

NHL lockout: Legal manoeuvres by league, union add twist to labour talks

Quoting Keith P. Burkhardt

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A lawsuit filed in U.S. court, a charge of unfair labour practice and a potential dissolution of the National Hockey League Players' Association may have added interesting twists to the NHL's three-month-old lockout on Friday, but none of the three necessarily mean the entire season will be lost.

Reports the NHLPA was moving closer to filing a disclaimer of interest — dissolving the union for the purpose of filing antitrust lawsuits against the NHL in the U.S. — led to the NHL taking pre-emptive court action. Citing the earlier reports about the NHLPA, the league said it had filed a complaint in a federal court in New York to ask the court to affirm the legality of the lockout, while also filing an unfair labour practice charge with the National Labor Relations Board.

With the latter, the NHL alleges “that by threatening to ‘disclaim interest,’ the NHLPA has engaged in an unlawful subversion of the collective bargaining process and conduct that constitutes bad faith bargaining.”

The rattling of legal sabers puts the two sides no closer to a deal, though.

“The lawsuit is entirely expected,” said Keith Burkhardt, a labour lawyer with Toronto-based Sherrard Kuzz LLP.

“They presumably have had the complaint written for some time and were just waiting for a news report giving them a sufficient basis to file the suit,” said Nathaniel Grow, an assistant professor at the Terry College of Business at the University of Georgia. (He has a paper, *Decertifying Players' Unions: Lessons From the NFL and NBA Lockouts of 2011*, due to be published early in the New Year.)

The NFL and the NBA underwent similar processes during their respective lockouts last year. In the case of the NBA, an agreement was reached two weeks after the players filed in court.

“I don't think this is particularly shocking news,” Grow said. “The same thing happened in the NBA lockout and did not prevent the parties from reaching a deal.”

Burkhardt suggested the NHL filed its case in New York because that jurisdiction has historically been friendlier to employers than to labour.

Interestingly, Sidney Crosby was left off the list of 36 defendants named by the NHL, a list that includes marquee names such as John Tavares and Shea Weber. The league, in its filing, calls the threats of a disclaimer “an impermissible bargaining tactic.”

“In order to be effective, the disclaimer must be made in good faith,” Burkhardt said. “If a union disclaims interest, but continues to collect dues, file grievances, picket or otherwise represent employees, it is possible that the disclaimer will be negated.”

The NHLPA issued an official response later Friday, saying it had only just received a copy of the lawsuit: “However, based on what we’ve learned so far, the NHL appears to be arguing that Players should be stopped from even considering their right to decide whether or not to be represented by a union. We believe that their position is completely without merit.”

There is uncertainty how this scenario might play out in court, because none of the major professional sports organizations have taken it the distance. If the players file an antitrust suit, they could be awarded treble damages — meaning that if they are losing US\$10-million a day during the lockout, the NHL could be held liable for US\$30-million a day.

So the uncertainty, and the possible outcome, is a possible benefit for players.

“The risk is that, if they do go forward with this, the owners might dig in their heels and refuse to negotiate further,” Grow said. “There’s definitely a downside, a risk. But I think they’re probably looking at it as, ‘Maybe this will get us that final piece of leverage we need to get a deal done.’”

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