Bettman and Daly are Not Psychic

July 22, 2010
by Josh Brewster
INSIDEHOCKEY.COM
http://insidehockey.com/bettman-and-daly-are-not-psychic

1 Comment

With each of the 30 National Hockey League teams employing a "capologist" to help navigate the Collective Bargaining Agreement, the idea that every eventuality can be foreseen is erroneous, and fails to acknowledge the key role that the League's top attorneys occupy. In some cases, Gary Bettman and Bill Daly occupy a purely reactive position because there is literally no way that every massaging of the League's salary cap can be foretold, as though the League's top lawyers can see the future.

In the case of Ilya Kovalchuk's now-rejected contract, they're not changing the rules in midstream, they're applying them upon identifying a trend. Bettman and Daly are very much empowered to track trends in contracts, and stem any dangerous tides that arise. What the rejection of Ilya Kovalchuk's contract does is put clubs on notice that the trend will not continue.

The most notable front-loaded deals which raised eyebrows, but not a rejection, are the Chris Pronger and Marian Hossa deals, also the Roberto Luongo contract. While there are similarities, there are key differences. No contract trails off quite as severely or for as long as Kovalchuk's, and the deal was an invitation for League action.

In fairness to critics of the rejection, it's close. But most critics are not acknowledging that if Bettman and Daly didn't take action now, invoking the circumvention clause, there may be five, ten or more deals similar to Kovalchuk's coming down the pipeline.

THE RULES HAVE NOT CHANGED AND SOMEONE HAS TO STEER

Despite what people think about the League's governing document, the CBA doesn't prepare for every eventuality. That may not be as tidy a situation as fans hope for, but that's the reality, whether the CBA is a wonderful document, a flawed pact, or a terrible agreement. Regardless the quality of the CBA, it is General Counsel's job to react. Not everything can be proscribed.

And that is why Gary Bettman and Bill Daly earn big bucks. Because to steer a major professional sports league–or any major franchise business of any type—the top attorneys must make tough decisions about when it's time to stem a tide that could prove detrimental.

The Devils decided to structure Kovalchuk's contract differently (emphasis mine) than some earlier deals. Kovalchuk's deal runs near the absolute minimum for six of 17 years, and it is no surprise that it proved to be the straw that broke the front-loaded camel's back.

Pronger's deal with the Flyers trails off with its final two seasons at the minimum ($525K). Hossa's Blackhawks contract trails off in the final four seasons with two at roughly double the minimum ($1M) and two more at roughly 50% over minimum ($750K). Luongo's final three seasons include one at roughly triple the minimum ($1.6M), then two at roughly double ($1M).

A key difference—and it's a matter of degrees—is that Kovalchuk's trails off to minimal salary ($525K) for five years.

Lou Lamoriello knew that he had gone too far, I'll argue, when he uttered the now-famous words, "This is within the rules…This is in the CBA. There are precedents that have been set. But I would agree we shouldn't have these."

Lamoriello chose to push the situation further than the Pronger or Hossa deals. He gave Bettman and Daly every reason to roll out the "circumvention" clause of the CBA when he chose to massage the situation too far. Lou's not stupid. When pressed on the issue, he told reporters to ask "ownership" why such a deal was made. He knew, I'll argue, that the NHL's rejection was a likelihood.

The rules did not change for the Devils. They are still well within their rights to sign Kovalchuk, and they can (probably quite easily) rework the deal to something more palatable to the League. For example, paying Kovalchuk double or triple the minimum in the final years of the deal—similar to Luongo–might smooth the path toward acceptance.

Another option, arbitration, is no slam-dunk for the Devils and Kovalchuk. Don't be so sure that an arbitrator will be tone deaf to the League's position. The League has a valid point if it posits that the last six years of Kovalchuk's deal is just different enough from the previous deals to rightly invoke the circumvention clause. Don't be so sure that the arbitrator will be tone deaf to the idea that while the League may have allowed a few front-loaded deals, it is within its rights to stem the tide before it faces a troubling new practice on a much bigger scale.

A LAWYER, NOT A PSYCHIC

The mistake that Bettman's critics make is that they fail to understand the role of General Counsel in a franchise business.

NHL contracts are not "precedents" in the same sense that Brown vs. Board of Education is a legal precedent. And despite what critics believe, no CBA proscribes and defines all activities and practices.

In franchise businesses, franchisees may find new wrinkles to exploit in executing their contracts, and the General Counsel of the larger company can decide when it's time to put his or her foot down and interpret the new practice as a circumvention of, for example, an umbrella franchise license agreement filed with the Securities and Exchange Commission on behalf of a hotel, convenience store, movie theatre, or other chain.

The General Counsel of the franchise business can then let all the franchisees know that headquarters won't be accepting the new trend or practice. When the franchise license agreement is revisited upon its next filing, it may include a provision restricting the new practice.

In fairness to Bettman's critics, surely, if another Kovalchuk-type deal appears on his or Daly's desk, then the League knows it will have to be consistent and reject the deal.

No, the League can't revisit the CBA now, but the League's attorneys are responsible for controlling manipulations of the CBA. Its reaction to new practices and trends does not necessarily constitute a changing of the rules in midstream.

When exactly would have been the right moment to invoke the circumvention clause? Never? Or how about after a 20- or 30-year deal? The League's critics are quick to point out that it could have been invoked after some earlier deals, but they're never clear about when the circumvention clause should have been invoked. After Pronger's? After Hossa's? When, exactly?

Simply put, those same critics would have howled had the League acted earlier. Hell, they'd have howled any time Bettman tried to do anything, because they are operating under the false assumption that the CBA prepares the League for any eventuality. Even the most "perfect" CBA cannot guard against manipulative practices.

The most perfect CBA cannot predict every practice, every trend. General Counsel must react to such manipulations, and Bettman and Daly did right by the League in putting their feet down.

Comment:

Jim Devellano
August 9, 2010 at 10:30 pm

VERY INTERESTING THOUGHTS–WELL DONE & THOUGHT OUT !!!! Jim Devellano