1 injury to the players who are involved. This is a
2 pro-player rule. This is not an anti-player rule. This is
3 for the players, for very large, strong, powerful men who
4 can do significant injury to one another, this is to prevent
5 them from doing that and certainly to prevent their
6 altercations from spilling out in the crowd.
7 THE COURT: His argument, as I understand it, is
8 as follows: It is not like they are going to be regularly
9 challenging or seeking an arbitration every time because
10 their challenge is essentially, at least under the collusion
11 prong, to the very existence of this per se rule in its
12 form. So the hardship that the League would suffer under
13 their analysis is that on this one occasion instead of being
14 able to invoke the rule immediately, they would have to wait
15 a week, and that could not be said to meaningfully undercut
16 the force of the rule if in fact it turns out the rule is
17 correct and is non-collusive and is proper in all respects.
18 What will follow then is that forever after it will be
19 enforced by its terms immediately, but the hardship that the
20 League will suffer on this occasion if a TRO is granted and
21 the League ultimately prevails will be on this one occasion
22 it had to wait a week to enforce the rule.
23 MR. GANZ: May I respond?
24 THE COURT: Yes. When I recapitulate one side's
25 arguments or another it does not mean I necessarily agree or

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1 disagree. I am just trying to clarify it in my mind.
2 MR. GANZ: I will respond to that with three
3 points. First, your Honor, the bargain struck here between
4 this union, the players and the N.B.A., the bargain struck
5 here is that the suspension goes ahead and the adjudication
6 of its propriety follows that the employer acts, the
7 employee grieves, and that is the standard in
8 labor-management contracts. It is very clear from the
9 language of at least two provisions in the collective
10 bargaining agreement. If I may just call your attention to
11 one which regrettably is not referred to in our brief.
12 THE COURT: I assume that is the norm, but of
13 course there he is saying that from there the very reason
14 they are here for a TRO is because of the highly unusual
15 circumstances that creates an unusual hardship for them.
16 MR. GANZ: May I respond to that, your Honor?
17 THE COURT: Yes.
18 MR. GANZ: I don't doubt that game six of this
19 series is very important, but I don't know whether a game on
20 March 10 that determined who was going to make the play-offs
21 was just as important to the players involved or a game at
22 the end of the season as to who was going to get home
23 court --
24 THE COURT: I wonder how far that cuts. I agree
25 with you there is a continuum, but, for example, if someone

1 were disciplined and were told you cannot participate in the
2 final Olympic contest of a particular sport because we have
3 a rule that says discipline first, grievance later, and
4 tomorrow is your Olympic contest, to argue back and say,
5 well, of course before that Olympic gold medal contest there
6 was 14 qualifying rounds and that if the person had missed
7 any of the qualifying rounds they also might have missed the
8 whole thing I think is a spurious argument. There is a
9 difference between those two situations.
10 MR. GANZ: I am not arguing that point, your
11 Honor. We have a contract that says nothing contained in
12 this agreement shall excuse a player from prompt compliance
13 with any discipline imposed upon him. That is point one.
14 Point two, we have an agreement that says the
15 Commissioner or his designee can suspend you for on-court
16 misconduct, and then within 20 days if you appeal he has to
17 have a hearing and then he has to make a decision ten days
18 later and the suspensions proceed.
19 Mr. Kessler made a point in the collusion area to
20 saying the deal in basketball is different than that in
21 baseball. It is different in this respect too, your Honor.
22 In baseball, if your Honor recalls the incident with Roberto
23 Alomar, the baseball players have, as I understand it, a
24 provision in their agreement that says you don't have to
25 serve your suspension until the hearing is held. The N.B.A.

1 contract is just the reverse. You serve your suspension and
2 then the hearing is held.
3 Frankly, without criticizing baseball by any
4 means, the N.B.A. believes that is a fundamentally important
5 right that it obtained in this agreement for the very
6 reasons -- pointing specifically to the Roberto Alomar
7 incident and the tremendous outcry of protest about not only
8 what Mr. Alomar was accused of doing or did, but about
9 baseball's inability to take seize of it and control it
10 immediately.
11 It is the swift discipline, the swift punishment
12 that is absolutely essential not only to prevent players
13 tomorrow night from engaging in the same kind of conduct,
14 but to preserve really the essence and integrity of the
15 game, to assure the fans that this game is going to be
16 played according to a set of rules.
17 The last point I would make in response to your
18 question, your Honor, is it is easy for Mr. Kessler to say
19 that we will do it next week. The suspensions here may or
20 may not -- only history will tell -- have a significant or
21 insignificant or a non-competitive effect, and if a
22 temporary restraining order is issued and the players to be
23 suspended tonight and/or on Sunday are returned and
24 ultimately it is concluded that they should have been
25 properly suspended, the N.B.A. is in a pretty big pickle.

1 Is tonight's winner still the winner? Is Sunday's loser
2 still the loser? Do we replay the games? What is the
3 N.B.A. supposed to do in those circumstances?
4 THE COURT: In your analogy or your distinction
5 between baseball, I would have guessed from what you told me
6 about the baseball situation that that comes up all the
7 time -- and I would suspect that that is not before me --
8 and the result stands even if the grievance is ultimately
9 overturned, so I wonder whether that is really quite as
10 major a problem as you are positing. If I understand the
11 point you were making about baseball, it ought to be an
12 issue there all the time, at least potentially, and seems
13 not to have prevented the sport from surviving.
14 MR. GANZ: Your Honor, all I can respond to is
15 that these are issues that someone has to decide.
16 Mr. Kessler has no problem with a rule as to
17 throwing a punch. I don't know if that is a good rule or a
18 bad rule or a sensible rule or not. If you throw a punch
19 and it is clear you never would have hit the guy, is that a
20 punishable offense? I think in the N.B.A. it is.
21 Someone has to make that judgment. These are not
22 easy judgments. Believe me, the N.B.A. takes no pleasure --
23 this is a self-inflicted wound. The N.B.A. takes no
24 pleasure in having had to come to the conclusion it came to
25 yesterday, but someone has to decide.

1 This really is the bottom line point which I
2 think cuts across all of the arguments we have made and
3 Mr. Kessler made. The agreement that we have reached with
4 the players, for good or for ill, is that it is up to the
5 Commissioner. It is not, with all due respect, your Honor,
6 you, it is not the system arbitrator.
7 THE COURT: Thank you for small favors.
8 MR. GANZ: You are quite welcome.
9 If I may, your Honor. We have talked about this
10 rule -- and I don't want to pick up Mr. Kessler's lingo --
11 this "blanket rule" as being the generator for why we're
12 here, but Mr. Thorn's declaration that is before you makes
13 very clear at the end of it that with or without any rule he
14 would have come to the same determination.
15 Without reading extensively, what he says is that
16 the N.B.A. has learned by experience -- and, frankly, we
17 wouldn't be happy to display these videotapes, but we are
18 prepared to show you the sort of legislative history or the
19 basis for the enactment of the rule, and including the one
20 clip that stands out in my mind, your Honor. Maybe here
21 people will recall the Kermit Washington, Rudy Tomjanovich
22 thing that happened about 20 years ago when Tomjanovich was
23 running down the court to be a peacemaker, and I don't think
24 anyone ever doubted that, no one except apparently Kermit
25 Washington who broke his jaw and cheek and everything else

1 in 16 places. So Mr. Washington didn't appreciate
2 Mr. Tomjanovich' intent.
3 That is why there is this rule. What the
4 N.B.A.'s experience has shown is that a player who leaves
5 the bench during an altercation, his entry onto the court
6 creates an incendiary situation that simply escalates to
7 conflict or can be perceived as intended that way. The
8 opposing player can't know whether his adversary who is
9 marching on the court to be Ralph Bunch --
10 THE COURT: I understand that point, and it is a
11 fair response to some of the points that were made by your
12 adversary, but to my mind it is tangential just as his
13 claims that their hearts were pure is tangential.
14 The real question -- not the only question -- is
15 whether the rule to deal with that, assuming it was invoked,
16 is a rule that can be challenged before an arbitrator
17 regardless of whether the rule is a good rule or bad rule.
18 You have pointed out reasons why it is a sensible
19 rule, and that may be relevant on the hardship point, but in
20 theory you could come up, if it were otherwise lawful, with
21 a completely unsensible rule and you would still have the
22 right to deprive this court of jurisdiction if there was any
23 rule that fell within the exception to the anti-injunction
24 statute.
25 MR. GANZ: What we have here, your Honor, is a

1 sensible rule.

2 THE COURT: I am not at all suggesting that is

3 not true. I am just saying I think it is not the heart of

4 the controversy.

5 MR. GANZ: Whether it is or it isn't, I agree, it

6 is not the heart of the controversy. Whether it is sensible

7 or not sensible, whether its application here is appropriate

8 or inappropriate, those are issues not foreclosed. Those

9 are issues that the parties have agreed to adjudicate in a

10 particular way. That is the basic point.

11 That is the reason, your Honor, why Norris

12 LaGuardia applies, if you are talking about any other

13 arbitral forum, because there is no agreement to arbitrate

14 in such other forums. So this litigation cannot be in aid

15 of arbitration. It is indeed, your Honor, a way to avoid

16 the very process that the parties agreed would be the way in

17 which these matters would be resolved.

18 Thank you, your Honor.

19 THE COURT: Let me hear from petitioner's

20 counsel.

21 MR. FLUMENBAUM: Your Honor, may I speak on

22 behalf of the Miami Heat?

23 THE COURT: Mr. Flumenbaum, despite my tremendous

24 respect for you, I do not think they are a party to this

25 proceeding and I am going to reluctantly decline to give you

1 that opportunity.

2 MR. FLUMENBAUM: I understand that they are not a

3 party, however, they do have an interest and they do have an

4 objection to the Players Association --

5 THE COURT: I think it is not properly before me,

6 but it is a pleasure to have you in my courtroom.

7 MR. FLUMENBAUM: Thank you.

8 MR. KESSLER: Your Honor, let me begin by

9 agreeing with your Honor that the issue is what did the

10 parties agree to here -- that is the core issue -- and would

11 there be arbitration of these issues.

12 I submit that Mr. Ganz has not done anything to

13 question or detract from our collusion arguments because his

14 position that the collusion provisions could not apply to

15 something like a suspension would render nugatory the need

16 for Section 2 which says, but remember collusion doesn't

17 apply to suspensions for drugs, crime and gambling. It just

18 makes utterly no sense. You can't reconcile those two

19 things.

20 THE COURT: The question of those conflicting

21 interpretations is -- I would be interested if you

22 disagree -- I think he is right that that is a question for

23 the Court. That is presumably the threshold question or one

24 of the threshold questions I have to reach.

25 MR. KESSLER: If I understand correctly, I don't

1 think so, your Honor.

2 THE COURT: The determination of whether there

3 has been consent to arbitration is a question of law for the

4 Court, yes?

5 MR. KESSLER: Yes, but I think the way you

6 approach that issue is as follows:

7 Clearly both sides agree there has been consent

8 to arbitrate what is a violation of the collusion

9 provisions. There is no dispute on that. Mr. Ganz and I

10 don't dispute that. We agree there is an agreement on that

11 issue. The next issue becomes is a particular type of

12 agreement between the N.B.A. and its teams collusion, which

13 is what our argument is.

14 THE COURT: You have also agreed, have you not,

15 not to arbitrate certain other types of activities. If the

16 question therefore is you could escape the effect of that

17 other clause by simply any time you wanted to recast it as

18 to fall within the first clause, it cannot be that that

19 issue gets determined by an arbitrator. It seems to me that

20 is an issue for the Court.

21 MR. KESSLER: I understand what you are saying.

22 Yes, you have to interpret what is the scope of the

23 arbitration with respect to the collusion or what is the

24 scope of the arbitration for suspension. I submit, though,

25 it is very clear that if you look at the actual language of

1 Section 8 of the grievance procedures, which Mr. Ganz is
2 referring to, it is clear you are talking about case-by-case
3 commissioner adjudication of individual facts. There is no
4 mention of an ability of the NFL to promulgate any rules --
5 the N.B.A. I am sorry.
6 If Mr. Ganz were right, it would say, And the
7 Commissioner may promulgate rules, policies, presumptions
8 about discipline which shall also only be arbitral this way.
9 In fact, it is very easy to see why his argument can't be
10 correct.
11 Under his argument you could suspend a player,
12 for example, and say the Commissioner decides the
13 appropriate punishment in this case is going to be to not
14 only punish the player but require the team to give up
15 salary cap room -- and your Honor may be familiar that we
16 have a salary cap in the N.B.A. -- well, that would directly
17 violate another provision of the CBA which sets the salary
18 cap. And we would bring an arbitration again before this
19 same system arbitrator saying, Mr. Commissioner, you cannot
20 in the guise of discipline violate something else you have
21 given up, and that arbitrator determines that. This is what
22 we're saying here. In the guise of case-by-case discipline
23 you cannot promulgate the terms and conditions of employment
24 which the collusion provisions say you cannot do.
25 Now, if they have terms to propose, we could

1 agree with them on it. We are not unreasonable people on
2 the players' side. We are willing to debate with them and
3 come up with reasonable rules, but these rules were never
4 offered and shown.
5 In that regard, with respect to the *Barkley* case
6 that they cited, the *Barkley* case, of course, is completely
7 off point. Number one, it had nothing to do with collusion.
8 In fact, the arbitrator who decided that would have no
9 authority to consider it collusion. So there was no
10 collusion idea in that case.
11 Number two, there was no uniform policy. It was
12 a case-by-case adjudication. The argument there was, did
13 the imposition of the penalty somehow take that out of the
14 case-by-case adjudication. Completely different argument.
15 Nothing to do with this at all.
16 Again, this goes to the hardship point. Your
17 Honor's at least formulation of my position was exactly
18 correct. What we're saying is in the small amount of time
19 that it will take to determine whether the Commissioner has
20 the authority or not to promulgate these type of rules
21 without the Players Association there will be very little,
22 if any, damage done to their discipline powers, to their
23 authority unless we're right. If we're right, then it is
24 not cognizable injury, it is simply the fact that it is the
25 deal they gave up.

1 Someone might think that there should be $10
2 million in fines imposed on players who get into fights.
3 Maybe that will deter all fighting. I suspect it would.
4 The Commissioner could not do that. There is a maximum fine
5 set in the agreement. So all of this is about what has been
6 agreed to and how do you review that in the context of
7 arbitration.
8 THE COURT: Is there any other place -- and,
9 again, I do not have these full documents before me; I have
10 little snippets -- is there any other place in these
11 documents as a whole where the terms and conditions of
12 employment is referred to in a way to make it unmistakable
13 that it includes discipline?
14 MR. KESSLER: I have not reviewed it for that
15 point, your Honor, but I would say nothing could be clearer
16 than Section 2 of this very article because that is the
17 context in which it is raised. Again, there would be no
18 reason to exclude discipline for drugs and crime if it
19 wasn't included.
20 THE COURT: I understand that argument from
21 before and it is important.
22 MR. KESSLER: It certainly is not a defined term.
23 It is a fairly broad term. I know label laws are generally
24 terms and conditions of employment -- not taking it out of
25 the CBA -- and generally refers to almost any aspect under

1 the terms under which the employer deals with the employee.
2 It is an extremely broad concept.
3 Again, singling the fact that the players deal
4 here, the bargain they achieve was if you want to change our
5 terms and conditions of employment, do it with us, because
6 as you know on the label laws employers can sometimes impose
7 terms. What we did was bargain that away during the term of
8 the CBA. During the term of the CBA, they have imposed
9 terms upon themselves, have committed collusion. That is
10 why we are entitled to have arbitration.
11 Mr. Ganz went through this argument about
12 baseball and, after all, we didn't have this provision
13 specifically allowing for injunctions. Well, Mr. Ganz and
14 his firm are extraordinarily knowledgeable label lawyers.
15 They knew of the boy's market exception. They knew that in
16 an appropriate case an injunction in aid of arbitration
17 would be available. That is the deal we made. We didn't
18 prohibit it. We didn't specifically provide for it. Both
19 of us being knowledgeable lawyers put ourselves in the state
20 of the law about which we were very familiar. This is the
21 case.
22 Again, we have not had many cases under the CBA.
23 As your Honor pointed out, it is the extraordinary
24 circumstances of this particular situation where we need the
25 injunction. Frequently when we have disputes with the

1 N.B.A., if it takes weeks to resolve or a month to resolve
2 no one particularly gets upset about that because we could
3 work that out. This is one where we believe the
4 consequences will be severe.
5 Finally, your Honor, just to close, all we're
6 seeking to do is to preserve the status quo for the next ten
7 days or shorter. We are willing to stipulate to a shorter
8 time to have this hearing if the N.B.A. is. That is all we
9 are doing.
10 The pickle Mr. Ganz referred to is a pickle that
11 won't go away no matter which way you turn the pickle jar,
12 because if you don't grant this TRO and the players don't
13 play and the team loses and a week later we get a
14 determination they should have been able to play, you have
15 the same pickle that Mr. Ganz referred to.
16 This won't go away one way or the other. The
17 point is, shouldn't the arbitrators be permitted to do their
18 job? As your Honor said, no one gave the Court the job --
19 not that your Honor may not want it; maybe you want it,
20 maybe you don't --
21 THE COURT: I am much too short for any of the
22 jobs that seem to be available.
23 MR. KESSLER: Our arbitrators are not terribly
24 tall. The point is the parties selected the arbitrators.
25 All we are seeking is an ability to let them render their

1 relief in a context where the parties will preserve their
2 rights until that happens.
3 Thank you, your Honor.
4 THE COURT: All right. Mr. Ganz, I do not know
5 if there was anything further you wanted to add, but I will
6 give you that opportunity if you want it.
7 MR. GANZ: Thank you, your Honor.
8 First, your Honor, I would with respect to this
9 argument about collusion invite the Court -- if I may hand
10 up a complete copy of the collective bargaining agreement.
11 THE COURT: All right.
12 MR. GANZ: Your Honor, I am not going to parse
13 the language, but if I could just call your attention to the
14 anti-collusion provisions, they start at page 117. I think
15 if you read them, you will come to the correct conclusion
16 that they have absolutely nothing to do with what is before
17 you today. These are, as the language indicates, provisions
18 designed to prevent teams from colluding so as to refuse to
19 negotiate with players, not offering player contracts, and
20 depriving them of compensation and other rights by some
21 conspiracy.
22 This is clearly not that, I would submit, and I
23 think the language would support that, your Honor.
24 THE COURT: I have looked at that. I noticed
25 that in the copy you have given me it goes from page 112 to

1 115 and then to 116 and then it doubles back to 113 and 114,
2 but that is not a unique problem for federal courts to deal
3 with. I manage to parse through.
4 MR. KESSLER: We have an extra that your Honor
5 may have.
6 THE COURT: Thank you.
7 MR. GANZ: You will note, your Honor, this is
8 jointly produced.
9 THE COURT: To my mind it has the clear
10 indications of the handiwork of lawyers.
11 MR. GANZ: Your Honor, two other points. One,
12 Mr. Kessler says that we are both pretty good lawyers and
13 yet he can't understand how I could never have expected to
14 be here today under the circumstances. With respect to
15 that, on this issue of on-the-court player discipline, the
16 reason why I could never have anticipated, or one of the
17 reasons, one of the principal reasons I could never have
18 anticipated being here is reflected again in the language of
19 the agreement.
20 I call your attention here again to Article 31,
21 Section 8, which sets forth this procedure before the
22 Commissioner and obviously contemplates the service of the
23 suspension before its adjudication, as well as Article 31,
24 Section 14D, which makes clear that the player must comply
25 promptly with the discipline imposed upon him.

1 Finally, your Honor, whether this is a pickle jar
2 or whichever way it works, I think it goes back to something
3 I said earlier. Someone has to make a decision. The
4 parties, I submit, have agreed as to who that someone is
5 supposed to be. Judgments like that, what is best for the
6 game of basketball, what is best for the N.B.A., both the
7 players and teams, are the kind of judgments, it seems to
8 me, your Honor, that ought to be made by the Commissioner of
9 the National Basketball Association, especially where there
10 is powerful language suggesting that that is his
11 entitlement.
12 Thank you, your Honor.
13 MR. KESSLER: Your Honor, if I could just answer
14 one question you asked. I found another answer. It is on
15 the same page. I apologize for being slow.
16 You asked is there any other meaning of the word
17 "terms and conditions of employment." In that Section 2 of
18 Article 14, again I now look -- this is again what is not
19 included in collusion -- I find in No. A the formulation,
20 negotiation of collective bargaining proposals. Of course
21 that is exactly our point. It says we exempted them from
22 formulating and proposing it to us. So if they propose to
23 us that there will be a rule like this, collective
24 bargaining is clearly the broad meaning of terms and
25 conditions, that is not collusion. If they implemented the

1 proposals to have a rule like this, then in fact it is not
2 exempt and it becomes subject to collusion.
3 Thank you, your Honor.
4 THE COURT: Thank you.
5 Let's talk about timing that will both
6 accommodate your needs and give me a chance to look more
7 deeply at some of the materials you furnished me with.
8 What I would propose, unless you tell me it does
9 not meet the sensible way of handling this time-wise, is
10 that we reconvene at 4:30 and I will render my decision at
11 that time. I would think that since the game does not start
12 until 8:00 that even, assuming arguendo, I would grant the
13 TRO that that would be sufficient time.
14 Is that true or not?
15 MR. KESSLER: Given the time constraints your
16 Honor is under, I think we would find that very reasonable.
17 THE COURT: I will look forward to seeing you all
18 then at 4:30.
19 (Recess)
20
21
22
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24
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1 (Resumed)

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

6 THE COURT: I have reached a decision. I have
7 made some rough notes. I will try as best I can based on
8 those notes to articulate not only my decision but also the
9 reasons for it.

10 I do at the outset want to express my
11 appreciation for the excellent advocacy by counsel for both
12 sides, who if they were not already consummate professionals
13 would certainly be appropriate first-round draft picks, and
14 their excellent papers and excellent oral argument on very
15 short notice has tremendously assisted the Court.

16 We are here, as everyone knows, on a request for
17 a temporary restraining order with respect to the discipline
18 imposed on the individual plaintiffs and, in particular,
19 those who are most immediately affected tonight. Both sides
20 are agreed, as they must be given the Second Circuit law,
21 that the standard in this circuit for the obtaining of a
22 temporary restraining order and preliminary injunction is
23 that the party that is asking for it must demonstrate,
24 first, irreparable harm, and, second, either likelihood of
25 success on the merits or sufficiently serious questions

1 going to the merits to make a fair ground for litigation and
2 a balance of hardships tipping decidedly toward the party
3 requesting the preliminary relief.
4 The good thing about this complicated standard is
5 that it guarantees that no one but lawyers will fully
6 understand anything else that is said in these proceedings.
7 The Court is therefore required to first address
8 whether there is irreparable harm.
9 In essence, the harm that is being asserted is
10 non-economic in nature, but very immediate in nature. It is
11 the deprivation of the opportunity of these players to play
12 in a critical play-off game that they realistically and
13 reasonably view as very important in their overall careers
14 and life goals.
15 Were it purely a question of psychological harm,
16 I would be somewhat hesitant to hold this makes out a case
17 of irreparable harm. One can suppose that some high school
18 seniors who are deprived because of what they view as
19 improper discipline from going to their senior prom -- this
20 shows my age, because I do not even know if there are still
21 senior proms -- that someone in that situation would quite
22 possibly feel very severe psychological harm that I am not
23 sure would give rise to the irreparable harm of the sort
24 required by the standard. But as I indicated earlier today
25 in the question about the Olympics, there is an objective

1 component here as well, and no one can for a moment pretend
2 that this game and games that are coming up in the play-offs
3 are just another game. It also is apparent to me from
4 reading the parties' papers that the defendants do not make
5 any serious challenge to the claim of irreparable harm. So
6 I conclude that on the first prong the plaintiffs have made
7 out their demonstration of irreparable harm.
8 So we then come to the multi-bifurcated second
9 prong of showing either a likelihood of success on the
10 merits or the two-part showing that there are sufficiently
11 serious questions going to the merits to make a fair ground
12 for litigation and a balance of hardships tipping decidedly
13 toward the party requesting the preliminary relief.
14 For reasons that I will get to in a minute, I do
15 not think there is a showing of likelihood of success on the
16 merits. So we turn to the alternative of sufficiently
17 serious questions going to the merits to make a fair ground
18 for litigation and a balance of hardships tipping decidedly
19 toward the party requesting the preliminary relief.
20 Taking up the second part of that initially, the
21 balance of hardships, I find that to be a somewhat close
22 question. There is no doubt that the defendants will suffer
23 some hardship in not being able to swiftly enforce
24 discipline, pursuant both to their overall arrangements that
25 discipline should be swiftly enforced, particularly for

1 on-court infractions, and also more particularly pursuant to
2 the so-called "blanket rule" that is in issue here.
3 Nevertheless, the hardship to the defendants from
4 this particular requested order is not all that severe in
5 terms of those long-term goals because the essence of the
6 challenge goes not to the right to impose discipline or to
7 impose it swiftly, but to the particular viability of this
8 particular rule without the agreement of the players, and if
9 that challenge -- which could be resolved by an arbitrator
10 presumably in a matter of a few days -- were to fail, then
11 forever after that rule would be in place and discipline
12 would be promptly visited for infractions in accordance with
13 the terms of the rule.
14 In other words, nothing about the requested TRO,
15 in the Court's view, would have meaningful long-term
16 implications for the ability of the League to visit
17 punishment swiftly for on-court infractions that indeed, for
18 reasons alluded to earlier in the argument, must in
19 appropriate cases be dealt with swiftly.
20 By contrast, the hardship to the plaintiffs is of
21 more severe consequence because although this Court is
22 sufficiently parochial to wish that the Knicks would be in
23 every play-off game in every level in every season, one
24 cannot assume that that will always be the case.
25 So on balance I find that the plaintiffs have

1 made out the portion of the prong, the subpart of the text
2 that we are now dealing with, namely, that they have
3 demonstrated that the balance of hardships tips decidedly
4 toward them in requesting the preliminary relief.
5 We reach, therefore, the question of the merits,
6 sort of, in the funny and oblique and indirect way that
7 merits get reached in TRO-type situations.
8 The real question that one has to look at in that
9 regard is whether the challenge to the blanket rule raised
10 here by plaintiffs is something that the parties have agreed
11 to arbitrate or, even more precisely, whether there are
12 sufficiently serious questions about that issue to make it a
13 fair ground for litigation.
14 If it is not a matter open to arbitration, then,
15 number one, an injunction would not issue at all because we
16 would be under the anti-injunction statute rather than under
17 the arbitration exception to it, and, number two, the
18 plaintiffs would not have shown sufficiently serious
19 questions going to the merits to make a fair ground for
20 litigation let alone likelihood of success on the merits.
21 I am mindful, by the way -- as a sidelight
22 here -- that defendants have argued that the blanket rule
23 really was not invoked, that it was a determination case by
24 case on the merits that the blanket rule was only part of;
25 but I think that is itself a little bit in issue.

1 Defendants themselves argued in a different context that the
2 plaintiffs had to be on notice of the so-called blanket
3 rule, because there have been 22 or so cases, they allege,
4 in which the rule has been invoked and in effect followed.
5 I think it is a reasonable inference that plaintiffs could
6 argue that that is all that was involved here.
7 Now I suppose I should pause here and say what
8 the parties are referring to by the "blanket rule." It is a
9 sub, sub, subpart of one of innumerable rules that are part
10 of what are called the "Official Rules of the N.B.A.," and
11 although I have not been furnished by either side with the
12 entirety of those rules, I finally discovered that what
13 defendants had given me as Exhibit C to the affidavit of
14 Jeffrey Mishkin corresponds to what in his affidavit he
15 refers to as Exhibit 3, and that is a portion of the
16 official rules including the blanket rule. It states:
17 "During an altercation all players not
18 participating in the game must remain in the immediate
19 vicinity of their bench. Violators will be suspended
20 without pay for a minimum of one game and fined up to
21 $20,000. The suspensions will commence prior to the start
22 of the next game. The team must have a minimum of eight
23 players dressed and ready to play at every game. If five or
24 more players leave the bench, the players will serve their
25 suspensions alphabetically according to the first letters of

1 their last name. If seven players are suspended, assuming
2 the participants are included, four of them will be
3 suspended for the first game following the altercation. The
4 remaining three will be suspended for the second game
5 following the altercation."

6 Now plaintiffs say that rule is in violation of
7 the anti-collusion provisions of the N.B.A. collective
8 bargaining agreement and that as such it must be subject to
9 arbitration because the anti-collusion provisions, with
10 certain carve outs, are subject to arbitration. They point
11 in particular to Section 1 of Article 14 of the N.B.A.
12 collective bargaining agreement which, the overall article,
13 is entitled "Anti-collusion provisions." Section 1 states:

14 "Subject to Section 2 below, no N.B.A. team, its
15 employees or agents will enter into a contract, combination
16 or conspiracy, express or implied, with the N.B.A. or any
17 other N.B.A. team, their employees or agents:

18 (a) to negotiate or not to negotiate with any
19 veteran or rookie;

20 (b) to offer or not to offer a player contract
21 to any free agent;

22 (c) concerning the terms or conditions of
23 employment offered to any veteran or rookie."

24 Now read on its face it seems rather doubtful
25 that this has anything to do with the blanket rule. First

1 of all, it is directed not to the Commissioner's office, but
2 to N.B.A. teams, their employees and agents. It talks in
3 language drawn from antitrust law about contracts,
4 combinations or conspiracies. It talks about negotiations,
5 offers, things of that sort, conditions of employment.
6 It seems on its face clearly, or at least
7 certainly primarily, directed at collusion in the signing up
8 of players, negotiation of terms with players, things of
9 that kind. But plaintiffs say, well, one of the carve outs,
10 which is Section 2E, states that any action taken by the
11 N.B.A. League office to exclude from the League, suspend or
12 discipline any player for reasons involving gambling, drugs
13 or the commission of a crime will not be subject to the
14 requirements of the anti-collusion provisions. They say by
15 negative inference that suggests that any action taken by
16 the N.B.A. League office to discipline any player for other
17 reasons is subject to the anti-collusion provisions.
18 It is a clever argument. I think one would
19 ultimately find it unpersuasive in that the more natural
20 sense of the carve out is simply to say that if people go
21 around signing up players or negotiating with them, they
22 better not be signing up crooks. The N.B.A. reserves the
23 right to make sure that that is never done, and the section
24 does not really speak one way or the other to the issue that
25 the plaintiffs are raising.

1 I say, in finding that that argument in and of
2 itself would not be sufficient to show that plaintiffs have
3 established a likelihood of success on the merits, I think
4 if it were all that were involved in this contract perhaps
5 it might arguably make out sufficiently serious questions
6 going to the merits to make a fair ground for litigation,
7 especially since in the context of whether or not something
8 is arbitral the law of the United States has always been,
9 for many years now, to tilt in favor of arbitration wherever
10 it reasonably can be inferred. But that is not by any means
11 all that is involved in this collective bargaining
12 agreement.
13 We have an article, Article 31, which is the
14 natural place anyone would look to see if something is
15 arbitrable or not, because it is entitled "Grievance and
16 Arbitration Procedure;" and among other pertinent things
17 Section 8 of that article, entitled "Special Procedures with
18 Respect to Player Discipline," states that "Any dispute
19 involving a fine or suspension imposed upon a player by the
20 Commissioner or his designee for conduct on the playing
21 court shall be processed exclusively as follows:" And then
22 it sets forth provisions that do not include reference to
23 the arbitrators.
24 Plaintiffs argue that this refers to in effect
25 the Commissioner's quasi judicial functions of determining

1 on a case-by-case basis with reference to all its
2 particularities whether there has been any
3 on-the-playing-court violation, but does not deal with the
4 question of whether he can propound without compliance with
5 the anti-collusion provisions a blanket rule and then, as
6 they would argue, apply it automatically in the
7 circumstances of this case. I think that is far too fine
8 spun an argument in the face of language that is so plain,
9 so clear, so unequivocal and so on point to the dispute that
10 underlies this controversy.
11 If there were intended to be the limitation that
12 plaintiffs argue for, it would have been set forth right
13 there in Section 8, one would have supposed. So if one
14 plays the game of negative inference, which this court
15 believes is in any case not a very solid way of reasoning,
16 it would cut here in defendants' favor just as in the
17 previous section it cut in the plaintiffs' favor. I think
18 much more to the point is the unequivocal language of this
19 provision.
20 Accordingly, the Court finds that not only have
21 the plaintiffs failed to show a likelihood of success on the
22 merits, they have not even demonstrated against the very,
23 very modest standard required in the arbitration law context
24 that they have sufficiently serious questions going to the
25 merits to make a fair ground for litigation.

1 Accordingly, the Court will deny the preliminary
2 injunction.
3 Ladies and gentlemen, I have another matter that
4 is important to the litigants, and it may not matter to
5 anyone else, but I am going to have to take that up. I ask
6 everyone to clear the court except for the people that
7 should be here.
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