

NATIONAL SPORTS LAW **NEGOTIATION COMPETITION 2020**

ROUND ONE

“Play-In for Keeps”

GENERAL FACTS FOR BOTH TEAMS

The NBA is experiencing tremendous growth worldwide and is one of the most successful major sports leagues. Over the past two decades, however, a serious problem has emerged with respect to late-season games. Teams unlikely to make the playoffs have taken to “tanking,” the name given to teams that essentially try to lose to enhance their draft position in the next season. Although the players on the court generally play as hard as they can, teams can tank by trading away their best players for future draft picks, resting better players, and fielding a team of less talented players.

The NBA and the National Basketball Players Association (NBPA) have tried to combat this problem by altering the structure of the system used to determine the draft order. The NBA and NBPA first tried instituting a draft lottery (and later a weighted lottery) to prevent teams from simply tanking in an effort to receive a top pick. These efforts, however, have been largely unsuccessful, and more and more teams seem to follow the tanking strategy each year, preferring to intentionally lose and gather talent over a period of years rather than to compete to obtain the best record that they can.

Things are not much better for the league’s top teams that often secure playoff positions with a dozen or more games left in the regular season. Knowing that they have the potential to go deep into what can be a 28-game playoff schedule, these strong teams reduce their competitiveness by resting key players to prepare for a long playoff run, which begins just days after the end of the regular season.

As a result of these factors, a large percentage of the end-of-the-regular-season games tend to be non-competitive and boring, hurting the reputation of the league and its players. These problems also suppress late-season attendance and TV revenue. Because the networks

know that viewership is likely to be low for many late-season games, they reduce their bids to televise NBA games compared to what they would bid if games were generally competitive through the end of the regular season.

With the tentative support of 23 of the NBA's 30 team owners, NBA commissioner Adam Silver has proposed a new play-in tournament to determine the last two playoff seeds in each conference. Commissioner Silver has argued that this proposal would further the NBA's goals of (1) reducing the incentive for teams to tank, and (2) maintaining fan interest across the full NBA calendar. And while the Commissioner has not stressed the financial impact of the proposal, many of the supporting teams believe that (1) the tournament itself will raise revenue substantially and (2) opening post-season play to two additional teams in each conference should enhance attendance at late season games in March and April. From the perspective of the Commissioner and most teams, the plan has substantial upside and virtually no downside risk.

Commissioner Silver's proposed plan would work as follows: At the end of the regular season, the top six teams in each conference would automatically make the playoffs instead of the top eight that currently receive automatic bids. The league would then hold two four-team tournaments among the seventh, eighth, ninth, and tenth seeds in each conference. The seventh seed would host the eighth seed, with the winner of that single game nabbing the seventh spot in the playoffs. The loser of the 7-versus-8 game would then play the winner of a game between the ninth and tenth seeds for the final playoff spot.

This plan is designed to combat the objection that a play-in tournament devalues the regular season. It gives the seventh and eighth seeds a significant edge over teams that finish ninth and 10th—a method of ensuring that regular-season success still means something. Teams that finish seventh and eighth get two chances to win one game to clinch a playoff spot, including a guaranteed win-and-get-in home game for each. The ninth and 10th teams need to win two games without a loss, and the 10th seed would need to win two consecutive road games.

This plan would create a number of new sources for competitive late-season games. Any team within striking distance of the 10th seed rather than the 8th would now have a substantial incentive to play hard in order to reach this play-in tournament. And new value would come from holding the sixth overall seed in each conference, because those teams would be guaranteed a playoff spot without having to play in the new tournament.

The plan would also work against so-called selective tanking for playoff positioning among the top eight teams. In certain circumstances in the current playoff season—usually because of injuries or match up factors—a team ranked in the middle of the top eight may conclude that “dropping down” in seed to play a higher-ranked team would actually increase the team’s chances of advancing in the playoff. But under the new plan no team would risk tanking from sixth to seventh in order to lock in a potentially more favorable playoff matchup. Doing so would drop the team into the competitive play-in tournament rather than receiving an automatic bid. Even tanking from fifth to sixth could be risky if the standings are close enough, as the team may not be able to fully control their fall in the standings and may drop into the play-in tournament.

Furthermore, the Commissioner has also argued that most NBA basketball fans are also college basketball fans where most major conferences conclude the season with a tournament among all of the teams in the conference. These conference tournaments are extremely popular and do not appear to detract from regular season games. The new play-in tournament would be a chance to emulate the NCAA’s success in this regard.

NBA playoff games generate average revenue of approximately \$10 million in ticket and concessions revenue per game. The NBA—that is the league itself—takes 25 percent of playoff ticket revenue, devoting a portion of this revenue to create a player’s pool that the NBPA divides amongst the players on each playoff team. The teams’ owners keep the rest. It is uncertain at this time, however, how much revenue the tournament play-in games will generate. On the one hand, they will be played by lesser teams unlikely to win the championship. On the other hand, they will be exciting one-and-done type games that will make a significant difference for the players on the teams involved and their fans. For the purpose of these negotiations however, the owners and the players have agreed to an estimate of \$10 million per game.

The 2019 player’s pool of playoff revenue allocated by the NBA and distributed by the NBPA was \$22 million. Of this revenue, players on the NBA Champion Toronto Raptors (for example) received \$250,000 each. Although the playoff share is a relatively small amount for star players, it can constitute a substantial percentage of the regular annual salary for lower tier players. In 2019, the Raptors share for winning the championship slightly exceeded 50 percent of the salary of players earning the league minimum of slightly below \$500,000.

As large as playoff ticket revenue streams are, the NBA's largest source of revenue comes from television. Revenue from network and local television approaches \$25 billion annually and is paid on a lump sum basis that does not depend on the number of playoff games in a given year. This amount entirely covers player salaries with room to spare.

Although the Commissioner and the teams have agreed to implement this proposal for the 2020-21 season, the NBPA would first have to agree to the necessary changes in the collective bargaining agreement, the current version of which runs through the 2023-24 season with a mutual opt out opportunity one year before.

The NBPA agrees that if a play-in system is introduced, the one described above and proposed by the Commissioner makes the most sense. The NBPA is unwilling, however, to agree without first ironing out the details and ensuring that the players are well-protected in all aspects of the new agreement.

A major issue for the NBPA is the players' belief that they are already required to play too many games. The regular season has stood at 82 games since the NBA expanded to a 12-team league in 1967. Back then, however, there were only two playoff rounds before the finals, and one of those was a best-of-five series rather than the best-of-seven structure that now makes up all aspects of the playoff apparatus. The league has kept the 82-game schedule despite adding a third pre-finals playoff round and expanding all rounds to a best-of-seven format. As a result, top players play substantially more games now than they did 50 years ago. As well as ensuring that the players receive a proper share of the incremental revenue generated by the play-in tournament, the NBPA would prefer to cut the number of games that players are required to play—either in the regular season, the playoffs (including the new play-in tournament), or both.

The NBPA has agreed to send representatives to meet with the NBA's representatives to see if they can come to a mutually agreeable understanding on any CBA changes necessary to implement this play-in tournament plan. Leadership for both the NBA and the NBPA have given their representatives full authorization to be creative and find mutually beneficial agreements that will advance each side's interests. The two sides have also agreed that this negotiation is not intended to re-open aspects of the CBA, other than those directly related to the proposed play-in tournament and related issues such as the number of regular season and playoff games. In that sense, both sides want an agreement as limited as possible.

CONFIDENTIAL FACTS FOR THE NATIONAL BASKETBALL ASSOCIATION
(NBA)

Commissioner Silver is excited about the play-in proposal and thrilled about the *tentative* support he received both from ownership and the NBPA. The Commissioner knows, however, that seven team owners voted against his proposal, and several others are teetering on the edge as to whether to continue their support.

Indeed, there is debate among team owners about whether a play-in would inspire as much fan interest and hype as the Commissioner hopes. After all, the tournament would solely involve middling teams who may be seen as simply battling for the right to get destroyed by the top seeds in the playoffs.

The owners who voted against the proposal worry, on the one hand, that they have little to gain from the play-in tournament because it will not generate significant incremental revenue. On the other hand, they could lose substantially if the NBPA figures out a way to use the tournament approval process to achieve their long-sought goal of reducing the number of games without reducing player salaries.

Because of the shaky support by the owners, the Commissioner believes that it is critical to achieve an agreement with the NBPA before the league meetings scheduled for mid-April. The more time that goes by without an agreement, the more likely Commissioner Silver's fragile super-majority of owners will fall apart.

Preferably, a deal can be reached with the NBPA that does not reduce the overall number of games played, as ownership in general—both among those in support and in opposition to the tournament—do not want to reduce the number of games played. Although they recognize the downside to non-competitive, low-attendance games in March and April, the teams make the bulk of their revenue through season ticket sales and television revenue, and not every team will make the playoffs, even if the playoffs are technically expanded to ten teams per conference.

Commissioner Silver has experience with the reticence of ownership towards cutting regular season games. Last year, the league floated an idea of cutting the regular season from 82 to 58 games, where each team would play every other team twice. The owners rejected that idea, declaring such a significant cut to the regular season schedule a non-starter.

In theory, revenue from a play-in tournament could enable the league to slash a few games from the 82-game schedule. For example, a 74-game schedule would allow each team to play teams within its division six times and all other teams in the league twice. But it is unclear whether six play-in tournament games would rake in sufficient cash to cover all of the lost regular season games, even if the schedule is reduced by just eight games.

The owners fear that any cut in regular season games may cause them to lose season ticket sales revenue (fans will want a reduction in the cost of a season ticket if there are fewer games) that would exceed any possible reduction in player salaries that could be achieved in negotiations with the NBPA.

But if games must be cut to get a deal, the owners would want games cut from the regular season rather than the playoffs. Playoff games make more money both in attendance and television revenue. And the owners cannot see the NBPA agreeing to any salary cap reduction if only playoff games are cut, since player salaries technically cover only regular season games. The players pool of playoff revenue, however, comes out of the league's 25 percent cut of playoff ticket-sales revenue, not the owners' 75 percent share. Given that in the past the league has taken as much as a 40 percent cut of playoff ticket revenue, the owners understand that they may have to accept a lower percentage going forward. As long as the owner's share remains at 70 percent or above, the Commissioner believes that the owners would consent to minor changes to the playoff structure particularly if they can exclude the new revenue from the play-in tournament from the overall playoff revenue calculation.

If the NBPA is firm on requiring a cut to the regular season schedule to accommodate the play-in tournament, Commissioner Silver is convinced that he can get the owners to agree to a 74-game schedule if the agreement includes a proportional cut in player salaries—a $1/82$ reduction to the salary cap for each game cut—to make up for any losses. Although a proportional cut would be the owners' goal, they realize that the per-game revenue lost for these late-regular-season games would be below the average per-game revenue. They would therefore accept a formula that cuts players' salaries somewhat less than $1/82$ of the salary cap for each game cut.

The owners believe that adding the play-in tournament at the cost of a few regular season games is acceptable even if the owners lose a little with respect to players' salaries. Such a move is unlikely, the owners believe, to hurt the league in future television contract negotiations, the

primary source of team revenue. Late regular season games have little value to the networks, and the play-in tournament should interest the networks. Cutting playoff games, by contrast, could give the television networks a reason to reduce future television payments. The owners are thus much more reluctant to take the risk of cutting playoff games unless the players make substantial concessions in other areas. If necessary, Commissioner Silver feels he can convince ownership to cut the first round of the playoffs from a best-of-seven series to a best-of-five series, but he would strongly prefer to avoid having to make that sell.

The league and teams are extremely divided among themselves on the issue of tanking. The league believes that tanking hurts its image. Most team owners agree as a general matter. Nevertheless, owners believe that they should have the right to dump highly paid players when necessary to lower payroll and improve their draft position. The league/owners thus oppose any changes that would: (1) restrict teams' ability to trade high-salaried players in mid-season; and (2) increase the minimum team salary. If necessary to reach agreement, however, the league/owners can agree to up to 5 percent increase in team minimum salaries.

CONFIDENTIAL FACTS FOR THE NBA: OCT. 2020 UPDATE¹

One major motivating factor behind the NBA’s desire for a play-in tournament was to eliminate the problem of non-competitive and boring games at the end of the long season schedule. While the COVID-19 crisis was certainly devastating in many ways, it many ways gave the NBA and ownership a preview of what life would be like with the play-in tournament that was being discussed before negotiations with the NBPA shut down in March. Just when the most problematic stretch of season approached in mid-March, the league shut down entirely because of the crisis. When games resumed in late July, ownership, the league, and the Players Association had collaborated to replace the remainder of the regular season with a play-in tournament for the playoffs that included only the teams with a realistic chance of actually making the post-season. The teams most likely to tank were not included.

While Commissioner Silver does not want to repeat the circumstances that led up to the “Bubble” tournament (and certainly knows that the players do not want that either), he feels strongly that the great success of the tournament has shown that a play-in tournament would be extremely popular and lead to great ratings. At the same time, the disruptions caused to the 2019-20 season—as a result of COVID-19 and the players boycotting games because of police violence—and the accommodations for the virus that will be necessary for the 2020-21 season, have also made a number of owners nervous about agreeing to any permanent changes. They have expressed the desire to “get through this storm” and worry about the future after the league is back on a regular schedule.

Commissioner Silver believes that waiting is not an option, however. Mustering a super-majority of owners is always difficult, and the Commissioner is thus loath to let this opportunity slip by while he still has substantial ownership support.

Because of the COVID-19 pandemic, critical league meetings set for April 2020 had to be postponed. And giving the more pressing matter of deciding how to resume the 2019-20 season, Commissioner Silver was unable to make progress on the play-in tournament idea with the owners. He believes that the last reasonable chance to reach an agreement to adopt the play-

¹ This document supersedes and takes precedence over the Spring fact patterns should there be any discrepancies between them. For all points and issues that have not been directly changed or contradicted by this document, consider this party’s interests and positions as unchanged from what was included in the Spring fact patterns.

in tournament for the 2020-21 season will be at the league meetings scheduled for mid-October, at which plans will be set for the upcoming season. The more time that goes by without an agreement, the more likely Commissioner Silver’s fragile super-majority of owners will fall apart. The Commissioner thus believes that it is critical to achieve an agreement with the NBPA before October league meetings.

One new issue that the NBA feels may pop up in negotiation with the players is whether the play-in tournament will feature a “bubble” where players will stay in one location for the duration of the play-in tournament, and play games in one, neutral-site arena. While (hopefully) the precise circumstances leading to the bubble (including the need for players to remain sealed in one place) will not happen again in the future, Commissioner Silver knows that the “bubble” has been deeply unpopular with most players, as they have been very unhappy with their inability to go home for the duration of the tournament. While some owners like the idea of a bubble for a play-in tournament as it would cut travel costs and would potentially allow for more games in a shorter amount of time—and thus requiring fewer games to be cut from the regular season schedule—Commissioner Silver is willing to cede on this issue and allow for a traditional set-up where the team with the best record is the home team.

**CONFIDENTIAL FACTS FOR THE NATIONAL BASKETBALL PLAYERS
ASSOCIATION (NBPA)**

The NBPA is largely on board with the play-in proposal. But it sees a unique opportunity. Commissioner Silver’s strong desire to implement the new tournament, the NBPA believes, gives the union leverage to achieve changes to the CBA that are important to the players. This leverage, the NBPA believes, will not exist in a few years when it negotiates a new collective bargaining agreement. As the play-in tournament—which represents a clear change in terms and conditions of employment—conflicts with the current collective bargaining agreement that is not set to expire until after the 2023-24 season (owners can opt out after the 2022-23 season), the NBPA knows that the NBA cannot unilaterally implement the tournament for next season without risking unwinnable litigation. But once the whole deal is back on the table, the NBPA believes that the owners will have more leverage and could insist on adding the play-in tournament at the cost of other gains that the NBPA wants. The union’s leverage is thus at its maximum now.

The play-in proposal is appealing to the NBPA for two distinct reasons. First, the NBPA is always interested in additional revenue, so long as the players get a fair share. Additionally, the NBPA likes that the tournament would delay the start of the playoffs for the top six teams in each conference. The play-in tournament would give a needed break to the best teams in the league who are most likely to go deep into the playoffs. The players believe that this delay would help reduce injuries.

The NBPA is concerned, however, because the proposal would increase the total number of games. The NBPA has for the past 50 years been concerned about the ever-increasing number of games. While the players certainly understand the link between the number of games, revenue, and player salaries, the NBPA has become more concerned in recent years with the toll that an 82-game schedule—plus up to 28 additional games in the playoffs—places on the players. Two of the game’s leading stars (Kevin Durant and Klay Thompson) suffered serious injuries deep into the 2019 playoffs. Both are likely to miss the entire 2019-20 season, affecting their ability to win playoff shares both last season and this season. Such injuries are also likely to significantly impact a player’s salary going forward, though in these particular cases it did not because Durant and Thompson are huge stars.

To combat the problem of late-season injuries, the top teams regularly rest star players throughout the regular season “to save them for the playoffs.” While the NBPA applauds these efforts to guard against injury, the union knows that fans resent the practice of resting stars, which turns fans against the players and drives down revenue—both in general and for the specific players’ endorsement deals.

The play-in tournament would add two potential additional games for the teams that are in it, which the NBPA views as unacceptably extending a season that is already far too long. The NBPA feels, however, that games can be cut elsewhere to add the tournament while also addressing this problem. One particularly intriguing option for the players is cutting the first round of the playoffs from a best-of-seven to a best-of-five games series. This change would not be new; in fact, the first round of the playoffs was a best-of-five games series until 2003. These extra games rarely play a role in the result; since 2016, the team leading after five games ultimately won in every first-round series. The NBPA likes this option because it would enable players on the top teams to rest longer after the regular season and play fewer playoff games without moving back the dates of the NBA Final.

Although the players want fewer games overall, they are opposed to cutting regular season games for two reasons. First, the NBPA does not believe that reducing the number of regular season games will help solve injury problems. The best teams will often guard against injury by using star players for only limited minutes in late season games that do not matter to the standings. This will likely not change if the regular season schedule is reduced. By contrast, star players are compelled to play full minutes in virtually every playoff game. As such, players will generally not be rested during the playoffs, so the longer the playoff series, the greater the threat of injury. As a result, the NBPA greatly prefers to reduce playoff rather than regular season games. But if the owners are firm that regular season games, rather than playoff games, may be cut, the players would like the regular season reduced by at least ten games to compensate for the added playoff games.

Second, the NBPA knows that if regular season games are cut, the owners will want a proportionate reduction in player salaries. The players are opposed to such a reduction. The play-in tournament is the owners’ proposal, and the union is loath to agree to reduce player salaries to make it happen. The NBPA cannot accept a proportional 1/82 reduction for each

game cut. But the union could accept a smaller salary reduction and a cut of slightly less than ten games if it achieved favorable terms on other issues.

The NBPA understands that a reduction in playoff games will reduce the players' pool. To combat this, the NBPA wants an increase in the league's share of playoff revenue (from which the players' pool is derived) from the existing 25 percent to 30 percent (thus reducing the owner's share proportionally) to generate more league revenue to allocate to the players' share. The union believes that the owners should be amenable to this change because the league's share would still be substantially lower than it had been in years past when the league took 40 percent of playoff game attendance revenue. If necessary, however, the NBPA would accept an agreement with no increase in the percentage of the league's share of playoff revenue as long as the play-in game revenue is treated as playoff revenue and thus included in the calculation of the players' pool.

The NBPA is opposed to tanking. Higher salaried players are forced to change cities mid-season. And lower salaried players on tanking teams are forced to suffer embarrassing losses. Their development may be hindered, and they lose the opportunity to compete for a share of the playoff money that can be significant for low-salaried players. In exchange for their acceptance of the play-in tournament, the NBPA wants two rule changes to help reduce the incentive to take: (1) teams should be prohibited from trading players with at least five years of NBA service time during the season unless the player consents; and (2) minimum team-salary levels should be increased by 20 percent to deter incentives to tank. While this is an important issue for the players as concrete measures to reduce tanking, they realize that they are somewhat stretch goals and can be compromised or even abandoned to achieve better results on the revenue and number-of-game issues.

CONFIDENTIAL FACTS FOR THE NBPA: OCT. 2020 UPDATE²

While NBPA membership is still largely on board with the basics of the NBA’s play-in proposal (at least those details shared with them in March), the interruptions to the 2019-20 season caused by COVID-19 and issues relating to police violence have only added to the players’ concern about injuries. Any disruption to a player’s regular routine will increase the likelihood of injury, which in turn threatens the player’s earning power over his career. The 2019-20 season has starkly revealed how unanticipated events can impact the players in significant ways.

If anything, this realization has given the players all the more incentive to agree to the play-in tournament as it will provide more rest before the playoffs for those players likely to play the most games. But the concerns raised by many players about disruptions to the usual routines is real, and their experiences with this during the time off this summer has only strengthened the NBPA membership’s position to insist that the number of games—either playoff games or regular season games—must be reduced.

Another major issue that the players fear may come up in these renewed negotiations is the idea that ownership may want to replicate the “bubble” format of this summer’s tournament in a proposed play-in tournament. While the players are confident that the precise circumstances that led to the summer tournament will not necessitate an *exact* replica of the summer tournament in future events, the players would strongly prefer that the play-in tournament not be held at one neutral site.

Spending so much time in the “bubble” this summer has been extremely difficult for most players, who have missed being able to travel, stay at home during home games, and—most importantly—being able to see their families. And even if families are allowed inside the “bubble” for play-in tournaments, spending an extended period of time at one neutral-site location is an experience that the players do not want to experience again. Furthermore, the players are concerned that the owners will use a neutral-site tournament as an excuse to fit more games into a shorter amount of time (since travel will not be required), playing off the players’

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desire to spend as little time as possible at a neutral site as an end-around towards pushing through more playoff games.

As such, the NBPA would strongly prefer that the play-in tournament—if the two sides can agree on final terms—allows for a format where the team with the best record is the home team for each of the play-in games. Indeed, the players feel that this adds incentive for teams to play harder to attain better seeds in the play-in tournament since the best teams in the tournament will have home-arena advantage throughout the tournament. If the owners are insistent on cutting costs by hosting the tournament at a neutral site, however, the players will require significant concessions in other areas.