside because it "fail[ed] to 'draw its essence' from the agreement'" and, alternatively, "decide[d] matters … not submitted to [the arbitrator]." ADD010-ADD011.

Specifically, Judge Doty held that the award should be vacated because: (1) it "violate[d] the essence of the CBA" by "ignor[ing] established law of the shop, namely, that the New Policy may not be retroactively applied"; and (2) Henderson "exceeded his authority by adjudicating the hypothetical question of whether Peterson's discipline could be sustained under the previous policy." ADD011-ADD012, ADD014. In reaching his conclusion, Judge Doty applied settled Eighth Circuit precedent, including *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416 (8th Cir. 1986), *Bureau of Engraving, Inc. v. Graphic Commc'ns Int'l Union*, 164 F.3d 427 (8th Cir. 1999), and *John Morrell & Co. v. Local Union 304A of the United Food & Commercial Workers*, 913 F.2d 554 (8th Cir. 1990).

STANDARD OF REVIEW

In reviewing a district court's decision to vacate an arbitration award, this Court reviews factual findings for clear error and decides legal questions *de novo*. *Boise Cascade Corp. v. Paper Allied-Indus.*, 309 F.3d 1075, 1080 (8th Cir. 2002).

SUMMARY OF ARGUMENT

The district court's decision to vacate Henderson's award should be affirmed. In disregarding Goodell's repeated admissions and numerous NFL arbitration decisions prohibiting retroactive discipline of players—the unequivocal "law of the shop"—that award failed to draw its essence from the CBA. Further, Henderson

exceeded his authority by deciding an issue not presented to him—whether the *previous* Policy could hypothetically support the discipline of Peterson—and in a manner that conflicted with Goodell's repeated admissions that the New Policy imposed much stricter punishment.

I. Under longstanding Supreme Court and Eighth Circuit precedent, labor arbitrators may not confine their decisions "to the express provisions of the contract." *Trailways*, 807 F.2d at 1423 n.12 (quoting *Warrior & Gulf*, 363 U.S. at 581-582). Rather, "the practices of the industry and the shop" are "equally a part of the [CBA]," and "courts have no choice but to refuse enforcement of [an] award" that "ignores the law of the shop" and thereby fails to "draw its essence from the [CBA]." *Id.* at 1421 (quoting *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)); *id.* at 1423-24.

As the district court recognized, Henderson's award "simply disregarded the law of the shop." ADD014. That authority included Judge Jones's ruling in *Rice*, based on Goodell's own testimony, that the Commissioner "is 'required to provide proper notification'" and "could not retroactively apply the [N]ew [Policy's] presumptive penalty." A052, A061. The *Rice* decision is just the latest of many "prior NFL arbitration decisions" that "unequivocally recognized that [new disciplinary policies] cannot be applied retroactively, notwithstanding the Commissioner's broad discretion in meting out punishment under the CBA." ADD013 & n.4. As Judge

Doty explained, "[e]ven leaving the *Rice* decision aside, it is not seriously contested that the Commissioner understood he was constrained to apply the New Policy prospectively." ADD014. Yet one searches Henderson's award in vain for any analysis of this law of the shop, of why any differences between this case and those cases "would justify a different result," or of Goodell's testimonial admissions that retroactive application was barred. ADD013.

II. Beyond Henderson's disregard of the law of the shop, affirmance is warranted on the basis that he exceeded his authority in deciding whether the same discipline could have been imposed on Peterson under the previous Policy. Labor arbitrators may decide only what the CBA permits. They may not "fashion a remedy" that the CBA does not allow (*N. States Power Co. v. Int'l Bhd. of Elec. Workers*, 711 F.3d 900, 903 (8th Cir. 2013)), and they may not "alter[] the issue[s] for decision" (*Trailways*, 807 F.2d at 1424) as "the parties have framed the[m]" (*John Morrell*, 913 F.2d at 561).

II.A. As the district court recognized, however, Henderson "strayed beyond the issues submitted to him" and authorized by the CBA. ADD014-ADD015. "There is no dispute that the Commissioner imposed Peterson's discipline under the New Policy" (ADD012), and "[n]othing in the record supports a finding that the NFLPA asked Henderson to determine whether the discipline imposed was consistent with the previous Policy" (ADD015). Indeed, the CBA places the authority

to discipline players "exclusively" in the Commissioner (A009 § 1(a)), and the NFL admits that arbitrators may [redacted] the discipline that the Commissioner imposes—not determine the issue of discipline anew. A526 (*Rice* 396:17-25). But that is just what Henderson did, thereby exceeding his authority under the CBA.

II.B. Further, Henderson himself acknowledged that, "[a]s framed by the player's counsel, 'what we have here is the *pure legal issue* as to whether it is permissible, whether it is fair and consistent for the league *to retroactively apply the new policy* to the May conduct that took place beforehand.'" ADD020. Thus, Henderson was authorized to "decide *that* issue" alone. ADD015 (emphasis in original). But instead of limiting himself to that "'pure legal issue,'" he declared "that the New Policy was consistent with its prior iterations and that the discipline imposed 'fits either or both'" policies. ADD009, ADD015. Henderson thus exceeded his authority.

The NFL's contrary view relies on the NFLPA's statements that *the Commissioner* must apply the prior Policy, and on *oral* snippets from the arbitration hearing. Br. 35-36. Read in context, however, those statements did not ask *Henderson* to decide the question of Peterson's discipline *afresh*, under the prior Policy. Moreover, as the district court explained, "Henderson's conclusion that the New Policy is

consistent with the previous Policy is contradicted by the Commissioner's own statements in which he acknowledged that the New Policy included 'changes' to the [previous] Policy." ADD015.

III. Having ruled in favor of the NFLPA on both grounds discussed above, Judge Doty did not reach the NFLPA's two other grounds for vacatur: Henderson's evident partiality and the fundamental unfairness of the proceedings. ADD016. Contrary to the NFL's arguments, however, those issues are neither "purely legal" nor "foreclose[d]" by Eighth Circuit precedent. Br. 39. Rather, both issues warrant further factual development, and this Court typically deems it "inappropriate" to examine issues "when the district court did not make [factual] findings because it did not reach the question." *Bank of Am., N.A. v. UMB Fin. Servs., Inc.*, 618 F.3d 906, 914 (8th Cir. 2010). Should this Court decide to reach these issues, however, even the current record supports affirmance on these alternative grounds.

III.A. An arbitrator is evidently partial if he "'objectively demonstrate[s] such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives.'" *Williams v. NFL*, 582 F.3d 863, 885 (8th Cir. 2009). That standard is amply satisfied here.

Although Henderson is a senior NFL insider—he was the longtime chief labor negotiator bargaining against the NFLPA and even today retains significant profes-

sional and financial ties to the League—that is *not* the basis for the NFLPA's challenge to his evident partiality. As the NFL acknowledges (Br. 41), the NFLPA has not sought Henderson's recusal in "dozens of [prior] appeals" and recognizes that, in many cases, the Commissioner has the authority under Article 46 to appoint arbitrators with ties to the League.

In this particular case, however, Henderson's evident partiality stems from the atypical fact that Peterson's appeal required Henderson to adjudicate the testimony, prior commitments, and ultimately the credibility of Commissioner Goodell and NFL Executive Vice President Troy Vincent—Henderson's colleagues and benefactors. Most notably, this case pitted Goodell's express testimony in *Rice* that he could not apply the New Policy retroactively against his about-face in doing exactly that to Peterson. Henderson also had to pass judgment on Vincent's repeated admissions that the League could apply only the previous Policy to Peterson, and thus could suspend him for only two games.

These and other unique issues required Henderson to determine the *credibility* of top league executives with whom he has worked day-in, day-out for years. Such circumstances could not have been anticipated by the Union at the time of bargaining, and they rendered Henderson an evidently partial arbitrator in this case.

III.B. This Court may also affirm on the basis of fundamental fairness. Although this Court has yet to formally recognize fundamental unfairness as a basis for

vacating an arbitral award, it should follow the other circuits that have done so. The Commissioner's retroactive application of the New Policy to Mr. Peterson was patently unfair, and defies the most basic notions of fundamental fairness. Federal courts should not become parties to the enforcement of awards that fail to meet even the most minimal standards of notice and fair process.

ARGUMENT

I. The District Court Correctly Vacated Henderson's Award Because It Disregarded Both the Commissioner's Testimonial Admissions and the Parties' Law of the Shop, and Thus Failed to Draw Its Essence from the CBA.

Although the NFL makes much of the deference that courts afford to labor arbitration awards (Br. 21-23), such deference has no application where, as here, the award fails to draw its essence from the CBA. *E.g.*, *Trailways*, 807 F.2d at 1421. Indeed, Judge Doty expressly acknowledged the principle of arbitral deference (ADD010), but correctly held that, in this particular case, the principle must give way under longstanding precedent holding that "courts have no choice but to refuse enforcement of [an] award" that fails to "draw its essence from the collective bargaining agreement." *Trailways*, 807 F.2d at 1421 (quoting *Enter. Wheel*, 363 U.S. at 597).

Further, although one would not know it from the NFL's brief, labor arbitrators may not confine their decisions "to the express provisions of the contract." *Id.* at 1423 n.12 (quoting *Warrior & Gulf*, 363 U.S. at 581-82). Rather, "the industrial common law—the practices of the industry and the shop—is equally a part of the [CBA] although not expressed in it." *Id.* Applying this principle, this Court and others have repeatedly held that arbitration awards should not be enforced when they depart from or "ignore[] the law of the shop." *E.g.*, *id.* at 1423, 1421 (collecting authorities); *Bureau of Engraving*, 164 F.3d at 430 (vacating arbitral award that

"cannot find support in the parties' past practices"); *Int'l Woodworkers v. Weyerhaeuser Co.*, 7 F.3d 133, 136 (8th Cir. 1993).

Henderson improperly disregarded the "established law of the shop"—which "unequivocally recognized that the New Policy cannot be applied retroactively, notwithstanding the Commissioner's broad discretion in meting out punishment under the CBA." ADD013. Indeed, as the district court recognized, Judge Jones's decision on this point in *Rice* was consistent with a host of "prior NFL arbitration decisions recognizing the importance of notice in advance of discipline." ADD013 n.4 (citing the *Langhorne*, *Coles*, *Brown*, and *Bounty* decisions). Because "[t]here is no dispute that the Commissioner imposed Peterson's discipline under the New Policy" (ADD012), the district court was compelled to vacate the award.

Remarkably, the NFL ignores this established law of the shop, mentioning it only *once*, when summarizing Judge Doty's decision. Br. 17. But Henderson's decision contravened the plain law of the shop, leaving the district court with "no choice but to refuse enforcement of the award." *Enter. Wheel*, 363 U.S. at 597.

A. Labor arbitration precedents become law of the shop and part and parcel of collective bargaining agreements.

It is an "established arbitral principle that '[a]n award interpreting a [CBA] usually becomes a binding part of the agreement and will be applied by arbitrators thereafter.'" *Trailways*, 807 F.2d at 1425 (quoting Elkouri & Elkouri, *How Arbitration Works* 425 (BNA, 4th ed. 1985)). Because labor negotiations cannot foresee all

possible disputes under negotiated agreements, they inevitably leave "[g]aps … to be filled in" by the grievance and arbitration systems. *Warrior & Gulf*, 363 U.S. at 580-81. The "processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *Id.* at 581.

It follows that any arbitrator "construing [a] collective bargaining agreement … must take into account any existing common law of the particular plant or industry, for it is *an integral part of the contract*." *Norfolk Shipbuilding & Drydock Corp. v. Local No. 684 of Int'l Bhd. of Boilermakers*, 671 F.2d 797, 799-800 (4th Cir. 1982). Significantly, this Circuit has cautioned that, "[i]f an arbitrator does not accord any precedential effect to a prior award … it is questionable when, if ever, a 'final and binding' determination will evolve from the arbitration process." *Trailways*, 807 F.2d at 1425-26.[11]

[11] That the law of the shop must be adhered to as a part of a CBA is Labor Law 101. *See*, *e.g.*, International Labor and Employment Laws, 33c-76 (William L. Keller et al. eds., 3d ed. 2008) ("[A] majority of the substantive rules and principles used in labor arbitration largely have been based on 'the law of the shop,' as gradually formulated by arbitrators in individual cases construing the terms of the parties' collective bargaining agreement"); *id.* 33c-77 ("[G]uided by the contract and other substantive arbitral principles, the arbitrator will issue his or her written decision, called an 'award,' which (in most cases) is final and binding on both parties (including individual employees in the bargaining unit).").

As demonstrated below, the district court appropriately held that Arbitrator Henderson, in sustaining the retroactive discipline, disregarded these long-standing principles, defying the law of the shop and the essence of the CBA.

B. Arbitrator Henderson disregarded the CBA law of the shop barring retroactive application of the New Policy to Peterson.

1. As the district held, the established law of the shop here "unequivocally recognized that the New Policy cannot be applied retroactively, notwithstanding the Commissioner's broad discretion in meting out punishment under the CBA." ADD013; *supra* at 25-26. The law of the shop barring retroactive discipline includes not only Judge Jones's recent decision in *Rice* (2014), but also the *Bounty* (2012), *Brown* (2010), *Coles* (2009), and *Langhorne* (1994) decisions. ADD013 n.4 (citing these "prior NFL arbitration decisions" as "recognizing the importance of notice in advance of discipline"). Moreover, Commissioner Goodell himself expressly acknowledged this law of the shop when he testified in *Rice* that the New Policy may not be retroactively applied to players. A052 (quoting A452 (*Rice* 100:13-15)); *see also* A813 (Goodell's public statement that "[w]e can't just make up the discipline. It has to be consistent with other cases"); A800 (Birch's public statement that "we are bound in large part by precedent in prior cases, decisions that have been heard on appeal in the past," and "we have to make decisions that are fair and consistent"); *supra* at 18.

Arbitrator Henderson wrongfully sidestepped all of this. Although he noted the existence of *Rice*, he proceeded to ignore its holding on the basis that *Rice* also involved a double jeopardy issue not present here. ADD021-ADD022. But as Judge Doty found, "[a]lthough Henderson purported to rely on factual differences between *Rice* and this case, he did not explain how those differences would justify a different result." ADD013. Indeed, Henderson's purported factual distinction–that *Rice* involved a double jeopardy issue—was no distinction at all, and Henderson could not deny *Rice*'s holding that the New Policy may not be retroactively applied. *Cf. Konradi v. United States*, 919 F.2d 1207, 1212 (7th Cir. 1990) ("every case is factually different from every other case," but "unless the factual differences between [two cases] are connected with a difference in principle," there "is no warrant for refusing to follow [the first case] in th[e] [second] case").

Judge Jones's decision in *Rice* held *three separate times* that the New Policy could not be applied retroactively:

- "Recognizing that even under the broad deference afforded to [Commissioner Goodell] through Article 46, he could not retroactively apply the new presumptive penalty [under the New Policy] to Rice, the Commissioner called Rice to ensure him that his punishment would remain unchanged."
- "Despite recognizing that the original policy was inadequate, the Commissioner never considered changing Rice's discipline because '[he] gave him the discipline, [he] felt it was appropriate.' The policy change was forward looking because the League is 'required to provide proper notification.'"

- "After the policy change, [the Commissioner] called Rice and made clear to him that 'it didn't impact on him … He was given his discipline and we moved forward.'"

A061, A052. *Rice* thus created "final and binding" law of the shop on this issue.

The *Rice* decision was grounded not only in past arbitration precedent, but in Goodell's *own* admissions that principles of notice and past practice barred him from applying "the new presumptive penalty" to earlier conduct. A052, A061. For example, Goodell testified that [redacted] '*required* to provide proper notification." A052 (quoting A452 (*Rice* 100:13-15)); *accord* A452 (*Rice* 101:7-102:9). And as the district court recognized, Henderson failed to address Goodell's admissions or "explain why the well-recognized bar against retroactivity did not apply to Peterson." ADD013.

Under this Court's precedents, that was fatal to the award. Arbitrators may not "ignore[] the law of the shop." *Trailways*, 807 F.2d at 1423. Indeed, "courts have vacated awards solely because of the arbitrator's failure to consider" this "extremely relevant source of common law[]." *Id.* None of Judge Jones's retroactivity holdings—and none of Goodell's sworn admissions confirming the same principles—were even acknowledged by Henderson. Instead, Henderson's award refused to apply the law of the shop or Goodell's testimony that the CBA "required" him to apply the New Policy only prospectively.

2. *Rice* was simply the latest in a long line of NFL arbitral decisions establishing the CBA prohibition against retroactive punishment. In the *Bounty* arbitration, for example, former NFL Commissioner Paul Tagliabue, serving as an Article 46 arbitrator, "vacate[d] all discipline to be imposed on [four New Orleans Saints]," principally because they did not receive notice of their potential punishments. A382. As Tagliabue explained, "a sharp change in sanctions or discipline can often be seen as arbitrary," and players must have "a clear understanding that [particular] behavior is prohibited" and "where the lines are between permissible and impermissible conduct." A386, A395.

Tagliabue chronicled how the NFL historically had provided not only advance notice of changed player disciplinary policies, but sometimes even "a short-term exemption from discipline" to ensure prior notice of the changes. A388, A387. For example, when steroids became an issue, then-Commissioner Pete Rozelle "warned one-year in advance that a discipline policy suspending players for steroid use would be implemented the following season." A388. Yet, he "withh[eld] player discipline" that year and advised players "by letter of the specific disciplinary actions" some "[f]our months prior to [their] enforcement." *Id.*

As Tagliabue found, the NFL has previously recognized that, under the CBA, "sometimes it is necessary to clarify the rules—make sure everyone understands; postpone discipline for a while, not forever, but maybe for a season; and then enforce

the rules with strict discipline." *Id.* Applying this CBA prohibition against retroactivity, Tagliabue vacated the players' suspensions as inconsistent with the NFL's settled law of the shop. A393 ("previous NFL punishment for obstruction suggests that a seven-game suspension is unprecedented"); A394 ("the League has tolerated this behavior without punishment of players"); A397 (the NFL "has disciplined clubs—but not players—for non-compliance"); A398 ("the NFL's decision to suspend a player here for participating in a program for which the League typically fines a club certainly raises significant issues regarding inconsistent treatment"). Yet Henderson never cited, let alone analyzed, the *Bounty* decision. *But see Peterson* A069 (9:21-10:11), A073 (24:18-25:18), A090 (94:19-95:1), A092 (103:16-23) (discussing *Bounty* and submitting opinion to Henderson).

Several NFL arbitral decisions in recent decades further establish that the CBA bars retroactive player discipline. In the 2009 *Coles* arbitration, for example, a player was disciplined for violating Club Rules for which he did not have prior notice. The NFL sought to defend this retroactive discipline by arguing that the absence of notice of the relevant "weigh-in" rule was "of little consequence" because "the only real difference between the [prior and new rules] was the amount of the maximum fine." A241. But the arbitrator rejected that view as "not persuasive," explaining that "even if there were no difference" between the new and old rules, the NFL "may not rely on any language similarity between prior rules and new rules

as a basis for [failing to give] adequate notice." *Id.* Thus, "the absence of clear notice" and the "longstanding practice" of treating similar conduct more leniently required vacating the discipline. A245. Here too, *Coles* was submitted to Henderson (A073 (*Peterson* 26:24-27:7)), but he made *no* attempt to reconcile it with his contrary decision.

Henderson also disregarded the 2010 *Brown* arbitration. As the arbitrator there summarized the law of the shop: "A rule must clearly and unambiguously establish the scope of prohibited conduct, *as well as the consequences of violations*, in order to be enforceable." A297.[12] And since the player "did not receive adequate notice" of the new rule at issue, his discipline was vacated. A299, A303.

Finally, more than twenty years ago, the arbitrator in *Langhorne* reached the same conclusion and vacated a team's conduct detrimental discipline because the grievant was "deprived" of "notice as to what consequences would flow from his [action]." A142. As the arbitrator held, "[a]ny disciplinary program requires that individuals subject to that program understand, with reasonable certainty, what results will occur if they breach established rules." *Id.* Applying new disciplinary rules to players without notice violates the law of the shop.

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[12] This binding CBA rule was derived from black letter labor law: "An employee must receive clear notice of both what the employer expects as well as the range of penalties that may be imposed." Elkouri, *supra*, 15-71 (Kenneth May et al. eds., 7th ed. 2012).

As this substantial body of CBA authority demonstrates, the district court correctly held that the "established law of the shop" requires advance notice of new disciplinary policies and prohibits retroactive discipline. ADD013 n.4 (citing *Langhorne*, *Coles*, *Brown*, and *Bounty*). Indeed, this is an *a fortiori* case under the CBA. Not only is Peterson's discipline more severe than in *Coles*, *Brown*, and *Langhorne*, but Commissioner Goodell "acknowledged that he did not have the power to retroactively apply the New Policy: 'The policy change was forward looking because the League is 'required to provide proper notice.'" ADD013. As Judge Doty concluded: "Even leaving the *Rice* decision aside, it is not seriously contested that the Commissioner understood he was constrained to apply the New Policy prospectively. Henderson simply disregarded the law of the shop and in doing so failed to meet his duty under the CBA." ADD013-ADD014.

The NFL twists Judge Doty's finding that Henderson "did not explain" his decision into an argument that the district court vacated the award *because of* a lack of explication. Br. 25-27. But as the quotation above shows, Judge Doty held that Henderson fundamentally "*disregarded* the law of the shop," as confirmed by Goodell's admissions, and simply noted Henderson's lack of explanation as further support for this conclusion. ADD013-ADD014. Such disregard for the law of the shop demands vacatur. *Trailways*, 807 F.2d at 1421.

3. The stark contrast between the vacated award and the NFL's principal authority, *American National Can v. United Steelworkers*, 120 F.3d 886 (8th Cir. 1997), is instructive. There, management argued that the arbitrator failed to follow arbitral precedent in barring the company from transferring work to a non-unionized plant. *Id.* at 887. This Court upheld the award, finding that the arbitrator reviewed "numerous prior arbitration awards" and "carefully considered [the] argument that the … issue was controlled by two [such] awards." *Id.* at 890. The arbitrator "specifically identified … critical factual differences between the arbitral decisions cited by [the company] and the case before him," including "the amount of work" and "money involved," "the number of bargaining unit jobs affected," "the capability of the bargaining unit employees to perform the subject work," and the "permanent" nature of the "transfer of work." *Id.* at 890, 892. The arbitrator ultimately determined that "no reasonable or proper comparison [could] be made" between the case before him and "the two prior decisions," and thus concluded that the latter should receive "no preclusive effect." *Id.* at 888, 892. Because the arbitrator did not summarily disregard the law of the shop—rather, he carefully considered it—the award was confirmed. *Id.* at 892. But the Court expressly reaffirmed that it will not confirm the award of an arbitrator who does not "seriously consider the potential preclusive effect of [a] prior award, *despite the apparent identity of material facts*." *Id.* at 891-92.

Here, Henderson simply disregarded the law of the shop. He did not engage the extensive body of "prior NFL arbitration decisions recognizing the importance of notice in advance of discipline" and barring retroactive discipline. ADD013 & n.4. He thus made the same error as the arbitrator in *Trailways*. Here, as there, the prior awards involved "the same company, the same union, … the same issue, and interpretation of the same contract." 807 F.2d at 1425-26. And here, as there, Henderson "did not discuss the similar nature of the [prior] grievances and why, in light of this fact, the [prior] award was not to be given preclusive effect." *Id.* at 1425; *see also* Elkouri, *supra*, 11-15 (7th ed.) ("where a prior decision involves the interpretation of the identical contract provision, between the same company and union, every principle of common sense, policy, and labor relations demands that it stand until the parties annul it by a newly worded contract provision"); *Alcan*, 729 F.3d at 842 ("the hallmarks of an honest judgment that drew its essence from the agreement" include "consult[ing] decisions interpreting similar contracts, and squarely address[ing] the parties' arguments").[13]

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[13] Precedential opinions bind the parties in subsequent disputes with "'strict factual identities'" (*Trailways*, 807 F.2d at 1425), but "'[s]trict factual identit[y]' does not mean that the specific facts underlying the grievances must be identical." *Wilbur Chocolate Co. v. Bakery, Confectionary & Tobacco Workers' Int'l Union, Local 464*, No. 86-5479, 1988 WL 33881, at *4 (E.D. Pa. Mar. 31, 1998), *aff'd mem.*, 862 F.2d 312 (3d Cir. 1988). Rather, the factual circumstances need only be "substantially similar." *Oil Workers Int'l Union v. Ethyl Corp.*, 644 F.2d 1044, 1050 (5th Cir. 1981); *see*

Indeed, Henderson's decision to ignore Commissioner Goodell's sworn admission that the New Policy could not be retroactively applied—a fact argued extensively by the NFLPA—demonstrates even greater disregard for the essence of the parties' agreement than the award vacated in *Trailways*. "[A party] must be bound by his own testimony and admissions against interest," and "cannot … be heard by a court to deny today what he solemnly swore was true on yesterday, without some explanation or excuse." *State Farm Mut. Auto. Ins. Co. v. Bonacci*, 111 F.2d 412, 419 (8th Cir. 1940). Thus, even apart from the law of the shop, Goodell's admissions independently warrant affirmance.

In sum, by vacating the award, the district court did not "substitute its own judgment" or "its own factual findings" for Henderson's. NFL Br. 28, 33. Rather, the court correctly concluded that Henderson "disregarded the law of the shop and in doing so failed to meet his duty under the CBA." ADD014.

C. The NFL's "traditional retroactivity principles," which derive from a case involving retroactive *statutory* application, are irrelevant to the CBA law of the shop.

Citing *Landgraf v. USI*, 511 U.S. 244, 269-70 (1994), the NFL asserts that "Peterson's punishment was not 'retroactive' at all" under "traditional retroactivity principles." Br. 24, 28. But *Landgraf* was not presented to Henderson, and for good

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also Trailways, 807 F.2d at 1425 (denouncing arbitrator's failure to discuss the "similar nature" of the grievances).

reason: It involved *statutory* retroactivity. Indeed, the NFL cites *not one* CBA authority in support of its retroactivity position.[14] But this case is governed by the parties' CBA, and the decisions interpreting it. Henderson's disregard for the law of the shop cannot be overcome by cases interpreting the U.S. Code.

Specifically, *Landgraf* involved the question of whether Congress's 1991 amendments to Title VII—amendments that created a right to recover certain damages—applied retroactively to cases pending when the amendments were passed. 511 U.S. at 249-50. That decision has nothing to do with retroactive discipline of employees under collective bargaining agreements, let alone this CBA.

In any event, the test stated in *Landgraf*—that "[a]pplication of a new rule to past conduct operates 'retroactively' only when it imposes 'new legal consequences' for past conduct" (*id.* at 269-70)—supports affirmance. Peterson *was* subjected to "new legal consequences" for his actions. Further, *Landgraf*'s "new legal conse-

[14] The NFL cites a prior decision by Henderson for the proposition that the Commissioner "is not forever bound to historical precedent." Br. 29. But this statement has nothing to do with the bar on retroactivity, and could not undermine the longstanding CBA requirement of "fair and consistent" discipline. Further, Goodell and other senior NFL executives have themselves acknowledged that they are bound by historical precedent. A813 (Goodell) ("[w]e can't just make up the discipline. It has to be consistent with other cases"); A800 (Birch) ("we are bound in large part by precedent in prior cases, decisions that have been heard on appeal in the past").

quences" analysis is to be tempered by "familiar considerations of fair notice, reasonable reliance, and settled expectations," and "prospectivity remains the appropriate default rule." *Id.* at 269-70, 272.

As the Court stressed, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" *Id.* at 265. Even when a statute increases the penalty for conduct that was already subject to liability, "[t]he *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." *Id.* at 283-84 (emphasis in original) (concluding the Court had never "read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment"); *contra* NFL Br. 28-29. And "a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Landgraf*, 511 U.S. at 283 n.35.

Thus, although *Landgraf* has no bearing on the CBA law of the shop disregarded by Henderson, the Court's conclusions are entirely consistent with *Rice*, *Coles*, *Brown*, *Langhorne*, and *Bounty*.

II. This Court May Also Affirm on the Independent Ground that the Arbitrator Exceeded His Authority.

This Court can and should also affirm based on the district court's holding that Henderson exceeded the scope of his authority under the CBA in adjudicating discipline under the previous Policy that the Commissioner never imposed on Peterson. The NFL acknowledges that an arbitration award must be vacated when an arbitrator exceeds his authority. Br. 34. Henderson did so in two respects.

First, labor arbitrators such as Henderson may decide only what the CBA permits. *Midwest Div.-LSH, LLC v. Nurses United for Improved Patient Care*, 720 F.3d 648, 650 (8th Cir. 2013) ("An arbitrator's authority derives from and is limited by the CBA."); *Beardsly v. Chicago & N.W. Transp. Co.*, 850 F.2d 1255, 1270-71 (8th Cir. 1988) ("When [the arbitrator] is no longer carrying out the agreement … he has exceeded his jurisdiction."). For example, an arbitrator exceeds his authority by "fashion[ing] a remedy" that the CBA does not allow. *N. States Power Co.*, 711 F.3d at 903. Nor may an arbitrator "disregard th[e] unambiguous [CBA] language and craft her own remedy" or "dispense his own brand of industrial justice." *Mo. River Servs., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848, 855 (8th Cir. 2001); *accord Enter. Wheel*, 363 U.S. at 597. In short, an arbitrator must "stay[] within the areas marked out for his consideration" under the CBA. *Enter. Wheel*, 363 U.S. at 598.

Second, an arbitrator may decide the issues only as "the parties have framed the[m]." *John Morrell*, 913 F.2d at 561. "[A]rbitration is a matter of contract, and

a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf*, 363 U.S. at 582. Otherwise, parties are improperly subject to "arbitration by ambush." *John Morrell*, 913 F.2d at 560. The parties must "explicitly giv[e] [the arbitrator] authority to act" (*id.* at 561), and the arbitrator may not "alter[] the issue for decision" (*Trailways*, 807 F.2d at 1424).

A. Henderson exceeded his CBA authority by adjudicating discipline under the previous Policy that the Commissioner never imposed.

Article 46 of the CBA provides that the authority to discipline players for conduct detrimental to the NFL rests "exclusively" in the Commissioner. A009 § 1(a). Moreover, it is undisputed that this provision "'demonstrates the parties' intent that the Commissioner, and only the Commissioner, will make the determination of conduct detrimental.'" A060 (*Rice*). [redacted]

A526 (396:17-25).

Here, "[t]here is no dispute that the Commissioner imposed Peterson's discipline under the New Policy." ADD012; ADD028. Thus, the *only* issue that Henderson could adjudicate was whether Peterson was properly subjected to an indefi-

nite suspension and a six-game check fine under the New Policy. Instead of confining himself to this role, Henderson ruled that the Peterson discipline was justified under the previous Policy, even though the Commissioner had not imposed any discipline on Peterson under that Policy.[15] ADD022; ADD009. This alternative basis for Henderson's decision clearly exceeded his authority under the CBA, which permitted him [redacted] (A526 (*Rice* 396:17-25)), not to impose discipline of his own.

B. Arbitrator Henderson also exceeded his authority by deciding an issue not presented to him.

In addition to ruling on hypothetical discipline never imposed by the Commissioner, Henderson recast "how the parties … framed the issue." *John Morrell*, 913 F.2d at 561. But a labor arbitrator has no authority to render an award which "alter[s] the issue for decision." *Trailways*, 807 F.2d at 1424; ADD015.

Here, "[t]he NFLPA identified the issue[] presented as … whether the Commissioner impermissibly applied the New Policy to Peterson," and the district court

[15] In fact, Henderson never decided the issue submitted by the NFLPA, instead concocting an extra-contractual scenario in which he personally could craft discipline under the previous Policy. *Compare Int'l Paper Co. v. United Paperworkers Int'l Union*, 215 F.3d 815, 818 n.1 (8th Cir. 2000) (affirming vacatur) ("[The arbitrator] never answered the framed question "yes" or "no."); *id.* ("The real issue [was] avoided by the arbitrator but clearly within and the object of his statement of the issue …. [Instead, t]he arbitrator did not interpret the contract, he rewrote it.").

found that "[n]othing in the record supports a finding that the NFLPA asked Henderson to determine whether the discipline imposed was consistent with the previous Policy." ADD008, ADD015. Henderson acknowledged as much, stating: "As framed by the player's counsel, 'what we have here is the *pure legal issue* as to whether it is permissible, whether it is fair and consistent for the league *to retroactively apply the new policy* to the May conduct that took place beforehand.'" ADD020 (quoting A072 (*Peterson* 22:16-20)); *accord* ADD014-ADD015. Even the NFL ultimately admits that "the NFLPA asked the Hearing Officer to determine 'whether the New Policy could be applied retroactively.'" Br. 37. Accordingly, the CBA limited Henderson to "'decid[ing] *that* issue'" alone, and his failure to do so warranted vacatur. ADD015 (emphasis in original) (quoting *Local 238 Int'l Bhd. of Teamsters v. Cargill, Inc.*, 66 F.3d 988, 990-91 (8th Cir. 1995)).

To challenge this ruling, the League says the NFLPA's "notice of appeal to the Commissioner"—which stated that "any punishment must be assessed and imposed consistent with the Policy and practices prior to August 28"—"is tantamount to a request 'to determine whether the discipline was consistent with the previous Policy.'" Br. 35 (emphasis omitted). But this was simply a statement to the Commissioner that *he* had applied the wrong Policy. It was not an invitation to *the arbitrator* (who had not yet been designated) to adjudicate discipline under the previous Policy that the Commissioner never imposed.

Aware of this difficulty, the NFL cites out-of-context *oral* snippets from the NFLPA's counsel at the hearing before Henderson. Br. 35 ("[t]o be fair and consistent, you must apply the old policy" (quoting *Peterson* A073 (27:22-23)); "the penalty should be a two-game suspension" (quoting A080 (55:17-18)); "the legal errors required [that] the suspensions be overturned as they—I shouldn't say 'overturned,' that they be reduced to two games time served and two game checks" (quoting A099-A100 (131:24-132:2))). But all agree that it is the NFLPA's position that, under the law of the shop, the CBA's requirement of "fair and consistent" treatment required the Commissioner to apply the previous Policy to Peterson's behavior, and that this would have resulted in at most a two-game suspension. A053 (*Rice*), A050 n.4; *see also supra* at 17 (discussing 21 prior decisions imposing a one- or two-game suspension in first-time offender domestic violence cases). Read in context, these statements in no way invited Henderson (or gave him authority) to apply discipline under the previous Policy. Only the Commissioner could have done so.

It is also no answer for the NFL to argue "no harm, no foul" on the erroneous premise that the previous and New Policy are the same. As the district court recognized, "Henderson's conclusion that the New Policy is consistent with the previous Policy is contradicted by the Commissioner's own statements in which he acknowledged that the New Policy included 'changes' to the Policy." ADD015. Henderson

ignored the Commissioner's admissions, but they foreclose any claim that the Policies are really the same: "And that's why we came out last month and said: we're going to make *changes to our policies. We made changes to our discipline.*" ADD015 (quoting A879); *see also* A444 (*Rice* 66:20-67:6) (NFL counsel) [redacted]. Indeed, the NFL's "no change" argument is nonsensical given the many textual changes between the two Policies, most notably including the addition of a presumptive six-game suspension for first-time domestic violence offenders.

In short, by deciding something other than "the *pure legal issue* as to whether it is permissible, whether it is fair and consistent for the league *to retroactively apply the new policy*'" (ADD020), Henderson violated the rule that arbitrators may not change "how the parties … framed the issue." *John Morrell*, 913 F.2d at 561. This Court should therefore affirm.

III. The NFLPA's Other Alternative Grounds for Vacating Henderson's Award Warrant Further Factual Development in the District Court, but, if Reached, Support Affirmance Even on This Record.

A. If the Court does not affirm the Order, it should remand for fact-finding on the issues not reached below.

Having vacated Henderson's award on other grounds, the district court did not reach the NFLPA's arguments for vacatur based on evident partiality and fundamental fairness. ADD016. According to the NFL, these arguments are "purely legal" and are "foreclose[d]" by Eighth Circuit precedent. Br. 39. Not so. Both issues are

fact-dependent and should be resolved in the first instance by the district court. *See Montez v. Prudential Secs., Inc.*, 260 F.3d 980, 983-84 (8th Cir. 2001) (discussing the facts of an evident partiality claim and noting that "findings of facts are reviewed for clear error").

This Court routinely finds it "inappropriate" to "examine [issues] … which require[] factual findings, when the district court did not make such findings because it did not reach the question, having disposed of the case on other grounds." *Bank of Am.*, 618 F.3d at 914; *accord, e.g.*, *Alliant Techsystems, Inc. v. Marks*, 465 F.3d 864, 873 (8th Cir. 2003) ("Because the district court did not decide the merits of these claims, which are heavily fact-based, we decline to consider them in the first instance."). Thus, if the Court were to reverse on both grounds decided below, the proper procedure would be to remand the case for factual findings and a determination of the two grounds for vacatur not yet decided. *See also BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 667, 668 (8th Cir. 2002) (remanding because "it would be imprudent to consider arguments bereft of the considered views and factual findings of the district court").

While ignoring these authorities, the NFL ultimately acknowledges that "ordinarily this Court does not decide disputed issues in the first instance." Br. 38. As shown below, however, in the event that the Court reaches these issues, they provide independent grounds for affirmance even on the current record.

B. The award was tainted by the arbitrator's evident partiality and can be vacated on this additional ground.

If this Court decides to address the NFLPA's partiality argument now, it should conclude that Henderson was an evidently partial arbitrator. An arbitrator is evidently partial when he "'objectively demonstrate[s] such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives.'" *Williams v. NFL*, 582 F.3d 863, 885 (8th Cir. 2009). And under the FAA and LMRA, an arbitrator's evident partiality requires vacating the award.

Arbitrator Henderson is not only a former NFL senior executive; he was the longtime chief labor negotiator bargaining against the NFLPA. To this day, moreover, he has significant professional and financial ties to the League and reports to the Commissioner. *Supra* at 22-23. Yet Henderson's inherent bias as a League insider is *not* the basis for the NFLPA's challenge to his evident partiality. *Contra* NFL Br. 13. On the contrary, as the NFL acknowledges, the NFLPA has never sought Henderson's recusal in "dozens of [prior] appeals." Br. 41.

Rather, the evident partiality that rendered Henderson unfit to serve as arbitrator in this particular case arises from the fact that Peterson's appeal required adjudication of the testimony, prior conduct and commitments, and ultimately the *credibility* of Commissioner Goodell and NFL Executive Vice President Troy Vincent—Henderson's colleagues. This reality made *Peterson* an atypical Article 46 appeal. *Supra* at 23-24. For example, it pitted Goodell's express testimony in *Rice* that he

could not apply the New Policy retroactively against his about-face in doing exactly that to Peterson in this case.[16]

Also uniquely at issue here were Vincent's repeated representations that only the previous Policy could apply to Peterson, and that he could therefore be suspended for at most two games. *Supra* at 20-21. Further, Henderson was required to adjudicate whether Peterson's indefinite suspension under the New Policy was in retaliation for his declining Vincent's entreaties to attend a pre-disciplinary "hearing" with NFL advisors who were not authorized by the CBA. Thus, under the atypical circumstances of this case—which could not have been anticipated by the Union at the time of bargaining—the specific issues in dispute rendered Henderson an evidently partial arbitrator.

The NFL says evident partiality cannot be found as a matter of law because the NFLPA agreed to a Commissioner-appointed arbitrator in Article 46 appeals. Br. 40-41. But the unusual facts showing partiality here—where the credibility, integrity, and testimony of league executives, including the Commissioner, are directly

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[16] At least one court has held that Commissioner Goodell's inherent bias, by virtue of his employment by the NFL's 32 teams, precludes him from arbitrating any claim against his employers. *State ex rel. Hewitt v. Hon. Kristine Kerr*, No. SC 93846, 2015 WL 2061986, at *9-10 (Mo. Apr. 28, 2015). As noted in the text, however, our position is significantly narrower: Henderson not only had to rule on the actions of his former employer, but to decide the *credibility* of NFL executives as to their conflicting statements and testimony on the central issue here—retroactive discipline.

at stake—are a far cry from the ordinary situation where the hearing officer merely evaluates the conduct of the *player*. On this record, any "reasonable person could assume that [Henderson] had improper motives." *Williams*, 582 F.3d at 885.

Contrary to the NFL's contention (Br. 40), a prior agreement to have the League's Commissioner or his designee serve as arbitrator does not automatically preclude an evident partiality disqualification where the conduct of the Commissioner and his staff become intertwined with the subject of the arbitration. In *Erving v. Virginia Squires Basketball Club*, for example, the Second Circuit rejected arguments that the district court "had no power to direct the substitution of a neutral arbitrator for the disqualified Commissioner of the American Basketball Association"—"in spite of the contract clause naming the Commissioner as arbitrator"—based on his employment "as a partner of the law firm representing [a party to the arbitration]." 468 F.2d 1064, 1067, 1068 & n.2 (2d Cir. 1972). As the court explained, "federal law is to be implemented in such a way as to make the arbitration effective," and a rule barring courts from substituting a neutral arbitrator would "emasculate arbitration procedures under the federal act." *Id.* at 1067-68.

Similarly, in *Morris v. N.Y. Football Giants*, 575 N.Y.S.2d 1013, 1016-17 (N.Y. Sup. Ct. 1991), the court disqualified the NFL Commissioner as an arbitrator —again, even though "[t]he contracts expressly provide[d] that the disputes be submitted to the Commissioner"—because the plaintiffs presented "evidence of lack of

neutrality and 'evident partiality' and bias on the part of the Commissioner with respect to this specific matter," due to his past advocacy of a position that conflicted with the plaintiff's position in arbitration. *Cf. In re Wal-Mart Wage & Hour Emp't Practices Litig.*, 737 F.3d 1262, 1267-68 (9th Cir. 2013) (Congress "barred federal courts from confirming awards tainted by partiality"; parties may not contractually waive judicial review if doing so "would … frustrate Congress's attempt to ensure a minimum level of due process for parties to an arbitration").

The NFLPA does not dispute that it "can ask no more impartiality than inheres in the method [the parties] have chosen" (NFL Br. 40), but the NFLPA never agreed that a League insider like Henderson could arbitrate a disciplinary appeal that turned on the testimony, credibility, and prior commitments of the Commissioner himself and one of his chief deputies. "[E]ven the agreed-upon appointment of an arbitrator with known links to one side of the controversy does not immunize the status or conduct of [a] decisionmaker from all judicial scrutiny." *Nat'l Hockey League Players' Ass'n v. Bettman*, No. 93 Civ. 5769, 1994 WL 738835, at *13 (S.D.N.Y. Nov. 9, 1994) (considering NHL Commissioner's fitness to serve as arbitrator, even though the parties had agreed through their collective bargaining agreement to Commissioner arbitration). Indeed, under similar circumstances in *Rice*—which put the Commissioner's public comments at issue—the NFL recognized that an outside, impartial arbitrator was required and designated Judge Jones.

Nor is the NFL correct that the NFLPA's evident partiality argument is precluded by this Court's decision in *Williams*. Br. 40-41. The Court there held that the NFLPA waived any evident partiality argument against an arbitrator appointed by the Commissioner under the Drug Program—not under Article 46 of the CBA — "by failing to object" to the arbitrator *during the arbitration*. 582 F.3d at 886; *see also Williams v. NFL*, 2012 WL 2366636, at *7-8 (D. Colo. June 21, 2012) (plaintiff "was aware that Mr. Henderson was appointed … yet did not object on the basis of bias *during the proceedings*"). Here, by contrast, the NFLPA moved to recuse Henderson both before and during the arbitration. *Supra* at 23-24.

The NFL further misconstrues *Williams* in contending that "actual prejudice" is the governing evident partiality standard in this Circuit. Br. 41. *Williams* never mentions any such standard. Rather, it confirms that the governing test is whether the arbitrator "*objectively* demonstrates such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives." 582 F.3d at 885; *see also Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 104 (2d Cir. 2013) ("partiality can be inferred from objective facts inconsistent with impartiality"); *Thomas Kinkade Co. v. White*, 711 F.3d 719, 723-24 (6th Cir. 2013) (same).

Here, a factual determination—which, again, should be made in the first instance below—would demonstrate that Henderson engaged in conduct during the

arbitration, including his complete disregard of the law of the shop and his unwillingness to adjudicate the veracity of Commissioner Goodell and Mr. Vincent, that would lead a reasonable person to conclude that he was biased or had improper motives. *Supra* at 24-25. Thus, this Court can affirm on that basis as well.

C. The arbitration was also fundamentally unfair, further warranting vacatur.

Finally, if the Court wishes to reach the issue, it should vacate the award on fundamental fairness grounds. The Commissioner's retroactive application of the New Policy to Peterson defies the most basic notions of fundamental fairness. And while the NFL is correct that this Circuit has yet to recognize fundamental fairness as an independent ground for vacatur (Br. 39), the Court has not "categorically reject[ed]" it. *Hoffman v. Cargill, Inc.*, 236 F.2d 458, 462 (8th Cir. 2001). The NFL does not even argue that its retroactive application of the New Policy is fundamentally *fair*. Nor could it. *E.g.*, Elkouri, *supra*, 15-71 (7th ed.) ("[a]n employee must receive clear notice of both what the employer expects as well as the range of penalties that may be imposed"). As the NFL's own (non-CBA) authority explains, retroactively applying a new rule defies "[e]lementary considerations of fairness" with "timeless and universal appeal." *Landgraf*, 511 U.S. at 265.

Here too, if the Court finds it necessary to reach this issue, it should remand to the district court for fact-finding. Alternatively, if the Court decides to reach this issue now, the only just decision would be a ruling, following the lead of several

other circuits, that vacatur is warranted to avoid making the judiciary party to a fundamentally unfair award. 9 U.S.C. § 10(a)(3) (vacatur is appropriate where "the rights of any party have been prejudiced"); *see Int'l Union, United Mine Workers v. Marrowbone Dev. Co.*, 232 F.3d 383, 388 (4th Cir. 2000) (vacating arbitration award where arbitrator denied the Union its fundamental right to a fair hearing); *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20-21 (2d Cir. 1997) (reversing district court and vacating arbitration award on grounds of "fundamental unfairness and misconduct" of arbitration panel); *Hoteles Condado Beach v. Union De Tronquistas Local 901*, 763 F.2d 34, 40, 42 (1st Cir. 1985) (affirming vacatur where decisions of arbitrator so "prejudice[d] the rights of the parties to the arbitration proceedings … as to warrant judicial review and to mandate vacatur"); *see also Gulf Coast Indus. Workers Union v. Exxon Co., USA*, 70 F.3d 847, 850 (5th Cir. 1995) (vacating fundamentally unfair award).

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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MAY 11, 2015

CERTIFICATE OF SERVICE

I certify that, on May 11, 2015, I caused the foregoing brief to be electronically filed with the Clerk of Court using the CM/ECF system, and thereby served via CM/ECF on counsel for Defendants-Appellants.

Dated: MAY 11, 2015

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