

SHYAM DAS
NEUTRAL DISCIPLINE ARBITRATOR

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| In the Matter of Arbitration |) | ARBITRATOR'S OPINION |
| Between |) | AND AWARD |
| |) | |
| |) | |
| THE NATIONAL HOCKEY LEAGUE |) | Appeal of Tom Wilson |
| PLAYERS' ASSOCIATION |) | Suspension |
| |) | |
| |) | |
| and |) | Case Heard: |
| |) | October 31, 2018 |
| |) | |
| |) | |
| |) | Award Issued: |
| THE NATIONAL HOCKEY LEAGUE |) | November 13, 2018 |

Appearances

For the NHLPA:

Don Zavelo, Esq.
John R. Gerba, Esq.
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For the NHL:

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BACKGROUND

Wilson/NHL

This is an appeal under Article 18.13 of the Collective Bargaining Agreement (CBA) of a determination by the Commissioner upholding a 20-game suspension imposed on Washington Capitals player Tom Wilson for On-Ice Conduct in a September 30, 2018 pre-season game between the Capitals and the St. Louis Blues.

During the game, Wilson delivered a forceful open-ice check to St. Louis Center Oskar Sundqvist. Wilson's left shoulder made contact with Sundqvist's right shoulder and head. Sundqvist landed on the ice on his right shoulder. Wilson was given a match penalty. The on-ice official's report states:

Synopsis of Incident: At 5:22 of the second period Tom Wilson was assessed a match penalty for Illegal check to the head on a hit delivered on O. Sundqvist. As Sundqvist entered the zone he shot the puck towards the goal. Wilson, coming from the other side of the ice, delivered a check that resulted in significant contact to Sundqvist's head right after the shot was released. Sundqvist was injured on the play as he stayed down on the ice and was bleeding from the face. Wilson was given a match penalty under rule 48.5.

Sundqvist sustained a concussion, a right shoulder A/C sprain and superficial facial lacerations.

Rule 48 of the National Hockey League Official Rules 2018-2019 provides:

Rule 48 - Illegal Check to the Head

48.1 Illegal Check to the Head - A hit resulting in contact with an opponent's head where the head was the main point of contact and such contact to the head was avoidable and is not permitted.

In determining whether contact with an opponent's head was avoidable, the circumstances of the hit including the following shall be considered:

- (i) *Whether the player attempted to hit squarely through the opponent's body and the head was not "picked" as a result of poor timing, poor angle of approach, or unnecessary extension of the body upward or outward.*
- (ii) *Whether the opponent put himself in a vulnerable position by assuming a posture that made head contact on an otherwise full body check unavoidable.*
- (iii) *Whether the opponent materially changed the position of his body or head immediately prior to or simultaneously with the hit in a way that significantly contributed to the head contact.*

48.2 Minor Penalty - For violation of this rule, a minor penalty shall be assessed.

48.3 Major Penalty - There is no provision for a major penalty for this rule.

- 48.4 Game Misconduct Penalty - There is no provision for a game misconduct for this rule.
- 48.5 Match Penalty - The Referee, at his discretion, may assess a match penalty if, in his judgment, the player attempted to or deliberately injured his opponent with an illegal check to the head.

If deemed appropriate, supplementary discipline can be applied by the Commissioner at his discretion.

Article 18 of the Collective Bargaining Agreement (CBA) provides, in relevant part:

ARTICLE 18
SUPPLEMENTARY DISCIPLINE FOR ON-ICE CONDUCT

18.1 Supplementary Discipline for On-Ice Conduct. "Supplementary Discipline for On-Ice Conduct" means any supplementary discipline imposed by the Commissioner or his designee for Player conduct either on the ice or in the Player or penalty bench areas vis-à-vis other participants in the game (i.e., other Players, coaches or on-ice officials) in violation of the League Playing Rules. Supplementary Discipline for On-Ice Conduct may take the form of a fine or a suspension. Notwithstanding anything stated in Article 17 (Grievances) of this Agreement, all incidents involving review by the League (i.e., the Commissioner or his designee) for Supplementary Discipline for On-Ice Conduct will be processed in accordance with this Article.

18.2 General. It is the parties' intention to impose Supplementary Discipline for On-Ice Conduct in a swift, effective and consistent manner with respect to conduct proscribed by League Playing Rules, including the use of excessive and unnecessary force and reckless acts resulting in injury. In doing so, however, the parties do not intend to alter the basic fabric of our game. In deciding on Supplementary Discipline for On-Ice Conduct, the following factors will be taken into account:

(a) The type of conduct involved: conduct in violation of the League Playing Rules, and whether the conduct is intentional or reckless, and involves the use of excessive and unnecessary force. Players are responsible for the consequences of their actions.

(b) Injury to the opposing Player(s) involved in the incident.

(c) The status of the offender and, specifically, whether the Player has a history of being subject to Supplementary Discipline for On-Ice Conduct. Players who repeatedly violate League Playing Rules will be more severely punished for each new violation.

(d) The situation of the game in which the incident occurred, for example: late in the game, lopsided score, prior events in the game.

(e) Such other factors as may be appropriate in the circumstances.

18.3 Preliminary Review.

(a) A preliminary review will be made by the League as soon as reasonably possible following the conclusion of the game in which the incident took place....

* * *

18.4 Evidence.

(a) If the League intends to rely, and in fact relies, exclusively, on any of the following: (i) video footage, (ii) reports of on-ice officials and/or Officiating Managers, (iii) written reports from a doctor(s) based on an examination of a Player involved in the incident in question, (iv) written medical information from the Club concerning a Player involved in the incident in question if a doctor's report is not available, and/or (v) information presented by the Player, the Player's Certified Agent, the Player's Club, or the NHLPA at a telephonic or in-person hearing held pursuant to Sections 18.7(d), 18.8 or 18.9, then the procedures set forth in this Article 18 shall govern exclusively....

* * *

18.5 Disciplinary Alternatives. Following its preliminary review, the League shall have the option to proceed with one of the following disciplinary alternatives:

* * *

(d) A disciplinary suspension of six (6) or more games, in which case the Player will have the right to an in-person hearing, as set forth in Section 18.9.

* * *

18.9 In-Person Hearing (6 or More Games). If the preliminary review indicates that a suspension of six (6) or more games may be appropriate and/or further investigation is required, an in-person hearing will be conducted as follows:

(a) The Player shall remain suspended while the investigation and hearing is being conducted.

(b) Prior to the hearing, and as soon as practicable after scheduling of the hearing, the League shall provide to the NHLPA, in accordance with Exhibit 3, with the following, if available: (i) video footage, (ii) written reports of on-ice officials and Officiating Managers, and (iii) written reports from a doctor(s) based on an examination of a Player involved in the incident in question, or written medical information from the Club concerning a Player involved in the incident in question if a doctor's report is not available.

(c) The Player has a right to appear at an in-person hearing and may, with the assistance of a representative of his choosing, present evidence and argument in support of his position.

(d) Representatives of the Club and the NHLPA may also attend and participate in the hearing.

* * *

18.12 Appeal to Commissioner. The NHLPA, on the Player's behalf, may file an appeal to the Commissioner of any decision regarding Supplementary Discipline for On-Ice Conduct imposed by the League. The appeal shall be filed in writing no later

than forty-eight (48) hours after the League's notification to the NHLPA of its determination. If the term of the suspension is ongoing, the Player shall remain suspended pending the appeal (but not longer than the duration contained in the initial decision). The Commissioner shall endeavor to hear all appeals on an expedited basis and will determine whether the decision was supported by clear and convincing evidence.... In the event the League's underlying decision results in a suspension of six (6) NHL Games or more, the Commissioner shall conduct an in-person hearing. The Commissioner shall have the authority to consider any evidence relating to the incident even if such evidence was not available at the time of the initial Supplementary Discipline for On-Ice Conduct decision. Except in cases involving a suspension of six (6) or more NHL Games which shall be subject to an appeal pursuant to Section 18.13 below, the decision of the Commissioner in an appeal shall be final and binding in all respects and not subject to review. For purposes of Section 18.13 below, the Commissioner's decision shall represent the complete and final decision of the League regarding whether the Player's conduct violated League Playing Rules, as well as the length of the suspension imposed on the Player.

18.13 Appeals to Neutral Discipline Arbitrator.

(a) If the Commissioner determines that the Player's suspension is six (6) or more NHL Games, after an appeal pursuant to Section 18.12 above, the NHLPA, on the Player's behalf, may file an appeal of the Commissioner's determination to the Neutral Discipline Arbitrator ("NDA"). Any such

appeal to the NDA must be filed within seven (7) days from the issuance of the Commissioner's determination.

(b) An appeal to the NDA shall be heard on an expedited basis. If the term of the suspension is ongoing, the Player shall remain suspended pending the appeal (but not longer than the duration contained in the Commissioner's determination).

(c) The NDA shall hold an in-person hearing and shall determine whether the final decision of the League regarding whether the Player's conduct violated the League Playing Rules and whether the length of the suspension imposed were supported by substantial evidence. The NDA shall issue an opinion and award as soon as practicable. The NDA shall have the authority to consider any evidence relating to the incident even if such evidence was not available at the time of the initial Supplementary Discipline for On-Ice Conduct decision or at the time of the Commissioner's decision in connection with the appeal. The NDA shall have full remedial authority in respect of the matter should he/she determine that the Commissioner's decision was not supported by substantial evidence. The NDA's decision shall be final and binding in all respects and not subject to review.

Following a preliminary review by the League's Department of Player Safety (DPS), George Parros, Senior Vice President, DPS, conducted an in-person hearing as provided for in Article 18.9 of the CBA. Following the hearing, Parros issued a decision suspending Wilson for 20 games. The basis for this Supplementary Discipline was explained in a DPS video announcing Wilson's suspension as follows:

Sunday afternoon in Washington, Capitals forward, Tom Wilson, was assessed a match penalty for an illegal check to the head of Blues forward, Oskar Sundqvist. As the video shows, Sundqvist takes a pass from a teammate and breaks into the Capitals' zone on the rush as Wilson back checks through centre. Sundqvist begins to move to the centre of the ice. Wilson sees this and gains speed with a quick crossover. Sundqvist continues on his path and releases a shoot on goal. As he does so, Wilson delivers a high forceful hit which makes Sundqvist's head the main point of contact on a hit where such head contact was avoidable and causes an injury. This is an illegal check to the head. It is important to note that Sundqvist is eligible to be checked on this play. Players cutting to the centre of the ice understand and accept that they maybe the recipient of a hard, full body hit from an opponent. However, rather than hitting through Sundqvist's core and delivering a legal full body check, Wilson takes a poor angle of approach that picks Sundqvist's head and makes it the main point of contact. It is also important to note that the head contact on this play is avoidable. Sundqvist does not materially change the position of his head or body just prior to or simultaneously with contact in a way that significantly contributes to the head being the main point of contact. While Sundqvist does adjust his arms in the course of taking a shoot, his head and core continue on a consistent path from the moment Wilson commits to this hit. This hit is entirely in Wilson's control and with time to take a better angle of approach that hits through Sundqvist's core Wilson instead delivers a hit that picks Sundqvist's head and causes an injury. In determining the

length of suspensions, the CBA between the NHL and NHLPA states "Players who repeatedly violate league playing rules will be more severely punished for each new violation". Wilson was suspended on three occasions during the 2017-2018 NHL season. On September 22, 2017, he was suspended for a late high hit on Robert Thomas. Just two preseason games later, Wilson was again suspended. This time for boarding Samuel Blais. Seven months later, Wilson was suspended for an illegal check to the head of Zack Aston-Reese. This hit on Sundqvist occurred in only his 16th game since his last suspension which was also for an illegal check to the head. In short, including preseason and post season games played, this is Wilson's 4th suspension in his last 105 games, an unprecedented frequency of suspensions in the history of the Department of Player Safety. To summarize, this is an illegal check to the head. Sundqvist suffered an injury on the play. Wilson is a repeat offender under the terms of the CBA. The Department of Player Safety has suspended Tom Wilson for 20 games.

The prior Supplementary Discipline issued to Wilson, referred to above, was as follows:

| <u>Incident Date</u> | <u>SD</u> | <u>Rule Violation</u> |
|----------------------|--------------------|-----------------------|
| 9/22/17 | 2 pre-season games | Interference |
| 10/01/17 | 4 games | Boarding |
| 5/01/18 | 3 playoff games | Rule 48 |

The illegal check to the head in a playoff game on May 1, 2018 resulted in an injury to Aston-Reese. The two earlier incidents did not result in an injury to the opposing player.

The NHLPA appealed the Supplementary Discipline imposed on Wilson to the Commissioner as provided for in Article 18.12. The Commissioner conducted an in-person hearing on October 18, 2018. Wilson, Washington Capitals General Manager Brian MacLellan and Parros testified at that hearing. The Commissioner issued his decision on October 25, 2018. In that decision, he concluded that the DPS decision was supported by clear and convincing evidence and affirmed the 20-game suspension.

The NHLPA subsequently timely filed this appeal to the Neutral Discipline Arbitrator (NDA) as provided for in Article 18.13. An arbitration hearing was held on October 31, 2018. The NHLPA challenges both the decision of the League that Wilson's conduct violated the League Playing Rules and, assuming the League's determination that Wilson violated Rule 48 is upheld, the length of the suspension. The arguments by both parties are addressed in the Findings below.

FINDINGS

Standard of Review

In his March 10, 2016 decision in Appeal of Dennis Wideman Suspension (Wideman) NDA James Oldham addressed the standard of review in Article 18.13(c) of the CBA as follows at pp. 11-12:

As quoted above, Article 18.13(c) of the CBA provides that, "The NDA shall hold an in-person hearing and shall determine whether the final decision of the League regarding whether the Player's conduct violated the League Playing Rules and whether the length of the suspension imposed were supported by substantial evidence." In addition, "The NDA shall have the authority to consider any evidence relating to the incident even if such evidence was not available at the time of the initial Supplementary Discipline for On Ice Conduct decision or at the time of the Commissioner's decision in connection with the appeal." Taken literally, these provisions seem internally inconsistent. The NDA is to consider whether the two parts of the Commissioner's decision were supported by substantial evidence. If the answer to either part is no, then the League's actions cannot be upheld. But if the answer is yes, the NDA can nevertheless disaffirm what the Commissioner decided based on new evidence, or otherwise the "new evidence" language is meaningless. Logically, the provisions must authorize the NDA to decide whether the totality of the evidence presented at the NDA hearing comprises substantial support for the Commissioner's decision.

It is important to note that in Wideman the arbitrator was presented with what he characterized as "an important piece of new evidence" which he relied on in his decision.¹

¹ In confirming NDA Oldham's Wideman decision, Judge Alison Nathan of the U.S. District Court (SDNY) stated in her March 15, 2017 opinion, at p. 21:

Neither party's description of the Arbitrator's standard of review is entirely correct. Though, as

Absent new evidence not available to the Commissioner I do not read Wideman as establishing a different standard of review than the substantial evidence standard set forth in the CBA. The internal inconsistency Arbitrator Oldham had to work around was between the language in Article 18.13(c) calling for a determination of whether the Commissioner's conclusions "were supported by substantial evidence" (italics as used by Arbitrator Oldham), that is, by the evidence before the Commissioner, and the provision authorizing the NDA to consider "new evidence" (quotes as used by Arbitrator Oldham). Arbitrator Oldham, notably, stated at p. 13:

My task in this appeal is superficially uncomplicated. I am to decide whether, based on the record presented to me, I find that the Commissioner's decision upholding Wideman's twenty game suspension was supported by substantial evidence, as provided in Article 18.13(c) of the CBA.

the NHL notes, the Arbitrator stated that his ultimate inquiry would turn on the presence or absence of substantial evidence for the Commissioner's decision, he nevertheless, as the Players' Association points out, affirmed that the inquiry would first have to take into account the significance and meaning of new evidence not available to the Commissioner and its effect on the entire record. The Arbitrator's articulation of the standard of review, then, can best be described as a hybrid between the competing sets of standards cited by the parties: less deferential than substantial evidence review, but not a de novo inquiry.

Similarly, in his decision at p. 17 Arbitrator Oldham found that the Commissioner's conclusion that Wideman's behavior constituted intentional action within the meaning of Rule 40.2 was "not substantially supported by the totality of the evidence presented to me at the NDA hearing."

In the present case, no significant new evidence was presented at the NDA hearing other than that Sundqvist had recovered from his injury and was cleared to return to play on October 25, 2018. The NHLPA did offer, over the League's objection that it was not new evidence, testimony by Mathieu Schneider offering his opinion and explanation that Wilson did not violate Rule 48. This testimony, although informed by Schneider's many years of experience as an NHL player and later participation as an NHLPA representative on the League's Competition Committee, essentially was based on his review of the video evidence that had been presented to and considered by the Commissioner and paralleled the arguments made by the NHLPA to both the Commissioner and the NDA. Schneider's testimony did not materially add to the evidentiary record on which the Commissioner based his decision.

Rule 48 Violation

Whether the head was the main point of contact and whether the contact was avoidable for purposes of Rule 48 are judgment calls. Such determinations may be close calls. In this case, the Commissioner upheld the determination of the DPS that Sundqvist's head was the main point of contact when Wilson

hit him and that such contact was avoidable. The NHLPA disagrees. The primary evidence relied on by both parties is the video footage of the hit.

Main Point of Contact

The Commissioner concluded that: "The video shows that as Mr. Wilson delivered the check on Mr. Sundqvist, Mr. Wilson's left shoulder made primary, direct and substantial contact with Mr. Sundqvist's head, and that his head -- as opposed to any other portion of the body -- received the majority of the force from Mr. Wilson's check." The Commissioner concluded, based on the video, that Sundqvist's head snapped in an independent manner just prior to the rest of his body -- which the DPS has indicated is an "excellent indicator" that the head was the main point of contact.²

The Commissioner also pointed to: (i) the unanimous conclusion of DPS personnel who reviewed the incident that Sundqvist's head was the main point of contact; (ii) Sundqvist's diagnosed concussion; and (iii) Wilson's testimony that he could not conclude one way or the other whether Sundqvist's head was the main point of contact. The Commissioner rejected the NHLPA's contention that the significant injury to Sundqvist's right shoulder indicated that a major part of the force was delivered to the shoulder, noting that Sundqvist landed hard on his right shoulder and citing the visiting team injury report

² The Commissioner stressed that an independent head snap is not the only indicator that the head was the main point of contact.

which the Commissioner said concluded that this injury was caused by him falling on his shoulder.³

The NHLPA insists that the video does not show Sundqvist's head snap independently of the body. On the contrary, as Schneider testified, the NHLPA asserts that the video shows that as Sundqvist releases the puck, Wilson comes in to deliver a check with his shoulder and first contacts Sundqvist's shoulder, after which -- as Wilson continues through the hit -- Sundqvist's body and head rotate in the same direction, moving in unison. The NHLPA cites Parros' testimony when asked whether the video shows Sundqvist's head and shoulders moving at the same time: "It's I guess hard to distinguish. I don't know but they are definitely both moving." The NHLPA also points to Parros' testimony that there was "some shoulder contact."⁴ The NHLPA also maintains: (i) neither the injury report, nor other evidence establish that Sundqvist's shoulder injury was caused by hitting the ice; and (ii) a concussion, as the DPS has pointed out, does not establish that

³ The injury report states: "Mechanism of Injury: Coming across middle of ice, hit by opponent's shoulder to his head causing him to spin around in the air and land on his right shoulder.

⁴ When asked whether the head was the main point of contact, Parros testified:

Well, I think -- when I look at the video, I think it looks very clear that, you know, the head is the main point of contact or there wasn't much question for me, really. I see a head snap, I see some shoulder contact as well, but I certainly see the head being the main point of contact. It wasn't too questionable for me.

the head was the main point of contact. In short, the NHLPA contends that the Commissioner's conclusion was based on guesswork.

My conclusion from viewing the video is that there was an independent snap of Sundqvist's head, albeit somewhat less pronounced than in the video of some other incidents included in the record because his body was moving in the same direction. More to the point, the video provides substantial evidence from which the Commissioner reasonably could conclude that the head was the main point of contact. The other evidence cited by the Commissioner is not conclusive, but is consistent with and lends some support to that conclusion. I do not find that, as the NHLPA claims, the Commissioner improperly relied on or was unduly influenced by the conclusions reached by DPS personnel, although he noted their experience and expertise.⁵

⁵ I also am not persuaded by the NHLPA's suggestion that the Commissioner or Deputy Commissioner Daly improperly attempted to influence the DPS. The NHLPA cites an email Daly sent to Parros at 5:05 p.m. on September 30, 2018 stating: "Looks like a big one. The Emergency Assistance Fund [which receives forfeited salary of penalized players] is going to be happy." Immediately prior to sending this email, Daly had been copied on five emails sent to Parros by other DPS personnel all stating that in their opinion Wilson had violated Rule 48. The NHLPA also cites Parros' testimony that the day before the DPS hearing on this incident he was at an unrelated meeting at which the Commissioner said something to the effect: "You're going to do the right thing or Do the right thing." The evidence as a whole, including Parros' testimony, does not establish that the

Avoidability

The Commissioner rejected the NHLPA's argument that Sundqvist left himself vulnerable to the check by Wilson and subsequent injury by skating to the middle of the offensive zone and failing to take any evasive actions to avoid Wilson or otherwise protect himself from imminent contact. The Commissioner stressed that while Sundqvist, as the DPS made clear, was eligible to be checked, he was not required to "bail" on a play in order to avoid being checked in the head. The burden, he stated, was on Wilson to avoid making the head the main point of contact as long as such contact was avoidable.

In this case, the Commissioner concluded that none of the three circumstances specified in Article 48.1(i), (ii) and (iii) was applicable.

In determining that Rule 48.1(i) was inapplicable, the Commissioner stated that Wilson "did not check Sundqvist squarely through the body." The NHLPA stresses that the Rule looks to whether the player "attempted to hit squarely," not whether he actually did so. The NHLPA also argues that the video shows that Wilson was squared up with Sundqvist's chest until Sundqvist changes his body very late when he attempts a shot on goal.

Rule 48.1(i) states:

DPS was improperly influenced by the cited comments of League officials.

Whether the player attempted to hit squarely through the opponent's body and the head was not "picked" as a result of poor timing, poor angle of approach, or unnecessary extension of the body upward or outward.

Although the NHLPA correctly points out that this provision looks to whether the player "attempted to hit squarely," not whether he actually did so, the Commissioner specifically addressed the NHLPA's assertion that Wilson was preparing to deliver a clean check and that his angle of approach was appropriate. The Commissioner concluded:

...based on my review of the video footage, I concur with the conclusion reached by DPS that Mr. Wilson's angle of approach was poor and resulted in Mr. Wilson trying unsuccessfully to cut in front of Mr. Sundqvist in order to check through Mr. Sundqvist's chest. Instead, Mr. Wilson's inability to position himself squarely in front of Mr. Sundqvist and check through the core of his body is likely what resulted in a high check that "picked" Mr. Sundqvist's head.... Mr. Wilson could have taken a different angle of approach that could have provided him more body with which to deliver a clean check. He also could have crouched lower in his approach to ensure there was no contact with Mr. Sundqvist's head. Or, he could have attempted to avoid the check altogether. He chose to do none of those things.

...Here, Mr. Wilson is only one inch taller than Mr. Sundqvist. While the NHLPA argued that Mr. Sundqvist "put[] himself in a shorter position by shooting the puck" (Tr.

90), the video itself belies that conclusion as it shows that both Players' heads (Messrs. Wilson and Sundqvist) were at nearly identical heights immediately prior to, during and immediately after the attempted shot on goal was taken, and through to the point of Mr. Wilson's contact with Mr. Sundqvist.

While reasonable minds possibly could differ on this point, I cannot conclude that the Commissioner's determination that Rule 48.1(i) was inapplicable based on the video was not supported by substantial evidence.

Rule 48.1(ii) states:

Whether the opponent put himself in a vulnerable position by assuming a posture that made head contact on an otherwise full body check unavoidable.

In concluding that this provision did not apply, the Commissioner stated:

d. Likewise, I find that Rule 48.1(ii) does not apply to the circumstances of the check in question. A review of the video footage belies the NHLPA's assertion that Mr. Sundqvist put himself in a vulnerable position -- making head contact unavoidable -- because he was bent low, his shoulder was low and his head was exposed. The video example that the NHLPA used as a comparator for this purpose is readily distinguishable. (NHLPA Ex. D) In the video the NHLPA relies on, Pittsburgh Player Patrick Hornqvist delivered a check to Boston Player Charlie

McAvoy. At the time the check is delivered, Mr. McAvoy was crouched forward, with his head bent down in front of his body while handling the puck -- making it impossible for Mr. Hornqvist to deliver a check to Mr. McAvoy without Mr. McAvoy's head being the main point of contact. I reject the NHLPA's claim that "[t]his is almost the exact same position that Sundqvist is in" as inaccurate and inconsistent with even a cursory review of the two videos. (Tr. 94.) Mr. Hornqvist was delivering a straight-on check and thus had no options to deliver a clean check; Mr. Wilson, by contrast, was approaching Mr. Sundqvist from a side angle and could have taken a different angle of approach that could have resulted in a clean check that did not "pick" Mr. Sundqvist's head. In short, the two plays are distinct, and have materially significant and controlling differences.

e. The NHLPA also showed video footage of a play from three (3) years ago in which Chicago Player Jonathan Toews successfully avoided a potential check by Mr. Wilson on a similar backchecking play, as well as various other video clips showing examples of offensive Players with the puck who took evasive actions to avoid being checked. (Tr. 99, NHLPA Exhs. B, E.) Mr. Wilson testified that he believed the onus was at least in part on the offensive Player to prepare for and to receive contact, and that he had expected Mr. Sundqvist to protect himself in some manner, which he failed to do. (Tr. 32-33, 36.) As the DPS suspension video makes clear, however, and as noted above, while Mr. Sundqvist was eligible to be checked on the play under the circumstances, Rule 48 in this case placed the onus squarely on Mr. Wilson to avoid making his opponent's head the main point of contact where such contact

was otherwise avoidable. Here, because head contact was otherwise avoidable for Mr. Wilson, the Playing Rules did not require Mr. Sundqvist to take affirmative actions to avoid being checked in the head on this play.

(Footnote omitted)

The NHLPA reiterates its claim that, like McAvoy in the DPS video referenced above, Sundqvist was bent over with his head in front of his body, contrary to the Commissioner's determination. The NHLPA also argues that the affirmative action Sundqvist took to place himself in a vulnerable position is relevant in determining whether Wilson violated Rule 48.

The distinction the Commissioner drew between Wilson's hit on Sundqvist and the hit by Hornqvist on McAvoy, which the DPS concluded was unavoidable, is supported by review of the respective videos. There is substantial evidence to support the Commissioner's determination that Wilson was not making an otherwise full body check and that he could have taken a different angle of approach that could have resulted in a clean check.

Rule 48.1(iii) states:

Whether the opponent materially changed the position of his body or head immediately prior to or simultaneously with the hit in a way that significantly contributed to the head contact.

In concluding this provision did not apply, the Commissioner stated:

f. Rule 48.1(iii) also does not excuse Mr. Wilson's check on this play because Mr. Sundqvist did not materially change the position of his head or body prior to or simultaneously with contact in a way that *significantly contributed to the head being the main point of contact*. Although Mr. Sundqvist adjusted his arms while taking a shot at the net, and his right shoulder dipped down to take the shot, it is dispositive that Mr. Sundqvist's head and the core of his body continued on a consistent path from the moment Mr. Wilson committed to the check through the time he delivered it.... Indeed, as Mr. Parros testified, notwithstanding the fact that Mr. Sundqvist's right shoulder slightly dipped down to take the shot, his body remained "siloed," and "[h]is head didn't move, his body didn't move." (Tr. 167.) Mr. Parros' finding in this regard is confirmed by the video evidence of the play in question, which clearly and convincingly establishes that Mr. Sundqvist's head did not "materially change" position in a way that "significantly contributed" to the head being the main point of contact.

g. This incident is clearly distinguishable from the circumstances that were intended to be covered by the exception set forth in Rule 48.1(iii). For instance, based on the examples shown on the DPS video that the NHLPA used during the appeal hearing (NHLPA Ex. D), the Players who sustained head contact in those plays had either abruptly turned (i.e., New Jersey Player Blake Coleman), or had stopped and suddenly turned (i.e., Pittsburgh Player

Brian Dumoulin), which, in both cases, directly resulted in the head contact that followed. (NHLPA Ex. D, Tr. 173-173.) Here, by contrast, Mr. Sundqvist was in a completely predictable and fully observable posture and position from Mr. Wilson's vantage point; Mr. Sundqvist did not abruptly stop or assume any material changes in body positioning. Indeed, Mr. Wilson admitted that he was fully expecting Mr. Sundqvist to attempt a shot or to pass the puck as he was approaching -- just as he ultimately did. (Tr. 54-55.) The fact that Mr. Sundqvist attempted a shot on goal quickly just prior to the check being delivered did not result in a material change in his body positioning that "significantly contributed to the head contact."

The NHLPA stresses that at the point where Wilson committed to check him, Sundqvist's position was upright with his head up and their bodies were at that point more or less square to each other. Less than a second later, Sundqvist turned his body to shoot. Sundqvist, the NHLPA asserts, no longer was upright, but bent over and looking away from Wilson, having turned his shoulder and head in front of his body, making head contact unavoidable.

The NHLPA maintains that Rule 48.1(iii) refers to a material change in position, not to a material change that could not be anticipated. Moreover, even if Wilson anticipated Sundqvist would take a shot, he testified before the Commissioner that he had not anticipated Sundqvist was going to turn his body completely toward the goal to shoot the puck. At

that point, the NHLPA insists, Wilson had less than a second to do anything about it, and there was nothing he could have done to avoid head contact.

Again, in my opinion it may be a close call, but given the substantial evidence standard of review, I cannot conclude that there was not substantial evidentiary support for the conclusion reached by the Commissioner. The videos of the hits to Coleman and Dumoulin also support the distinction the Commissioner drew between those hits and the present incident.

Accordingly, I find that there was substantial evidence to support the Commissioner's determination that, based on the circumstances of the hit including those specified in Rule 48.1(i), (ii) and (iii), contact to the head was avoidable.

* * *

For the reasons set forth above, I conclude that the League's final decision that Wilson's conduct violated Rule 48 was supported by substantial evidence.

Length of Suspension

Article 18.2 of the CBA spells out the factors to be taken into account in deciding on Supplementary Discipline for On-Ice Conduct. As the NHLPA stresses, Article 18.2 also states that it is the parties' intention to impose such discipline in "a consistent manner." The full provision states:

18.2 General. It is the parties' intention to impose Supplementary Discipline for On-Ice Conduct in a swift, effective and consistent manner with respect to conduct proscribed by League Playing Rules, including the use of excessive and unnecessary force and reckless acts resulting in injury. In doing so, however, the parties do not intend to alter the basic fabric of our game. In deciding on Supplementary Discipline for On-Ice Conduct, the following factors will be taken into account:

(a) The type of conduct involved: conduct in violation of the League Playing Rules, and whether the conduct is intentional or reckless, and involves the use of excessive and unnecessary force. Players are responsible for the consequences of their actions.

(b) Injury to the opposing Player(s) involved in the incident.

(c) The status of the offender and, specifically, whether the Player has a history of being subject to Supplementary Discipline for On-Ice Conduct. Players who repeatedly violate League Playing Rules will be more severely punished for each new violation.

(d) The situation of the game in which the incident occurred, for example: late in the game, lopsided score, prior events in the game.

(e) Such other factors as may be appropriate in the circumstances.

The Commissioner upheld the 20-game suspension imposed on Wilson by the DPS. In doing so, he addressed the factors listed in Article 18.2. In summary, his key conclusions were:

- Type of Conduct - Wilson violated Rule 48. His conduct was intentional and, even if he did not intend to injure Sundqvist, reckless. It involved use of excessive and unnecessary force.
- Injury - Sundqvist suffered a serious injury, missing 8 games with a diagnosed concussion and a shoulder A/C sprain.
- Status of Offender - This is Wilson's fourth suspension within a 53-week period. All of the infractions were for serious physical fouls. The two most recent were for illegal head hits that caused serious head injuries -- a broken jaw and a concussion.
- Situation of the Game - Not a material factor, other than to note that the reckless nature of the check and level of force applied in the context of the last pre-season game further reflects particularly poor judgment on Wilson's part.
- Other Factors - Wilson's four recent suspensions have been in rapid succession. During this period, DPS

has worked to provide specific instruction to Wilson. He knew what was expected of him. It is important to try to make sure that this does not happen again. The lengthy suspension issued by DPS was necessary and appropriate.

The Commissioner concluded, taking into account all of the above factors and the consistently dangerous style of Wilson's play during the relevant period, that an extended suspension is necessary. The CBA calls for more severe discipline for repeat offenders. The CBA does not mandate a formula, but Parros looked to suspensions imposed on six other players with three suspensions (some had four) within an 18-month period and looked to the multipliers that had been applied in the most recent suspension. These ranged from 10x in the case of Raffi Torres to lesser multipliers. Parros concluded that 3x was an appropriate multiplier, that Wilson's most recent suspension for 3 playoff games should be treated as equivalent to 6 regular season games, and that two games should be added based on the serious injury to Sundqvist. That is how the 20-game ($3 \times 2 \times 3 + 2$) suspension was determined. While not scientific, the Commissioner insists this was a reasonable way to impose discipline in this case to best ensure this does not happen again.

The NHLPA contends that a 20-game suspension, resulting in the salary forfeiture of \$1.2 million, is an incredibly severe penalty. In a comparison with players suspended since Rule 48 came into existence in the 2010-11

season, and even double counting playoff games, which the NHLPA disagrees with, Wilson's 20-game suspension is the third longest.

The NHLPA stresses that Wilson had no intent to injure or target Sundqvist's head, as Parros acknowledged. It is agreed that he was making a hockey play. His hit, even assuming it was a violation of Rule 48 -- which the NHLPA disputes -- was off "by inches," as recognized by the DPS. While the Commissioner points out that the hit was intentional, the NHLPA notes that all checks are intentional and this is not a relevant consideration.

The NHLPA stresses that the CBA's requirement that Supplementary Discipline be applied in a consistent manner requires consideration of analogous cases.

The NHLPA contends that Parros' explanation for how he determined that a 20-game suspension was appropriate not only was formulaic, but was unprecedented. There is no evidence that such a formula has been used before. In particular, the NHLPA disputes the doubling of Wilson's most recent prior suspension (3 games) because it involved playoff games and the 3x multiplication of that last suspension (as doubled) because this was his fourth suspension.

The NHLPA insists that doubling a suspension because it involved playoff games is inconsistent with the Commissioner's 2012 decision in Appeal of Raffi Torres (Torres).

In that case the Commissioner rejected the NHLPA's claim that playoff games were more valuable in refusing to discount the suspension issued to Torres because it included 13 playoff games. The NHLPA also rejects the argument that Wilson's prior 3-game suspension would have been greater if the games had not been playoff games, based both on Torres and on evidence that the DPS was deeply divided on whether any supplementary discipline was appropriate in that incident. If that 3-game suspension had not been doubled, even using Parros' formula, the suspension in this case would have been only 11 games ($3 \times 3 + 2$).

The NHLPA maintains that it appears that the 3x multiplier used in this case simply was pulled out of thin air. Parros said Wilson had three prior suspensions and therefore he multiplied the last of those suspensions (after doubling it) by three. The NHLPA maintains there is no basis in the CBA for that and no evidence that any player has been told that would be done. This also is not consistent with past discipline of comparable players.

The NHLPA presented an exhibit showing three players with four Supplementary Disciplines. Two of those players received the four disciplines in fewer games than Wilson did, and the other had less total on-ice time although it was spread over more games. There also are two other players on the exhibit with three Supplementary Disciplines issued over the span of a much shorter number of games. Therefore, the NHLPA argues, Wilson does not have an unprecedented history as claimed by the DPS.

The NHLPA disagrees with the Commissioner regarding how pre-season games are to be considered for disciplinary purposes. The NHLPA maintains that a pre-season game suspension should be treated like a fine. It bases this on Torres where the Commissioner rejected the NHLPA's position that Torres either should be allowed to play in the pre-season or have the pre-season games counted for purposes of his suspension. The NHLPA also notes that in his decision in this case the Commissioner downplayed the significance of pre-season games in criticizing Wilson's check on Sundqvist.

The NHLPA maintains there is no support for the Commissioner's characterizing Wilson's plays as "consistently dangerous." It points to testimony by Parros in which he remarked on the relatively low number of hits by Wilson during the 2017-18 regular season that had been flagged for review by the DPS. Only six out of 250 hits were flagged, and none resulted in Supplementary Discipline.

The NHLPA also points out that in two of Wilson's prior suspensions the DPS was deeply divided over whether a rule violation had occurred. It argues this is an additional reason against the gigantic jump from a 3-game to a 20-game suspension.

The NHLPA asserts that Torres, in which the Commissioner imposed a 21-game suspension, is distinguishable. In that case Torres violated three separate rules, and the Commissioner found that he targeted the opposing player's head

(which then was required under the applicable rule). Torres had five prior instances of targeting a player's head. Wilson had none. Torres also had more discipline. The NHLPA argues that the hit in Torres was much worse than here, where the DPS said Wilson was off by inches. Therefore, suspending Torres for 21 games and Wilson for 20 games is just not correct. The NHLPA discounts the Commissioner's contention that it is appropriate to hold players to a higher standard in 2018 than in 2012. The NHLPA sees that as merely an attempt to justify the inconsistent application of discipline in this case.

The NHLPA also cites the Commissioner's 2013 decision in Appeal of Patrick Kaleta (Kaleta), which it believes is the most appropriate comparison even though Kaleta involved worse circumstances. Kaleta had three suspensions and a fine over a span of 94 games and considerably less total on-ice time than Wilson had in the 105 games during which he had three suspensions and one pre-season suspension, which the NHLPA insists should be considered the equivalent of a fine. The NHLPA also disputes the Commissioner's attempt to distinguish Kaleta on the basis that Wilson's three prior suspensions all involved violent and dangerous physical contact. It notes that in Wilson's October 1, 2017 hit against Thomas the DPS found "zero violence," and in Kaleta the Commissioner stressed that Kaleta's six prior incidents of head contact or injury were more important than the frequency of his suspensions. The NHLPA stresses that Kaleta only went from a 5-game suspension (for boarding that resulted in an injury) to 10 games (for an illegal head check) -- that is double. Accordingly, the NHLPA believes

that there is no support in this case for more than an eight-game suspension (3x2 +2 for injury).

The Commissioner responded to the NHLPA's arguments in his decision. In summary, he stated:

- There is no basis in Article 18 or the League's past practice for treating a pre-season game suspension as the equivalent of a fine. Moreover, although there is no loss in pay, such a suspension places the player at risk of being treated as a repeat offender for purposes of the salary forfeiture provisions of Article 18.15.
- None of the other players cited by the NHLPA are appropriate comparators for a variety of reasons. In particular, Wilson was suspended four times in just over one year, and all of his suspensions involved violent and dangerous physical contact, which was not true of the other cited players, including Kaleta. Moreover, Wilson was the only player to have committed two illegal checks to the head -- both of which caused serious head injuries -- in such rapid succession.
- Torres' 21-game suspension occurred in 2012. Expectations concerning the importance of promoting head safety in the NHL have been heightened since 2012, as have the efforts of the NHL and NHLPA to

educate players on the importance of safe play. Moreover, 13 of the 21 games for which Torres was suspended were playoff games, which are considerably more valuable than regular season games. The NHLPA misconstrues statements in Torres in arguing that the Commissioner's decision in that case forecloses such a determination. Furthermore, the 21-game suspension in Torres was more than 10x the length of his most recent suspension -- a much higher multiplier than applied in this case.

- The League is not bound by the penalty imposed in Kaleta five years ago under the specific circumstances that existed at that time. Kaleta, as noted, did not have the same quantum of discipline in the same short period of time, nor did he have back-to-back illegal head checks, both resulting in serious injury. In Kaleta, the player received a 10-game suspension for an illegal head check that did not even result in an injury, following his earlier 5-game suspension for boarding in which the injury to the opposing player only caused him to miss two games.

The Commissioner also stresses that each case under Article 18.2 is to be decided on its own facts and circumstance and there are no exact comparators to apply in this case. The Commissioner insists that there is substantial evidence to

support his conclusion that a 20-game suspension was appropriate discipline in this case.

Article 18.2 does not establish a formula for determining the amount of Supplementary Discipline to be imposed. It does list specific factors to be considered including the catchall: "Such other factors as may be appropriate in the circumstances." It also calls for discipline to be imposed in a consistent manner. There is no dispute that Sundqvist was seriously injured and that Wilson had three prior suspensions in a period of a little over a year in which he played in 105 games. There was substantial evidence from which it could be concluded by the Commissioner that Wilson's conduct was reckless and involved use of excessive and unnecessary force. On the other hand, the League does not claim that Wilson intended to injure Sundqvist. He intended to check Sundqvist, which was a permissible hockey play, but, as Article 18.2(a) states: "Players are responsible for the consequences of their actions."

The key factor in reviewing the League's determination to impose a 20-game suspension was Wilson's status and history, as provided in Article 18.2(c), which stresses: "Players who repeatedly violate League Playing Rules will be more severely punished for each new violation." Wilson's prior Supplementary Discipline consisted of:

| <u>Incident Date</u> | <u>SD</u> | <u>Rule Violation</u> |
|----------------------|--------------------|-----------------------|
| 9/22/17 | 2 pre-season games | Interference |
| 10/01/17 | 4 games | Boarding |
| 5/01/18 | 3 playoff games | Rule 48 |

I am not persuaded by the NHLPA's argument that Wilson's initial 2 pre-season game suspension should be considered as only equivalent to a fine. I do not find substantial support for that in Torres. Moreover, Article 18.7(a) states: "The League may issue a fine for conduct that falls short of warranting a suspension." The focus is on the nature of the conduct. As the League also points out, imposing a suspension, rather than a fine, is significant under Article 18.7(e) in terms of forfeited salary for "repeat" offenders pursuant Article 18.15.

Similarly, whatever the Commissioner may have said in Torres in a different context did not preclude the League in this case from reasonably considering the 3 playoff games for which Wilson most recently was suspended in May 2018 as more "valuable" than regular season games. As the Commissioner pointed out in this case, it reasonably can be concluded that, following closely on the heels of prior 2-game and 4-game suspensions, the 3 playoff-game suspension imposed in May 2018 would have been longer if the rule violation had occurred in the regular season. Treating that suspension as equivalent to 6 regular season games was reasonable under the substantial evidence standard.

The difficulty with the 20-game suspension at issue is the methodology used to "multiply" the most recent prior discipline -- the equivalent, as upheld above, of 6 games -- by a factor of 3x. Parros decided on this multiplier as part of his formula, which the Commissioner concluded was "eminently reasonable and appropriate," after reviewing prior suspensions issued to six other players who had received three suspensions within an 18-month period. There is no evidence that any specific "multiplier", as such, was used to determine the discipline in those (or other) prior instances of repeated rule violations, and the after-the-fact multipliers calculated by Parros for purposes of this case varied widely from negative numbers to 10x in Torres' case. Parros explained that Wilson's record of four suspensions within 18 months was unprecedented and that a multiplier of 3x seemed appropriate taking into account this was his third repeat offense. Setting aside, for the moment, whether 20 games was reasonable under all relevant circumstances, this explanation is too thin a reed to substantially support the application of a multiplier of 3x as used in Parros' methodology.

Parros did not include Kaleta in the group of players he considered, presumably because Kaleta did not have three suspensions within 18 months. The NHLPA, however, did argue to the Commissioner that Kaleta, whose 10-game suspension for an illegal head check was upheld by the Commissioner in 2013 (Kaleta), provided a solid comparison. The NHLPA pointed out that Kaleta had four disciplines -- albeit one was a fine which it analogized to Wilson's pre-season suspension -- within a span

of fewer games and considerably less total-on-ice time than Wilson, and that two of Kaleta's suspensions were for illegal head checks and two involved injury of the opposing player, which is quite similar to Wilson's record. While the Commissioner seeks to distinguish Kaleta's circumstances on a number of grounds, as previously discussed, his decision in Kaleta is quite instructive in terms of comparability:

The Appropriate Penalty

As I noted in my most recent disciplinary opinion involving San Jose (then Phoenix) Player Raffi Torres, dated July 2, 2012, the CBA does not prescribe a formulaic basis for the determination of Supplementary Discipline....

I have concluded based on my review of the matter that there is clear and convincing evidence to support Mr. Shanahan's determination that a ten (10) game suspension is the appropriate penalty in this case. My conclusion is based on both the nature of the violation and, even more significantly, on Mr. Kaleta's prior disciplinary record, as discussed below.

As an initial matter, it bears repeating -- though it should not be necessary to do so -- that head hits are a matter of great concern to the League and the Players and that violations of Rule 48 are among the most serious Playing Rule infractions in the game....

* * *

Regrettably, Mr. Kaleta stands out for his repeated violations of -- and seeming indifference to -- the Playing Rules put in place to protect other Players, and, particularly, other Players' heads. Specifically, Mr. Kaleta has committed a series of other serious, head-related Playing Rule violations in each of the four most recent prior seasons.

* * *

This is a remarkable record over the span of just three and one-half seasons for a Player who is only in his eighth NHL season, and, as noted above, has demonstrated a total disregard for the safety of other Players and, in particular, their heads. It is not only the frequency of his prior offenses but, even more so, the fact that all of the offenses involved in some way contact with or an injury to an opponent's head that leads inexorably to the conclusion that Mr. Kaleta has not responded adequately to the progressive discipline that has been meted out to him thus far. In these circumstances.... I have no hesitation in affirming the determination that a meaningful increase in the quantum of discipline to be imposed on Mr. Kaleta is warranted and that a suspension of ten (10) games is an appropriate punishment.

* * *

... Nothing in Article 18 limits the League's right to consider suspensions that occurred more than eighteen (18) months earlier in determining the number of games for which a Player should be suspended for a subsequent offense.

* * *

Finally, I reject the Union's contention that the penalty assessed to Mr. Kaleta should be reduced because it is more excessive than the penalties assessed to other Players who have been suspended for head shots (Playing Rule 48 violations) this season. None of the Players cited by the NHLPA has a record that even remotely comes close to Mr. Kaleta's extensive prior history of discipline assessed in connection with incidents in which he targeted Players' heads.

Kaleta does note that the absence of an injury in the incident before the Commissioner had been factored into the determination to issue Kaleta a 10-game suspension, and that he suspected that a greater suspension would have been imposed if there had been an injury. That is a distinction between Wilson's case and Kaleta which the League properly could consider, as is the difference that one of Kaleta's four disciplines was a fine.

Other distinctions have been drawn by the Commissioner between the facts and circumstances in Kaleta and this case. There always, or almost always, will be distinctions between cases, but that does not negate the need for consistent application of Supplementary Discipline, recognizing that significant distinctions have to be taken into account.

On this record, I am not persuaded that there is substantial evidentiary support for the League's determination to impose a 20-game suspension on Wilson. In particular, the evidentiary record does not establish a reasonable basis for use

of the 3x multiplier employed in this case or the wide disparity between Wilson's 20-game suspension and the 10-game suspension imposed in Kaleta under substantially comparable circumstances, other than the injury to the opposing player, which was separately factored into Wilson's discipline.⁶

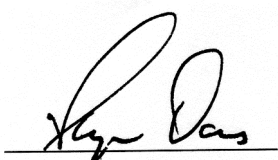
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Article 18.13 provides: "The NDA shall have full remedial authority in respect of the matter should he/she determine that the Commissioner's decision was not supported by substantial evidence." As stated above, I find that the League's decision that Wilson violated Rule 48 was supported by substantial evidence, but that the length of the 20-game suspension imposed was not supported by substantial evidence. As remedy, consistent with my findings, I conclude that Wilson's suspension should be reduced to 14 games. I have arrived at this length by treating his most recent prior 3 playoff game suspension as the equivalent of 6 regular season games, as Parros did, doubling that based on all relevant circumstances to 12 games -- which certainly constitutes more severe punishment consistent with the CBA -- and adding 2 games, as Parros did, based on the injury to Sundqvist. This 14-game suspension reflects the similarities with Kaleta as well as the relevant circumstances that support a somewhat longer suspension in this case.

⁶ Torres, in which the player received a 21-game suspension from the Commissioner, involved far more egregious circumstances, as all parties seem to agree.

AWARD

The matter is resolved on the basis set forth in the final paragraph of the above Findings.

A handwritten signature in black ink, appearing to read "Shyam Das", is written over a horizontal line.

Shyam Das
Neutral Discipline Arbitrator