

Players Union Makes Tactical First Move In Latest NFL Fight

By Zachary Zagger

After federal court losses in its last two discipline challenges, the NFL players union has made a surprising move in the suspension case of [Dallas Cowboys](#) running back Ezekiel Elliott that experts say could give it a tactical advantage this time around: going to court before a league-appointed arbitrator has even had a chance to issue a decision.

The [National Football League Players Association](#) [filed a petition Thursday](#) in the Eastern District of Texas to vacate the forthcoming arbitration award in a grievance case challenging a six-game suspension over allegations of domestic violence. The move came just hours after the conclusion of a three-day appeal hearing before [NFL-appointed arbitrator](#) Harold Henderson, a former league employee.

The NFLPA's court filing said that already this proceeding has become "one of the most fundamentally unfair arbitral processes conceivable" and that the punishment, for conduct that didn't even result in criminal charges and based on the claims of an accuser the union says is not credible, was nothing but a "league-orchestrated conspiracy."

But the challenge came before Henderson had even issued a decision whether to uphold, reduce or completely overturn Elliott's suspension, a surprise, yet strategic move that could frame the issue moving forward.

"Talk about creative," said Patrick R. Scully, a management-side labor and employment attorney with [Sherman & Howard LLC](#). He called the approach "unique," saying it "flies in the face of the usual process to wait for the award to become final and binding before challenging it."

"It is obviously a tactical effort to try and set the tone with the court for the ultimate review of the arbitrator's decision," Scully added.

The NFLPA's suit additionally seeks, at the least, to stay the suspension so that Elliott can begin practicing with the Cowboys on Tuesday to prepare for the team's first game next Sunday against the New York Giants.

According to the suit, the NFL ignored an investigator who had concluded that Elliott's domestic violence accuser was not credible. Last summer, an ex-girlfriend reported the allegations to authorities in Columbus, Ohio, where Elliott played college football at Ohio State University, but prosecutors later declined to bring charges.

The union says Henderson refused to allow the union and Elliott to confront this accuser at the arbitration hearing and further refused to compel NFL Commissioner Roger Goodell, who imposed the discipline, to testify.

Leading the NFLPA is sports litigator Jeff Kessler of [Winston & Strawn LLP](#), who represented the union in the last two federal court fights over player discipline. Those involved child abuse allegations against then-[Minnesota Vikings](#) running back Adrian Peterson, now with the New Orleans Saints, and the closely watched Deflategate controversy surrounding [New England Patriots](#) quarterback Tom Brady.

It appears that the union is taking a different approach here by making the first move and trying to frame the issue.

“I think it was a brilliant piece of strategy by Kessler,” said James Acho, a sports labor law attorney with [Cummings McClorey Davis & Acho PLC](#).

In Deflategate, Goodell served as the arbitrator himself, something allowed under the collective bargaining agreement. This allowed the NFL to [beat the NFLPA to the courthouse](#), as it filed a petition to uphold the arbitration ruling in New York federal court just after releasing Goodell’s arbitration decision.

The NFLPA filed its own challenge in Minnesota, a preferred venue because a judge in that court had previously issued a ruling favorable to players, but the case was transferred back to New York.

“If the union has learned anything from Deflategate it’s that the NFL is not going to play fairly,” said attorney Daniel Wallach, who has written about both cases. “The league basically manipulated the release of the arbitration filing to basically guarantee themselves to be the first to file. The NFLPA was caught flat-footed. It’s like fool me once shame on you, but fool me twice, shame on me.”

While a New York federal judge sided with the players, that ruling was [firmly rejected](#) by the Second Circuit, setting a strong precedent in favor of the league. The NFLPA likely did not want to find itself in that position again, particularly given Henderson’s prior relationship with the league.

“Where do you see this race to the courthouse to overturn or confirm a labor arbitration decision? It’s an anomaly, but it is an anomaly borne of sharp litigation tactics, where it is like a scorched-earth situation,” Wallach said. “The players wanted to avoid that from happening a second time, and the way to do that was to find that window of opportunity between the conclusion of the hearing and the issuing of the decision.”

Beyond some potential forum-shopping, however, experts said that by filing the challenge now, the union might be hoping to influence Henderson’s eventual decision on Elliott’s punishment.

“The lawsuit may also be seen as an attempt to influence Elliott’s currently pending appeal of his suspension through the CBA grievance process,” said John Alan Doran, a labor and employment attorney also with Sherman & Howard. “The lawsuit sends a clear signal to

arbitrator Harold Henderson that the Players Association could completely undo anything that might come out of the grievance process.”

Further, Scully said that even if the move does not change the ruling, it could at least force Henderson to address some of the complaints from the league, which will provide a better record for what appears to be an inevitable federal court review, whether in Texas or elsewhere.

“It is tactical because it might induce the arbitrator to address some of these issues in the award and thus make the subsequent complaint to vacate more viable because he is taking the bait, so to speak,” Scully said.

The lawsuit further shows the extent to which the relationship between the league and the players union has deteriorated, particularly over player discipline, heading into the next round of labor negotiations to replace the current CBA, which is in effect through the 2020 season.

“Ezekiel Elliott is an extremely immature young man who needs to grow up soon or he will ruin what could be a long, brilliant career,” Acho said. “Having said that, the arbitration process that the NFL subjects players to is unilaterally capricious.”

The court challenge is National Football League Players Association v. National Football League et al., case number [4:17-cv-00615](#), in the U.S. District Court for the Eastern District of Texas.

--Editing by Mark Lebetkin and Breda Lund.