

2018

## **Fifth Circuit Sides With The NFL In The Hotly-Contested Ezekiel Elliott Suspension: A Comment On National Football League Players Association V. National Football League**

Nicole A. Wheeler

Follow this and additional works at: <https://elibrary.law.psu.edu/arbitrationlawreview>



Part of the [Dispute Resolution and Arbitration Commons](#)

---

### **Recommended Citation**

Nicole A. Wheeler, *Fifth Circuit Sides With The NFL In The Hotly-Contested Ezekiel Elliott Suspension: A Comment On National Football League Players Association V. National Football League*, 10 (2018).

This Student Submission - Comment is brought to you for free and open access by the Law Reviews and Journals at Penn State Law eLibrary. It has been accepted for inclusion in Arbitration Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact [ram6023@psu.edu](mailto:ram6023@psu.edu).

FIFTH CIRCUIT SIDES WITH THE NFL IN THE HOTLY-CONTESTED EZEKIEL ELLIOTT  
SUSPENSION: A COMMENT ON *NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION*  
*V. NATIONAL FOOTBALL LEAGUE*

By  
Nicole A. Wheeler\*

I. INTRODUCTION

In *National Football League Players Association v. National Football League* (“NFLPA v. NFL”), the Fifth Circuit held that the District Court for the Eastern District of Texas did not have subject matter jurisdiction to issue the preliminary injunction the parties requested in the case,<sup>1</sup> functionally denying Dallas Cowboys player Ezekiel Elliott’s request to prevent the enforcement of his six-game suspension.<sup>2</sup> This case reflects the United States’ emphatic public policy supporting arbitration agreements in a universally consistent manner. Additionally, the case highlights the importance of exhausting all arbitral remedies before a court may intervene, given the Fifth Circuit refused to award a preliminary injunction where an arbitral award had not yet been rendered. Finally, the conduct of the National Football League Players Association (“NFLPA”) also illustrates the dilatory litigation tactics that courts in the United States refuse to permit and seek to avoid by using arbitration. The following sections discuss these points in detail.

II. CASE BACKGROUND

In 2017, the National Football League (“NFL”) and Ezekiel Elliott entered arbitration based on domestic violence allegations against Elliott.<sup>3</sup> Prior to the arbitration proceeding, in July of 2016, Ohio police investigated Tiffany Thompson’s (“Thompson”) domestic abuse allegations, but officers did not find any probable cause to arrest Elliott due to “conflicting and inconsistent information across all incidents.”<sup>4</sup> The NFL’s Personal Conduct Policy did not require that a player be charged, arrested, or convicted to justify disciplining a player.<sup>5</sup> Rather, the NFL can discipline a player when the NFL finds credible evidence of prohibited conduct, including off-field behavior, in violation of the Personal Conduct Policy.<sup>6</sup> Therefore, the NFL began its own investigation into Elliott’s conduct and subsequently produced an investigative report on Elliott’s conduct.<sup>7</sup> The NFL

---

\* Nicole Wheeler is the Comments Editor of the *Arbitration Law Review* and a 2019 Juris Doctor Candidate at Penn State Law.

<sup>1</sup> *National Football League Players Association v. National Football League*, 874 F.3d 222, 225 (5th Cir. 2017).

<sup>2</sup> *National Football League Players Association*, 874 F.3d at 225.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *National Football League Players Association v. National Football League*, No. 4:17-CV-00615, 2017 WL 3940545 at \*1 (E.D. Tex. 2017).

<sup>6</sup> *See National Football League Players Association*, No. 4:17-CV-00615, 2017 WL 3940545 at \* 1.

<sup>7</sup> *National Football League Players Association*, No. 4:17-CV-00615, 2017 WL 3940545 at \* 1.

commissioner, Rodger Goodell (“Goodell”), reviewed the evidence and report and determined the allegations were valid and warranted a six-game suspension.<sup>8</sup>

Pursuant to the collective bargaining agreement (“CBA”) between the National Football League Players Association (“NFLPA”) and the NFL, Elliott retained the right to contest, through arbitration, the league’s determination of the disciplinary sentence.<sup>9</sup> Elliott invoked his right to arbitrate the issue and arbitrated from August 29-31, 2017.<sup>10</sup> A former NFL executive, Harold Henderson, presided over the arbitral process.<sup>11</sup>

NFLPA and Elliott were not satisfied with the NFL’s conduct during the proceeding. During the process, NFLPA asserted that the NFL’s final investigative report was lacking crucial information and sufficient corroboration,<sup>12</sup> and that “Thompson’s accusations were incredible, inconsistent, and without corroborating evidence to sufficiently support any discipline against Elliott.”<sup>13</sup> To substantiate these claims, NFLPA requested that Goodell testify about an outside meeting Goodell held to determine whether Goodell withheld essential facts, but Henderson denied the NFLPA’s request.<sup>14</sup> Under Article 46 of the CBA, he was entitled “to attend all hearings provided for in [Article 46] and to present, by testimony or otherwise, any evidence relevant to the hearing.”<sup>15</sup> Goodell, however, did not follow this provision when he held the outside meeting.<sup>16</sup> Seeing the NFL season quickly approaching, the NFLPA subsequently filed an “emergency motion” for a temporary restraining order or preliminary injunction, which would functionally lift Elliott’s suspension.<sup>17</sup> At the time, Henderson had not yet issued a final arbitration decision.<sup>18</sup>

The District Court for the Eastern District of Texas held a preliminary injunction hearing on the matter, on September 5, 2017.<sup>19</sup> The District Court determined that “Elliott did not receive a fundamentally fair” arbitral hearing.<sup>20</sup> The day of court’s ruling, the arbitrator upheld the six-game

---

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 225.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> National Football League Players Association, No. 4:17-CV-00615, 2017 WL 3940545 at \* 2.

<sup>14</sup> *Id.*

<sup>15</sup> National Football League Players Association, 874 F.3d at 234.

<sup>16</sup> *Id.*

<sup>17</sup> National Football League Players Association, 874 F.3d at 231.

<sup>18</sup> *Id.*

<sup>19</sup> National Football League Players Association, No. 4:17-CV-00615, 2017 WL 3940545 at \* 1.

<sup>20</sup> National Football League Players Association, No. 4:17-CV-00615, 2017 WL 3940545 at \* 11.

suspension.<sup>21</sup> On September 8, 2017, the District Court enjoined the NFL from enforcing the suspension.<sup>22</sup> Following the District Court’s preliminary injunction, the NFL appealed to the Fifth Circuit Court of Appeals,<sup>23</sup> which held that the district court did not have subject-matter jurisdiction to issue the preliminary injunction.

Unrelenting, Elliott subsequently filed for a preliminary injunction in the Southern District of New York.<sup>24</sup> That District Court denied the request for a preliminary injunction, which officially began the clock for his six-game suspension.<sup>25</sup> On appeal, however, the Second Circuit granted a request for an administrative stay to the NFLPA at the end of October 2017, placing Elliott’s six-game suspension once again on hold, until a hearing could take place.<sup>26</sup> The Second Circuit placed Elliott back on suspension beginning on November 9, 2017.<sup>27</sup> Ultimately, Elliott decided to cease pursuing another appeal and was suspended until December 24, 2017.<sup>28</sup> As described below, the Fifth Circuit Court’s approach to the case and Elliott’s conduct throughout the process are of substantial significance.

### III. FIFTH CIRCUIT COURT’S ANALYSIS

#### A. *Majority Opinion*

The Fifth Circuit concluded that the NFLPA did not exhaust the required procedures, pursuant to the CBA.<sup>29</sup> On appeal, the NFL argued that the district court did not have subject-matter jurisdiction to issue a preliminary injunction pursuant to the Labor Management Relations Act, 29 U.S.C. § 185, (“LMRA”).<sup>30</sup> In response, the Fifth Circuit explained that preliminary injunctions are usually reviewed under the abuse of discretion standard, but *de novo* review was warranted in Elliott’s case because the “...‘district court’s ruling rests solely on a premise as to the applicable rule of law’ and the applicable facts are established or of no controlling relevance.”<sup>31</sup> Wherever

---

<sup>21</sup> National Football League Players Association, 874 F.3d at 225.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> National Football League Players Association v. National Football League, 17 Civ. 6761 (KPF), 2017 WL 4998198 (S.D.N.Y. 2017).

<sup>25</sup> *Id.* at 8.

<sup>26</sup> See Benjamin Hoffman, *The Cowboys’ Ezekiel Elliot May Have Run Out of Options*, N.Y. TIMES, Nov. 9, 2017, <https://www.nytimes.com/2017/11/09/sports/football/ezekiel-elliott-dallas-cowboys-suspension.html>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> National Football League Players Association, 874 F.3d at 227.

<sup>30</sup> *Id.* at 225.

<sup>31</sup> National Football League Players Association v. National Football League, 874 F.3d 222, 225 (5th Cir. 2017); United Offshore Co. v. S. Deepwater Pipeline Co., 899 F.2d 405, 407 (5th Cir. 1990).

subject matter jurisdiction appears is unclear, the Fifth Circuit explained, the *de novo* review standard applies.<sup>32</sup>

The Fifth Circuit began its analysis by applying the LMRA, in which the plaintiff must successfully satisfy three elements: “(1) a claim of violation of (2) a contract (3) between an employer and a labor organization.”<sup>33</sup> The NFLPA argued that Elliott satisfied all three elements, and thus, the court had jurisdiction.<sup>34</sup> In response, the NFL argued that Elliott first had to exhaust all of his contractual remedies before filing with the district court.<sup>35</sup>

The court began with a discussion of the federal policy requiring employees to use the contract grievance procedures to which the parties agree contractually and explained that if the parties deviate from these grievance procedures, the procedures lose their effectiveness in helping parties settle.<sup>36</sup> To rationalize its ruling, the court cited *Meredith v. La. Fed’n of Teachers* (“Meredith”), which held that the parties must exhaust the grievance and arbitration procedures to which the parties agree in their CBAs.<sup>37</sup> The NFLPA argued in response that *Meredith* was overturned pursuant to *Arbaugh v. Y&H Corp.*, and therefore, the court should not have considered exhaustion as an element of subject-matter jurisdiction.<sup>38</sup> However, the court pointed to Supreme Court’s long history of treating the exhaustion of grievance procedures in CBAs as jurisdictional.<sup>39</sup> Therefore, the Fifth Circuit held, the Supreme Court had not overturned *Meredith*, and the case was still good law.<sup>40</sup>

The Fifth Circuit concluded that the NFLPA had not exhausted the procedures outlined in the CBA.<sup>41</sup> The court explained that although the arbitral procedural rulings were final, the arbitrator had not rendered a final decision, which could still, in theory, be favorable to Elliott.<sup>42</sup> Though Elliott believed the arbitrator would issue an unfavorable award, he could not prove that it was

---

<sup>32</sup> National Football League Players Association, 874 F.3d at 225.

<sup>33</sup> National Football League Players Association, 874 F.3d at 225; *Carpenters Local Union No. 1846 of United Bhd. of Carpenters & Joiners of Am., AFL-CIO v. Pratt-Farnsworth*, 690 F.2d 489, 500 (5th Cir. 1982); 29 U.S.C. § 185(a).

<sup>34</sup> National Football League Players Association, 874 F.3d at 225.

<sup>35</sup> *Id.* at 226.

<sup>36</sup> *See e.g. id.*; *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965).

<sup>37</sup> National Football League Players Association, 874 F.3d at 226; *Meredith v. La. Fed’n of Teachers*, 209 F.3d 398, 402 (5th Cir. 2000).

<sup>38</sup> National Football League Players Association, 874 F.3d at 226; *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510–11 (2006) (holding that Congress had not deemed statutory coverage of Title VII as jurisdictional, and therefore, courts should be not be considering jurisdictional limitations).

<sup>39</sup> National Football League Players Association, 874 F.3d at 227; *see also Vaca v. Sipes*, 386 U.S. 171, 184–85 (1967).

<sup>40</sup> National Football League Players Association, 874 F.3d at 227.

<sup>41</sup> National Football League Players Association, 874 F.3d at 227.

<sup>42</sup> National Football League Players Association, 874 F.3d at 228.

futile to wait for the arbitrator's decision.<sup>43</sup> Without a final decision, Elliot had not yet exhausted the CBA's grievance procedures.<sup>44</sup> The court also discussed exceptions to the exhaustion requirement, which in relevant part include "(2) the employer's conduct amounts to a repudiation of the remedial procedures specified in the contract."<sup>45</sup>

The NFLPA argued that this exception applied.<sup>46</sup> The court disagreed, reasoning that the employer's mere refusal to adhere to the employee's position in the grievance did not necessarily mean the employer repudiated the grievance process.<sup>47</sup> Generally, the employer has the right to take a position contrary to the employee.<sup>48</sup> In this matter, the court recognized that there was a collective bargaining grievance.<sup>49</sup> The court distinguished the present case from *Meredith*, where the employer entirely refused the grievance process.<sup>50</sup> Here, the court explained, the NFL engaged in arbitration proceedings without refusal.<sup>51</sup> Therefore, the court found that the repudiation exception did not apply.<sup>52</sup>

The Fifth Circuit then noted that subject-matter jurisdiction is determined when the complaint is filed.<sup>53</sup> Although the district court issued the injunction after the arbitral decision, the preliminary injunction was premature, and the court lacked subject-matter jurisdiction because the complaint was filed before the arbitral decision.<sup>54</sup> Therefore, the Fifth Circuit vacated the lower court's preliminary injunction and remanded the case.<sup>55</sup>

### B. *Fervent Dissent*

Judge Graves wrote a passionate dissent, in which he argued that the district court had subject-matter jurisdiction.<sup>56</sup> He argued that the question on appeal was not regarding the district court's

---

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*; *Rabalais v. Dresser Indus., Inc.*, 566 F.2d 518, 519 (5th Cir. 1978).

<sup>46</sup> *See National Football League Players Association*, 874 F.3d at 228.

<sup>47</sup> *See id.* at 229.

<sup>48</sup> *See id.*; *Rabalais*, 566 F.2d at 520.

<sup>49</sup> *See National Football League Players Association*, 874 F.3d at 229.

<sup>50</sup> *See id.*

<sup>51</sup> *See id.*

<sup>52</sup> *See id.*

<sup>53</sup> *See id.*

<sup>54</sup> *National Football League Players Association*, 874 F.3d at 229.

<sup>55</sup> *Id.*

<sup>56</sup> *National Football League Players Association*, 874 F.3d at 231.

preliminary injunction, but rather the NFL's motion to stay.<sup>57</sup> Judge Graves pointed to the NFL's failure to cite to a single case similar to the one at hand in which a court held that the petitioner did not exhaust the grievance procedures.<sup>58</sup> Moreover, he argued, the NFL cited to dissimilar cases and conveniently ignored cases that supported subject-matter jurisdiction.<sup>59</sup>

Judge Graves was convinced that, pursuant to Section 301 of the LMRA, the district court had subject matter jurisdiction, stating:<sup>60</sup>

For a federal court to maintain jurisdiction over the alleged breach of a collective bargaining agreement, an LMRA "claim must satisfy three requirements: (1) a claim of a violation of (2) a contract (3) between an employer and a labor organization . . . ." As long as these three requirements are met an individual can sue for breach of the collective bargaining agreement . . . . Here, the NFLPA alleges a violation of a contract, the CBA. The CBA was entered into by the NFLPA, a labor organization, and the NFL, an employer.<sup>61</sup>

Furthermore, Judge Graves emphasized that the LMRA does not explicitly require exhaustion, and that the NFL had conceded to this during the oral arguments on the matter.<sup>62</sup> The LMRA states that any suit regarding a breach of contract should be brought in a federal district court that has jurisdiction over the parties.<sup>63</sup> Judge Graves critiqued the district court's conclusion that because there was a violation of a labor contract, Section 301's requirements were met.<sup>64</sup> Judge Graves agreed with the NFLPA that "exhaustion is a prudential consideration and not a strict jurisdictional prerequisite."<sup>65</sup> He further cited the U.S. Supreme Court decision in *Textron Lycoming Reciprocating Engine Div., AVCO Corp. v. United Auto., Aerospace & Agric. Implement Workers of Am., Int'l Union* to highlight that § 301(a) lawsuits do not rely on claims that a contract is invalid, but that the contract has been violated.<sup>66</sup>

---

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 231-32.

<sup>59</sup> See e.g. *National Football League Players Association*, 874 F.3d at 232; *Ramirez-Lebron v. Int'l Shipping Agency, Inc.*, 593 F.3d 124, 132 (1st Cir. 2010).

<sup>60</sup> *National Football League Players Association*, 874 F.3d at 232

<sup>61</sup> See e.g. *id.*; *Carpenters Local Union 1846 of United Bhd. of Carpenters and Joiners of Am., AFL-CIO v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 500 (5th Cir. 1982); *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 163 (1983) (citing *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962)).

<sup>62</sup> *National Football League Players Association*, 874 F.3d at 232.

<sup>63</sup> See *id.*; 29 U.S.C. § 185(a) (1964).

<sup>64</sup> See *National Football League Players Association*, 874 F.3d at 232.

<sup>65</sup> See *id.*

<sup>66</sup> See *National Football League Players Association*, 874 F.3d at 232; *Textron Lycoming Reciprocating Engine Div., AVCO Corp. v. United Auto., Aerospace & Agric. Implement Workers of Am., Int'l Union*, 523 U.S. 653, 657 (1998).

Judge Graves added that pursuant to *Republic Steel Corp. v. Maddox*, the controlling authority does not require exhaustion of the contract grievance procedure, but merely an attempt of the procedure.<sup>67</sup> He further argued that the NFLPA actually did attempt to exhaust the grievance procedure, and filed a lawsuit only after discovering that the NFL violated Article 46 of the CBA.<sup>68</sup> Because the NFL violated portions of the CBA, Judge Graves believed, the NFLPA satisfied the repudiation exception of exhaustion.<sup>69</sup> Pursuant to *Ramirez-Lebron v. Int'l Shipping Agency, Inc.*, breaching the terms of a CBA constitutes repudiation of the grievance procedure.<sup>70</sup>

Judge Graves proceeded to distinguish further cases from the present issue. To address a case heavily relied upon by the majority, Judge Graves argued that *Vaca v. Sipes* did not hold that a rendering of an arbitral award creates exhaustion, but simply that someone with a grievance must attempt to satisfy the procedures established in the CBA.<sup>71</sup> In the instant case, Judge Graves believed that the attempt to arbitrate satisfied the exhaustion requirement.<sup>72</sup> *Meredith* was distinguishable because, in *Meredith*, the employee failed to seek to compel arbitration entirely.<sup>73</sup> Furthermore, *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.* was also distinguishable because there, the courts did not contemplate any issue of breach or failure to exhaust.<sup>74</sup> Lastly, “the Sixth and Seventh Circuit cases [relied on by the Court] involved ongoing proceedings,”<sup>75</sup> whereas here, the parties already finished the proceeding.<sup>76</sup> Judge Graves concluded by reiterating that the binding authority on exhaustion only requires an attempt.<sup>77</sup> He emphasized the LMRA does not require exhaustion and that clear exceptions to the exhaustion requirement exist.<sup>78</sup> Therefore, he stated, the NFLPA’s complaint should not have been considered

---

<sup>67</sup> See National Football League Players Association, 874 F.3d at 233; *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965).

<sup>68</sup> See National Football League Players Association, 874 F.3d at 233.

<sup>69</sup> See *id.* at 234.

<sup>70</sup> See *id.* at 233; *Ramirez-Lebron v. Int'l Shipping Agency, Inc.*, 593 F.3d 124, 134 (1st Cir. 2010).

<sup>71</sup> See National Football League Players Association, 874 F.3d at 234-32; *Vaca v. Sipes*, 386 U.S. 171, 184–85 (1967).

<sup>72</sup> See National Football League Players Association, 874 F.3d at 235.

<sup>73</sup> See National Football League Players Association, 874 F.3d at 235; *Meredith v. Louisiana Federation of Teachers*, 209 F.3d 398, 402 (5th Cir. 2000).

<sup>74</sup> National Football League Players Association, 874 F.3d at 235; *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 108 S.Ct. 364 (1987).

<sup>75</sup> National Football League Players Association, 874 F.3d at 235

<sup>76</sup> National Football League Players Association, 874 F.3d at 235.

<sup>77</sup> *Id.*

<sup>78</sup> National Football League Players Association, 874 F.3d at 235.



premature.<sup>79</sup> If in the majority, Judge Graves would have denied the motion for stay, and allowed Elliott to continue playing until the claim was resolved.<sup>80</sup>

#### IV. SIGNIFICANCE

This case is substantial significance for several reasons. Notably, the case is likely to be the most significant opportunity for lay-persons to learn about the distinguishing features of arbitration since Tom Brady and “deflategate.”<sup>81</sup> In the United States, where football is an integral part of cultural and social life, this particular case dominated news headlines for several months,<sup>82</sup> garnering public attention. Many public spectators watching the matter unfold have little contact with, or knowledge of, the arbitration and adjudicatory system in the United States. This case brought these features to the limelight for the public.

The case is also of significance because the lengthy case procedures in the Fifth Circuit and Second Circuit<sup>83</sup> illuminate the benefits of awaiting final rulings by neutral arbitrators. The dilatory litigation tactics, for the purpose of avoiding a game suspension and drawing out the timeline of an arbitration, were tiresome for Elliot’s opposing party.<sup>84</sup> Such tactics defeated the purpose of entering into an arbitration agreement in the first place.<sup>85</sup> Having a final arbitration opinion in NFL disputes before filing in court is important in at least three respects. First, waiting for a final arbitration opinion reduces dilatory tactics, such as those described in Elliot’s case.<sup>86</sup> The emphatic federal policy supporting arbitration seeks to avoid dilatory tactics, including routine appeals, and re-filing in other venues, a common practice that is abundant in litigation.<sup>87</sup> Second, waiting for

---

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See Kevin A. Hassett and Stan A. Veuger, *Deflating “Deflategate”*, N.Y. TIMES, June 12, 2015, <https://www.nytimes.com/2015/06/14/opinion/deflating-deflategate.html> (“deflategate” was the controversial allegation that Tom Brady ordered the New England Patriots to deflate footballs during a conference championship game).

<sup>82</sup> See Marc Edelman, *Ezekiel Elliott Lawsuit Marks The Latest Challenge to NFL “Neutral” Arbitration*, FORBES, 2017, <https://www.forbes.com/sites/marcedelman/2017/09/05/ezekiel-elliott-lawsuit-marks-the-latest-challenge-to-nfl-neutral-arbitration/#72dd76813a5e> (last visited November 3, 2018); Mark Maske, *Ezekiel Elliott loses latest court battle, clearing way for NFL to enforce suspension*, WASH. POST, 2017, [https://www.washingtonpost.com/news/sports/wp/2017/10/30/ezekiel-elliott-loses-latest-court-battle-clearing-way-for-nfl-to-enforce-suspension/?noredirect=on&utm\\_term=.7fb671f32c76](https://www.washingtonpost.com/news/sports/wp/2017/10/30/ezekiel-elliott-loses-latest-court-battle-clearing-way-for-nfl-to-enforce-suspension/?noredirect=on&utm_term=.7fb671f32c76) (last visited November 3, 2018).

<sup>83</sup> See National Football League Players Association, 874 F.3d at 229; NFL Mgmt. Council v. NFL Players Ass'n, No. 17-cv-06761-KPF, 2017 U.S. Dist. LEXIS 171995 (S.D.N.Y. Oct. 17, 2017).

<sup>84</sup> See *supra* notes 24-28 and accompanying text.

<sup>85</sup> See *supra* notes 24-28 and accompanying text.

<sup>86</sup> See *id.*

<sup>87</sup> See National Football League Players Association, 874 F.3d at 229; NFL Mgmt. Council v. NFL Players Ass'n, No. 17-cv-06761-KPF, 2017 U.S. Dist. LEXIS 171995 (S.D.N.Y. Oct. 17, 2017).

the final decision, which avoids such tactics, saves a significant amount of money. Every time Elliott's team re-filed and appealed, both sides spent additional money. Third, awaiting a final arbitration opinion assists with logistical planning on the field.<sup>88</sup> Either as the Cowboy's or opposing team's defensive coordinator, the uncertainty surrounding Elliott's attendance at each game required careful planning and constant vigilance to the news surrounding Elliott's suspension.<sup>89</sup>

Finally, the decision is significant, because it has precedential value.<sup>90</sup> The case sets a new baseline for the Fifth Circuit in determining when exactly an individual has "exhausted" all remedies in labor arbitration proceedings.<sup>91</sup> The Fifth Circuit, among many other federal circuits in the United States, refuses to grant a preliminary injunction, or any other relief, where the arbitration proceeding has not yet concluded.<sup>92</sup> Only after the arbitrators render an award will the court intervene, and for limited reasons only.<sup>93</sup> In Elliott's case, the complaint against the NFL conduct during the arbitration proceeding, is a substantively valid issue the district court could review.<sup>94</sup> However, the Fifth Circuit reiterated that, in these cases, the courts cannot intervene until after an arbitrator renders a final award.<sup>95</sup> Here, the NFLPA likely filed the complaint a few days too early, because the NFLPA wanted to avoid the six-game suspension as the new season was rapidly approaching.<sup>96</sup> Without an award, however, a court cannot determine that the misconduct of the NFL had a negative effect on the arbitral proceeding.<sup>97</sup>

## V. CRITIQUE OF THE FIFTH CIRCUIT'S DECISION

The Fifth Circuit's analysis was thorough and rationally upheld the emphatic federal public policy in support of arbitration. For effective arbitration, the parties must fully exhaust a CBA's grievance procedures before any court can rule on issues regarding the arbitration procedure itself.<sup>98</sup> Without the exhaustion requirement, dilatory tactics, such as the ones Elliot pursued, can

---

<sup>88</sup> See *supra* note 26.

<sup>89</sup> See *id.*

<sup>90</sup> See National Football League Players Association, 874 F.3d at 226.

<sup>91</sup> See *id.*

<sup>92</sup> See National Football League Players Association, 874 F.3d at 229.

<sup>93</sup> See *id.*

<sup>94</sup> See National Football League Players Association, No. 4:17-CV-00615, 2017 WL 3940545 at \* 11.

<sup>95</sup> See National Football League Players Association, 874 F.3d at 226.

<sup>96</sup> See *id.* at 231.

<sup>97</sup> See *id.* at 229.

<sup>98</sup> See National Football League Players Association, 874 F.3d at 229.

delay arbitration proceedings.<sup>99</sup>The Fifth Circuit honored the general federal policy in which courts are deferential to arbitral decisions and usually do not overturn an award, unless the court finds serious substantive errors.<sup>100</sup> The primary issue, and point of division for the court, is the timing of the filing of the request for an injunction.<sup>101</sup> The district court found a valid ground for a preliminary injunction,<sup>102</sup> however, the majority writing for the Fifth Circuit Court argued that such a determination was too premature.<sup>103</sup> Instead, the majority emphasized the importance of waiting until the completion of an arbitral proceeding (i.e. an award is rendered) before any court may review the arbitral process for *vacatur* or other grounds for relief.<sup>104</sup>

The Fifth Circuit was likely in the right in enforcing the federal pro-arbitration policy for several reasons. First, dilatory tactics may run rampant if preliminary injunctions are enforced when there is still an award or decision pending by an arbitral tribunal. Such injunctions provide an incentive for attorneys to appeal and request injunctions before a tribunal renders an unfavorable decision.<sup>105</sup> Second, the connection between arbitration and court proceedings should be consistent and predictable. The arbitration process is most efficient when it remains outside the realm of courts.<sup>106</sup> By providing more exceptions to this general rule, the arbitral process may begin to lose effectiveness.<sup>107</sup> With its approach, the Fifth Circuit avoided these implications.

Additionally, while the dissent's view is honorable and would protect Elliott's interests in a fair arbitral proceeding, it simply does not fit within the scope of the emphatic federal public policy favoring arbitration.<sup>108</sup> The dissent highlights the view of those whom are skeptical of arbitration. In Judge Graves' view, judicial review does not require exhaustion of the arbitral remedy, but even if it did, he claims that the procedure was exhausted regardless of an award.<sup>109</sup> These tenets are directly in tension and contrast to the federal policy favoring arbitration. In sum, the Fifth Circuit was diligent in protecting the integrity of arbitration by avoiding involvement when rendering its decision.

---

<sup>99</sup> See *id.* at 231; See Benjamin Hoffman, *The Cowboys' Ezekiel Elliot May Have Run Out of Options*, N.Y. TIMES, Nov. 9, 2017, <https://www.nytimes.com/2017/11/09/sports/football/ezekiel-elliott-dallas-cowboys-suspension.html>.

<sup>100</sup> See *e.g. id.*; *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008).

<sup>101</sup> See *National Football League Players Association*, 874 F.3d at 228.

<sup>102</sup> See *National Football League Players Association v. National Football League*, No. 4:17-CV-00615, 2017 WL 3940545 at \*1 (E.D. Tex. 2017).

<sup>103</sup> See *id.*

<sup>104</sup> See *National Football League Players Association*, 874 F.3d at 228.

<sup>105</sup> See *id.*

<sup>106</sup> See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 632, 638 (1985) (“while the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal . . .”).

<sup>107</sup> See *id.*

<sup>108</sup> See *Mitsubishi Motors Corp.* at 632.

<sup>109</sup> See *National Football League Players Association*, 874 F.3d at 235.

## VI. CONCLUSION

*National Football League Players Association v. National Football League* (“NFLPA v. NFL”) is a win for the arbitral process. It illustrates the strict approach that courts use in upholding the integrity of the arbitration procedure and avoiding unnecessary court involvement.<sup>110</sup> The Fifth Circuit concluded that NFLPA agreed to arbitration and had to complete the entire process, before a court could intervene and issue any appeal or injunction.<sup>111</sup> The Court found, the NFLPA was premature in filing suit a few days too early and simply should have waited until the arbitrators rendered an award.<sup>112</sup> NFLPA v. NFL offers the opportunity for the public to learn about arbitration, given arbitration continues to be a topic that many American’s do not fully understand.<sup>113</sup> NFLPA v. NFL also illustrates the repercussions of dilatory litigation tactics that often cost the parties a significant amount of money, and even has an impact on the football field when preparing for a game.<sup>114</sup> In this sense, the Fifth Circuit’s opinion illuminates the federal court’s strict policy adherence to avoid unnecessary involvement into the arbitral process until full completion, even if otherwise a valid claim exists.<sup>115</sup> Without such patience, as the court and federal policy suggest, the effectiveness of arbitration is undermined.<sup>116</sup>

---

<sup>110</sup> See discussion *supra* Section III.A.

<sup>111</sup> See *National Football League Players Association*, 874 F.3d at 229.

<sup>112</sup> See *id.*

<sup>113</sup> See *supra* notes 81-82 and accompanying text.

<sup>114</sup> See discussion *supra* Section IV.

<sup>115</sup> See *id.*

<sup>116</sup> See *id.*