

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK EWING, ALLAN HOUSTON,
LARRY JOHNSON, JOHN STARKS,
AND NATIONAL BASKETBALL PLAYERS
ASSOCIATION,

Plaintiffs,

v.

97 Civ. 3578 (JSR)

DAVID STERN, ROD THORN,
AND NATIONAL BASKETBALL
ASSOCIATION,

Defendants.

May 16, 1997
1:20 p.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

WEIL GOTSHAL & MANGES
Attorneys for Plaintiffs

JEFFREY L. KESSLER
-and-

RONALD KLEMPNER
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Attorneys for Defendants

HOWARD L. GANZ
NEIL HOWARD ABRAMSON

ALSO PRESENT:
JEFFREY MISHKIN, National Basketball Association
MARTIN FLUMENBAUM, Attorney for Miami Heat

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1 (In open court)

2 THE DEPUTY CLERK: The matter of Patrick Ewing,
3 Allan Houston, Larry Johnson, John Starks and N.B.A. Players
4 Association v. David Stern, Rod Thorn and the N.B.A.

5 Counsel, please state your name for the record.

6 MR. KESSLER: Jeffrey Kessler, your Honor, for
7 the players and the Players Association.

8 MR. GANZ: Howard Ganz, your Honor, representing
9 the defendants.

10 THE COURT: I have received your papers and
11 reviewed them as best I could after the short time frame and
12 I am ready to hear oral argument on this application for a
13 temporary restraining order and preliminary injunction.

14 Let me hear first from the moving party.

15 MR. KESSLER: Very good, your Honor.

16 May it please the Court, my name is Jeffrey
17 Kessler and I am counsel for the four individual players and
18 the N.B.A. Players Association who has brought this action.

19 Your Honor, I think having quickly read the
20 N.B.A. papers it perhaps would be helpful to try to focus
21 what this motion is about and what it is not about.

22 This is an action seeking, very simply, an
23 injunction in aid of arbitration. Last night --

24 THE COURT: I take it that is the grounds on
25 which you say that it does not fall within the purview of

1 the anti-injunction statute.

2 MR. KESSLER: That is correct, your Honor. This
3 is a boy's market injunction case and all of the case law
4 they cite is simply inapplicable on that basis.

5 THE COURT: If it is under that provision, I take
6 it your challenge is not to this rule simply as applied to
7 these particular individual plaintiffs, but rather across
8 the board, as I read your papers here, on collusion grounds
9 or otherwise.

10 MR. KESSLER: Your Honor, it is both. We filed
11 two separate arbitrations this morning, at approximately
12 9:30 this morning. The suspensions were at 5 p.m. last
13 night.

14 THE COURT: Actually, in that regard I wanted to
15 inquire of this: There is some hearing going on before one
16 of the arbitrators today, you say in your papers?

17 MR. KESSLER: No.

18 In fact, we wanted to proceed with that
19 arbitration hearing immediately, and the N.B.A. had
20 suggested, and we agreed, to have a scheduling call at 8
21 a.m. this morning. When I got on the phone call, for some
22 reason counsel for the N.B.A. said they no longer saw any
23 purpose to having the call with the arbitrator until after
24 we came to the Court today to see what your Honor would do.

25 We stand ready to have both of these arbitrations

1 in a very expeditious fashion. We think they could be done
2 within a week to ten days, both of them, in terms of going
3 forward.

4 THE COURT: I take it the ball is in my court
5 then.

6 MR. KESSLER: That is correct. The bouncing
7 ball.

8 THE COURT: Very good.

9 MR. KESSLER: Let me say, your Honor, this is a
10 boy's market injunction -- we are considering basically
11 traditional standards of injunctive relief because, when you
12 cut through all the cases, essentially what they say -- and
13 we have discussed this in our brief -- is that you apply
14 traditional, equitable principles with a little wrinkle.
15 Then when you get to the question of substance, questions
16 going to the merits, you have to look at that in the context
17 of the arbitration.

18 THE COURT: I agree with that.

19 Let me just ask you in that regard something that
20 comes up sort of at the tail end of your adversary's papers.
21 On the question of the balance of hardships, they assert, as
22 I understand it, that there is a very considerable hardship
23 in not allowing the Commissioner and the League to take
24 prompt and serious action when a violation of a rule that
25 has as at least its partial, if not primary purpose the

1 prevention of violence and the prevention of injury on the
2 court, the basketball court. Why isn't that a very serious
3 hardship to them?.

4 MR. KESSLER: Your Honor, I don't think the
5 balance of hardships is even close. I will explain why.

6 To begin with, from their standpoint their
7 interest is if they have properly applied the rules to have
8 these players suspended for a game. If we are wrong, if we
9 lose both arbitrations within a week, these players will be
10 suspended probably from a play-off game. It will have
11 exactly the same effect from their standpoint. They can be
12 made whole in that sense.

13 THE COURT: Is that right, or is it a question of
14 that their interest -- and I may be reading more into their
15 papers than they were suggesting, but I thought they were
16 suggesting that the nature of this kind of rule and the
17 nature of this kind of alleged violation requires swift
18 punishment and that it is a happenstance -- not of their
19 doing -- that it occurred in the context of the play-offs,
20 but that it would be equally important to have it be swift
21 if it occurred in the middle of the season, and that
22 therefore deferring it, say, to next year does not have the
23 same attention to the purpose of their rule as having
24 immediate relief.

25 MR. KESSLER: First, your Honor, we are not

1 suggesting that it be deferred to next year. We are
2 suggesting that it be deferred until an arbitrator, both
3 arbitrators, can decide if the rule at stake here is a
4 violation of the collective bargaining agreement. If in
5 fact it is -- and we believe it is, and I would be happy to
6 discuss that point -- then they have no interest in
7 punishing these players.

8 THE COURT: Yes, but that is confusing the two
9 different standards. You are talking now about the prong of
10 the standard that goes to whether there are serious
11 questions going to the merits, but we have to look at the
12 balance of hardships separate.

13 MR. KESSLER: On the balance, on the one hand we
14 have, to begin with, four players who if they miss this game
15 at this point in the season will never be able to be made
16 whole by any arbitrator. This is not a question of them
17 getting back a monetary payment, a salary for a game. That
18 is not what this is about.

19 I was on the phone last night with these players,
20 and the pain in their voice for what this means to their
21 team and how far they have come, there is no way to make
22 them whole. I submit that is irrefutable. There is no way
23 to make the fans whole. There is no way to make the team
24 organization whole if the players are right.

25 On the other hand, can they be punished if we're

1 wrong, if the arbitrator comes out the other way?

2 Absolutely. Is there some marginal interest that maybe it
3 is more severe punishment for it to happen the next game
4 than a game a week later if we're wrong? I don't know.

5 If it is a week later, this team might be in the
6 N.B.A. finals on the next round and it could be worse to
7 have the suspension at that point. I don't know which is a
8 greater punishment.

9 What is clear is when you are balancing these
10 hardships the League's interest is if it is a proper rule to
11 have the player punished.

12 You were correct when you said it was pure
13 happenstance that this turned out to be the sixth game and
14 the seventh game of this play-off series. The rule doesn't
15 provide for that. The rule doesn't say the punishment is
16 you will miss a play-off game or series. Not at all.

17 If this had been the last play-off game of the
18 season, if this had been the championship game, the last
19 game, then their punishment would have been to miss the
20 first regular season game of the next season. All that is
21 is pure happenstance as to when it came in. That is not an
22 interest that could be matched against the interest of these
23 players.

24 THE COURT: This rule, as I understand it, was
25 invoked on numerous occasions over the past year and the

1 Players Association raised none of the challenges that you
2 are raising now, is that right?

3 MR. KESSLER: That is completely untrue, your
4 Honor. They did fax us an affidavit --

5 THE COURT: They only got your papers a few hours
6 ago.

7 MR. KESSLER: I will tell you, it was very
8 interesting. They talk about this applying to, I think it
9 is 22 players or something like that over this two-year
10 period. Well, one of them was apparently an incident that
11 happened over two years ago involving 16 players in one shot
12 which, to our knowledge, was completely resolved to the
13 satisfaction of those players and no one knew exactly how
14 the rule was being applied. That was 16 of them. The other
15 five are in this case. So apparently there is one other
16 player floating around, who we may not even know about, who
17 apparently they applied the rule to.

18 THE COURT: Let me make sure whether or not it is
19 true that although the Players Association knew of this rule
20 they did not, prior to this motion that you brought this
21 morning, raise the legal objections to that rule that you
22 now seek to arbitrate, is that right?

23 MR. KESSLER: That is not exactly right either.

24 What happened is these rules are not shown to us
25 as a matter of course. They are not part of the collective

1 bargaining agreement.

2 THE COURT: There is an allegation in their
3 memorandum, although without support in the affidavit unless
4 I missed it, that it is mailed to each player -- forget
5 about the rules as a whole -- this rule. I did not see an
6 allegation in your papers, unless, again, I may have missed
7 it because I have only had a short time to read it, that the
8 Players Association or even these individual players were
9 unaware of this rule.

10 MR. KESSLER: We don't know to what degree they
11 distribute it to players. Certainly not all the players
12 seem to recall this rule, but clearly they give it to the
13 teams. I suppose they ask the teams to talk to the players
14 about it. We are not disputing that point.

15 THE COURT: And no one brought a challenge up
16 until now.

17 MR. KESSLER: Let me explain. Up until this
18 incident last night, we never realized that in the
19 application of this so-called "rule" -- which was never
20 bargained for and it is not included -- their position is,
21 literally, as we found out for the first time, that if you
22 walk 3 feet away from the bench you engage in no hostile
23 conduct, you do not go near anyone, you do not push anyone,
24 you do not look angrily at anyone, if you come from here to
25 here, as Patrick Ewing did, you are suspended.

1 THE COURT: If the question is that you quarrel
2 now with a particular interpretation of the rule, then under
3 that provision it refers that kind of thing to the
4 Commissioner. That is not an arbitral matter.

5 MR. KESSLER: No. Let me explain.

6 We had believed that this was not a rule that had
7 been promulgated and given to the teams as being in force.
8 We had thought -- the one time we became aware of it about
9 two years ago with this one incident -- that it was, in
10 effect, a factor that the Commissioner was looking at in his
11 consideration because, for example, we have no problem in
12 case-by-case determinations by the Commissioner.

13 Mr. Ward was suspended for fighting in the
14 incident two nights ago. Mr. Brown was suspended for
15 fighting two nights ago. We have no problem with that. If
16 leaving the bench is a factor, we would have no problem with
17 that.

18 What we painfully learned last night after
19 talking to Mr. Ewing and Mr. Houston is that players who did
20 nothing that any rational person would construe as being
21 hostile, as being detrimental to the interest of basketball,
22 were being suspended because the rule now is being
23 announced, we believe for the first time, as a rigid rule,
24 that if you walk a few feet from that box after an
25 altercation -- and in Mr. Ewing's case it was after he

1 thought the altercation was over -- then you are suspended.

2 When we found out about that last night, we
3 brought the case this morning. I don't know how much
4 swifter we could have acted in that regard.

5 THE COURT: The rule as a whole was not, unless
6 again I missed it in your papers and, again, unless I have
7 missed it in their papers, was not perhaps in total context.

8 Maybe some other point may lead to something else
9 that is in these papers that will fill out the context, but
10 what I have is in the Thorn declaration in their papers, it
11 states, "Among the official rules of the N.B.A. is the
12 well-established rule set forth in Rule 12, Section 9,
13 subsection C" -- I would have like to have had, and maybe I
14 do and have not noticed it, all of Rule 12; just reading
15 that makes me think that it is fortunate that both the
16 players and management are represented by lawyers --
17 "providing that players who leave the bench during an
18 altercation will be suspended."

19 What is being quoted now, I take it, is mostly in
20 Section 9, subsection C, and what this quote states is as
21 follows:

22 "During an altercation all players not
23 participating in the game must remain in the immediate
24 vicinity of their bench."

25 That does not sound to me like it is a factor to

1 be considered. It seems like a flat, unequivocal statement.
2 The only question is perhaps what is meant by "immediate."
3 Anyway, the quote continues:

4 "Violators will be suspended without pay for a
5 minimum of one game and fined up to \$20,000. The
6 suspensions will commence prior to the start of the next
7 game."

8 Then it goes on with what to do if the
9 suspensions involve more than four players.

10 MR. KESSLER: The reason that rule was not
11 attached to our papers is because I didn't have it. What I
12 had was the N.B.A.'s press release stating that such a rule
13 existed and that, therefore, these players were suspended.

14 What you are reading, I quite agree, is a certain
15 rule. So we were correct in what their position was, this
16 is apparently how they are applying it, and we brought the
17 proceeding.

18 THE COURT: This document that they refer to as
19 the "Official Rules of the N.B.A.," is that a document you
20 are saying that the Players Association does not have?

21 MR. KESSLER: I have not done a file search of
22 the Players Association.

23 I can tell you that as a routine matter this what
24 is called, I think, the Basic Operating Rules, or whatever
25 that is called, that document as a whole has never been

1 shared with the Players Association. It is not something
2 that the League -- it is not part of our collective
3 bargaining relationship.

4 This is very important because I want to focus
5 the Court's attention on the anti-collusion provisions of
6 this agreement and why this is so significant.

7 We carefully bargained for anti-collusion
8 provisions that are unique in sports. It is not the same
9 provisions as in baseball or football. They are rather
10 unique. What these provisions did is a variety of things.
11 One of the things it did is it said to the N.B.A. and its
12 teams, You can't have any agreements concerning the terms or
13 conditions of employment offered to any veteran or rookie
14 that is not part of his deal.

15 Now they say, Well, this couldn't possibly mean
16 suspensions, it couldn't mean a rule about that; it must
17 mean a rule about money or meals or something else.

18 Well, we know what it refers to. How do we know?
19 They don't even discuss this in their brief. They had time
20 to look at my brief.

21 In Section 2 the parties said that despite the
22 fact that we are having this incredibly broad definition of
23 collusion, there are some things we are going to take out of
24 the collusion. It says that the following conduct shall not
25 be a violation of Section 1, and this is on Article 14,

1 Section 1 and 2 of the CBA.

2 Now the reason it says some conduct is not a
3 violation is because otherwise it would be.

4 What we do find is in Section 2, No. E, which is
5 one of the exclusions from collusion, and what is excluded
6 is "Any action taken by the N.B.A. League office to exclude
7 from the League, suspend or discipline any player for
8 reasons involving gambling, drugs or the commission of a
9 crime."

10 Now what is significant about that? We did not
11 agree to exclude from collusion any rules they were going to
12 promulgate about suspending players not for gambling, drugs
13 or the commission of a crime, but for on-court behavior.

14 Are we sure the parties thought of this? We can
15 be very sure. Because if you look at Article 35 of the
16 N.B.A. Constitution, which both parties cite, which is
17 attached to the Uniform Player Contract, it goes through
18 different reasons for suspending. You could be suspended
19 for drugs and you could be suspended for gambling and you
20 could be suspended for crimes, and in a separate section, in
21 Article 35, you can be suspended for on-court behavior.

22 Now the only inference we believe can be drawn is
23 that the parties intended to keep rules about this, not
24 individual proceedings about looking at the facts of a case
25 and deciding whether or not this was conduct detrimental to

1 basketball -- we don't have a problem with that -- but rules
2 that were not part of the anti-collusion provisions. Why?
3 Because the players wanted to be able to monitor and agree
4 to any rules so that they wouldn't promulgate a rule like
5 this one which says that if you walk 3 feet from a bench you
6 are suspended when that conduct has no rational relationship
7 to being against the interest of the N.B.A.

8 These players are the test. This is what we are
9 going to show the arbitrators, because the players here, one
10 of them, almost when the altercation was over, basically did
11 nothing except call the players to come back to the bench,
12 and the other one tried to be a peacemaker, and the third
13 one tried to pull one of his own players off of another
14 player. Those are the hostile acts against the interests of
15 the game that were punished here.

16 Now what we are entitled to is to present this to
17 the arbitrator charged with interpreting the collusion
18 provisions. We could do that within the next week or so.
19 If I am right, this is collusion, it is not right, and this
20 rule cannot be applied. It has to be case by case. If I am
21 wrong, then a week from now we will get a different result.

22 That balance of hardships with this serious
23 issue, I think a likelihood of success, frankly, on the
24 collusion point points to not suspending these players, to
25 breaking players' hearts, to breaking fans' hearts because

1 what's really happened here is the N.B.A. has decided that
2 they are going to get tough and they are going to take a
3 stand for whatever reason, no matter how irrational, because
4 that's how they are.

5 THE COURT: I think I need to bring you back to
6 the fact that we are in a court of law. Your legal points
7 are well taken. I will be interested to hear the responses
8 of your adversary.

9 MR. KESSLER: I apologize, your Honor, if I got
10 carried away.

11 THE COURT: I do not know that a jury speech is
12 really appropriate to this.

13 MR. KESSLER: I am sorry, your Honor. I get
14 carried away because of the emotional nature of the issue.

15 Let me go back to a legal point.

16 THE COURT: Just to pick up on that, basketball
17 games, any professional sports, obviously excite tremendous
18 albeit perhaps short-term emotions on the part of fans, on
19 the part of players. It is inherent in the situation. It
20 is part of the, if you will, pleasure of the situation. But
21 it follows from, one might think, that there has to be
22 pretty strict regulation of anything that threatens to let
23 those emotions get out of hand, because the potential for
24 brawls on the court spreading to brawls in the stands, etc.,
25 etc., is always present. One can think of the experiences

1 they have had in soccer games in Europe and things like that
2 where fights in the field have led to deaths in the stands
3 to know that this is a serious matter both ways.

4 MR. KESSLER: Your Honor, we could have an
5 interesting, philosophical debate about what are the
6 appropriate rules for the N.B.A., but the issue here is, are
7 there issues that they have given up in collective
8 bargaining the ability to do certain things without the
9 Players Association?

10 THE COURT: I agree with you that that is the
11 kind of issue we ought to focus on, but the relevance of the
12 point I was just making is that even if you meet the grounds
13 of sufficiently serious questions going to the merits to
14 make a fair ground for litigation -- which I won't attempt
15 to say ten times fast, but it is standard -- you also have
16 to meet a balance of hardships tipping decidedly towards the
17 party requesting the preliminary relief. At least one
18 question that I am, I guess, raising in my mind -- I have no
19 doubt that there is hardship here to the petitioners. I am
20 wondering still whether there is not still some hardship in
21 not permitting the League to properly enforce a rule that
22 upon its face calls for prompt enforcement.

23 MR. KESSLER: Again, your Honor, if there is some
24 hardship, it is a tiny amount of hardship. Because if
25 they're right, in a week we are going to know and every

1 player in the League is going to know the League is right,
2 this is the rule, and it is now enforced. These players
3 will be punished, if the League is right. There is no
4 material hardship there. There is no undermining of their
5 basic enforcement policy.

6 The only hardship they will really suffer is that
7 if they are wrong then they will suffer the hardship which
8 they should suffer, which is that their authority will be
9 reigned in by the proper arbitrators under the collective
10 bargaining agreement which, by the way, they even have a
11 right of appeal there under the collusion proceedings before
12 the system arbitrator. We even set up a private three judge
13 appellate panel.

14 The parties negotiated this deal so that there
15 were neutral individuals who could determine these very,
16 very important issues based on an understanding of the
17 industry which they get by being the arbitrators in this
18 situation and which they can apply on an expedited basis.
19 We specifically provided for these proceedings to be held.
20 As I said, we were ready this morning to have the first
21 arbitration this afternoon, and the N.B.A. wasn't
22 interested, for whatever reason they decided. We are
23 willing to do both of these.

24 That hardship of us being wrong for a week and
25 then it being established that they are right on the rule

1 and the players being suspended a week from now cannot
2 measure up to what will be lost if they are opposed tonight.

3 THE COURT: Where do you derive that estimate of
4 a week from?

5 MR. KESSLER: Based on our prior history when we
6 want to move, when both parties want to move -- in fact,
7 frankly, your Honor, I would be willing to stipulate as part
8 of this that we are ready to have that proceeding on any day
9 convenient to both arbitrators -- two days, within the next
10 week.

11 Obviously if there are player witnesses, we want
12 to do it on an off day for the players, not during a game or
13 when they are practicing just before a game. I see no
14 problem in doing that. I cannot tell you the arbitrators'
15 availability because they didn't want to make the phone call
16 this morning.

17 There is no reason why we can't do this. In
18 fact, your Honor, we only get a TRO for ten days. So if you
19 give me a TRO, my mission is to get this all resolved within
20 those ten days because, if I come back to you in ten days
21 and say it hasn't be resolved, I need it flipped over and
22 they say, Well, if Mr. Kessler and his players had not been
23 diligent in some way or it hasn't been possible, I don't
24 think you're going to give me the extension at that point.

25 What I need is simply the ability to get these

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1 neutrals to do their job. That is why I said it is a
2 classic injunction in aid of arbitration.

3 If the suspensions happen today and a week from
4 now it is found that Patrick Ewing should have played and
5 Allan Houston should have played tonight and the Knicks lose
6 the game and lose the series and the course of history is
7 changed, nobody can give that back to them. You can't. You
8 can't give it back. That hardship outweighs the sweetened
9 delay for them. They have their rules.

10 By the way, there is one last point I want to
11 make. They talk about a rule that they have established
12 that if you punch somebody you are suspended. It is silly.
13 No one is going to object to the Commissioner finding, yes,
14 that is a dispositive fact, you shouldn't punch anybody.
15 The problem with this rule, and precisely why we wanted this
16 collusion provision -- or why we wouldn't agree to it --
17 there is not necessarily any rational relationship. That is
18 why the players wouldn't agree to it, between this and doing
19 something detrimental to the League.

20 Now, if they brought a proceeding that these
21 players engaged in a fight, pushed people, did something,
22 that might be proper grounds. We are not contesting that
23 and we are not contesting the Commissioner's authority to do
24 that case by case.

25 THE COURT: I think at the risk of interrupting

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1 the course of history, I think I need to hear a little bit
2 from your adversary and then we will come back to you in a
3 few minutes.

4 MR. KESSLER: Thank you, your Honor.

5 MR. GANZ: Good afternoon, your Honor. My name
6 is Howard Ganz.

7 THE COURT: In terms of your argument about the
8 anti-injunction statute, why doesn't this fall within the
9 recognized exception for an injunction in aid of
10 arbitration?

11 MR. GANZ: Because, your Honor, it is not in aid
12 of any arbitration to which these players and this union are
13 entitled.

14 The clear and explicit language of the collective
15 bargaining agreement says that disputes about discipline
16 imposed by the Commissioner or his designee with respect to
17 on-court conduct are to be resolved exclusively in the ways
18 set forth and resolved exclusively by appeal to the
19 Commissioner.

20 The provisions go on to say that that is the
21 final binding, conclusive result -- binding on the players
22 involved, the teams involved, and the parties to the
23 agreement, the N.B.A. and the Players Association. That is
24 the explicit language of this collective bargaining
25 agreement.

1 Your Honor, in our papers -- and we may not have
2 gotten them to you in order for you to have seen this -- the
3 claim that someone else, someone other than the Commissioner
4 had jurisdiction or authority to adjudicate a dispute
5 concerning the imposition of discipline for on-court
6 misconduct, that dispute is one that we have already had --
7 "we" meaning the union and the N.B.A. -- we have already had
8 that and adjudicated it. It was decided under the prior
9 collective bargaining agreement where the language of the
10 process is either identical or substantially identical to
11 what it is now, meaning simply that disputes about player
12 discipline for on-court conduct went under the old
13 agreement -- exclusively, the Commissioner.

14 There was an incident, and your Honor may recall
15 or have read about it, where a player, who shall go
16 nameless, but I am sure people may recall the incident, was
17 alleged to have spat upon a fan. He was disciplined for
18 that conduct. The Players Association sought to have that
19 matter arbitrated before the grievance arbitrator.

20 One of the two arbitrators, they say, should
21 adjudicate this dispute here.

22 The arbitrator at that time, a Professor Collins
23 at NYU Law School -- he has been a long-time professional
24 arbitrator and teacher at NYU -- ruled very explicitly, and
25 I think we have attached the opinion and award to our

1 papers, that under the language of the agreement disputes
2 about the imposition of discipline for on-court misconduct
3 were exclusively for the Commissioner. That is what the
4 parties had agreed to.

5 So to go back to your question, the precondition
6 for the --

7 THE COURT: This particular rule which, again, I
8 do not have, as far as I know, the entirety of -- that is to
9 say, Rule 12 -- but only the portion that you have quoted,
10 what is the rule more generally to it?

11 MR. GANZ: Pardon me?

12 THE COURT: Do you have the whole rule?

13 MR. GANZ: I do not have the entire rule with me,
14 your Honor. It is a multi-page tiny print. I have a
15 portion of it. I will be happy to hand it up to the Court.

16 Rule 12 covers a variety of things. The
17 subsection 9 that we had cited I think is headed "fines"
18 and it goes through the different aspects of conduct that is
19 subject to discipline.

20 THE COURT: When new rules are promulgated within
21 this document they are not shown to the players?

22 MR. GANZ: I think Mr. Thorn's declaration makes
23 clear -- it is unclear whether he sends them to the players
24 or he informs the players of them. Let me just address that
25 point, your Honor.

75gnewin

1 These rules are published in a paperback
2 publication called the N.B.A. Guide. That is a publication
3 that is published by the sporting news. You can buy it on
4 your newsstand. The N.B.A. distributes, I would exaggerate,
5 probably 50,000 copies across the world, not only to people
6 involved in the N.B.A., but even to its lawyers. It has
7 pictures of the players and their statistics. At the end,
8 it has the official rules of the N.B.A.

9 Beyond that, your Honor, with all due respect, I
10 think it is outrageous to suggest that the Players
11 Association never knew that there was a rule that says if
12 you leave the bench during an altercation you are suspended.
13 Even the players, your Honor -- we didn't bother to bring
14 newspaper articles or other things -- even the players
15 involved in these matters were aware of that. The Miami
16 players didn't leave the bench, so they had to be aware of
17 something. Most of the Knicks, a majority of the Knicks,
18 didn't leave the bench.

19 I submit, your Honor, it is just absurd to
20 suggest that the union -- Mr. Hunter, Mr. Klempner -- didn't
21 know that there was such a rule. Maybe Mr. Kessler does not
22 know these rules, maybe he does not get a copy of the N.B.A.
23 Guide. I will make sure he is on the mailing list next
24 year. These are public, official rules that are available
25 to anybody. Their existence is known. This rule itself,

1 your Honor, has been applied several times since it was
2 promulgated.

3 THE COURT: Assuming they were on notice of the
4 rules, it certainly does not follow necessarily that they
5 could be held to have waived any objections. Part of his
6 point, as I understand it, is they had bargained for the
7 right to effect review of these rules but for the ones
8 dealing with gambling, etc. Maybe I am misunderstanding the
9 situation.

10 MR. GANZ: I think Mr. Kessler said something, or
11 at least I understood him to be saying something otherwise.

12 What he said, at least in part -- I don't know if
13 this is the point your Honor is going to -- is that we can
14 understand the union says a case-by-case adjudication by the
15 Commissioner or his designee of on-court misconduct, so the
16 union does not come here saying we want to upset the
17 suspensions of P.J. Brown and Charlie Ward -- Mr. Brown
18 playing for Miami; Ward for the Knicks -- who were the
19 original combatants in this altercation, because in their
20 view that was a case-by-case adjudication. They are
21 perfectly entitled to pursue a case-by-case adjudication of
22 the suspensions imposed upon the four other players. That
23 is what the Commissioner would entertain at a hearing.

24 Mr. Kessler, the union, the players, want to
25 advance whatever arguments, whatever factual assertions,

1 whatever evidence they can muster to persuade the
2 Commissioner that the suspension should be reduced,
3 eliminated, deferred. They are fully entitled to do that.
4 That is the procedure that everyone bought into by virtue of
5 this collective bargaining agreement, and, indeed, your
6 Honor, that has been the procedure with respect to on-court
7 discipline for 50 years. Certainly through half the time
8 there's been a union, 30 years.

9 Your Honor, with respect to the incidents where
10 players have been suspended for leaving the vicinity of the
11 bench when there is an altercation on the floor, in several
12 instances the players have invoked the Commissioner's
13 procedure and have filed an appeal and come to a hearing
14 with the Commissioner.

15 THE COURT: Maybe I just missed the point, and it
16 wouldn't be the first time, but I thought I saw in his
17 papers and I thought he was making the argument now that
18 while the players had agreed to and bargained for, if you
19 will, a case-by-case all-factors-considered decision vested
20 with the Commissioner for on-court problems, they had not
21 agreed to and they had under their unique, as he puts it,
22 anti-collusion rules not given up the right to bargain for
23 or have input with respect to specific per se rules that
24 would be invoked, and that in this case what was being
25 invoked was not a case-by-case all-facts-considered type of

1 decision -- because, indeed, by their view if that had been
2 done they would not have suffered this penalty -- but rather
3 was a strict and literal enforcement of a draconian and
4 unyielding rule that they would never have agreed to. I am
5 not saying that is right or wrong, but I thought that was
6 his point.

7 MR. GANZ: Let's assume that is, let me respond
8 to it, your Honor.

9 First, your Honor, I believe the language of the
10 agreement, the collective bargaining agreement, must
11 control. I understand what Mr. Kessler says about
12 collusion, but if you look at the language with respect to
13 collusion and try to force fit it into a phrase about an
14 employment term or condition, this whole notion of you can
15 get suspended if you leave the bench, I see the argument, I
16 think it is imaginative and creative, but it doesn't work.
17 Because if you go to the provisions that deal with how
18 disputes about the imposition of discipline for on-court
19 misconduct are to be handled, whatever it may say about
20 collusion, it says very specifically and precisely that
21 precise dispute is resolved exclusively by the Commissioner.
22 I think, your Honor, that is the absolute, plain, clear
23 language.

24 THE COURT: Assuming arguendo that there was a
25 reasonable question as to whether there were conflicting

1 provisions of the CBA that left open whether the no
2 collusion provision relating to terms or conditions of
3 employment was applicable here or not -- and I know you say
4 there is no issue there -- assuming that, is the
5 determination of whether there is a conflict and therefore
6 whether it is ultimately covered or not covered by what is
7 subject to arbitration, is that for the arbitrator or the
8 court?

9 MR. GANZ: The question, your Honor, as to
10 whether -- I would interpret what you have just posed as
11 positing the issue as to whether there is an agreement to
12 arbitrate. That is really at a party's instance, either for
13 the Court, if you are inclined -- and you can refuse to
14 arbitrate saying there isn't any agreement to arbitrate, or
15 you can without prejudice go before the arbitrator and say
16 you decide. It is my position you have no jurisdiction. We
17 have not agreed to arbitrate, but you may decide it. A
18 party has a right -- a party can't be ordered to arbitrate
19 unless a court decides that there is an agreement.

20 Here I say there is no agreement to have either
21 the system arbitrator or the grievance arbitrator involved
22 in player discipline matters, your Honor.

23 For the purposes of this proceeding, let me
24 remind myself of where we are. We are here at 2:30, 2:15
25 when there is a game at 8:00 this evening where the most

1 extraordinary kind of temporary relief is being sought.

2 There is, and I will be happy to go through it,
3 great prospect of hardship to the National Basketball
4 Association. There is exceedingly persuasive reasons for
5 this rule. Though Mr. Kessler can't understand its
6 rationality, we will be happy to display to the Court
7 videotapes that trace a history of on-court altercations and
8 players streaming from the bench, which indeed led to this
9 rule.

10 The point is, your Honor, that on this
11 application the plaintiffs here have to demonstrate that
12 there is a likelihood of success on the merits that the
13 arbitrators -- grievance and system -- will decide that they
14 have jurisdiction.

15 THE COURT: That is one of the branches they
16 could pursue, but there is an alternative branch. The basic
17 standard which I thought was pretty well the opinion of both
18 parties here is that in order to obtain this relief they
19 have to show A, irreparable harm, and, B, either likelihood
20 of success on the merits or sufficiently serious questions
21 going to the merits to make a fair ground for litigation and
22 a balance of hardships tipping decidedly towards the party
23 requesting the preliminary relief.

24 MR. GANZ: I didn't mean to leave out the
25 sufficiently serious question.

1 I think in your appraisal of those factors, I
2 would submit that you should and must consider, one, the
3 language, which I am not going to repeat what it says, and,
4 two, the prior precedent with respect to this very dispute.

5 A decision rendered by the very kind of
6 arbitrator that Mr. Kessler says should now decide this
7 issue, putting aside whether the suspensions are right or
8 wrong or otherwise, just on the question of jurisdiction,
9 fashioned on the language of this agreement and that
10 precedent and fashioned just to the collusion part, with an
11 open and notorious application, whether you want to call it
12 a rule or a fortuitous circumstance, that every time since
13 1994 a player left the bench and went on the court in the
14 middle of an altercation, he got suspended. Maybe I was
15 purely fortuitous, but I think not. There was never a
16 protest as to the application of that rule or the invocation
17 of that fortuitous circumstance, and players went to the
18 Commissioner to say, you shouldn't have done it to me
19 because I was going to be a peacemaker.

20 If I may just speak to that point, your Honor.
21 Your Honor was correct, and I don't mean to curry favor, but
22 sporting events, particularly at play-off time, arouse
23 enormous emotions on the part of players and fans, and
24 conduct on the playing court of the kind that occurred in
25 Miami a couple of nights ago obviously threatens enormous